

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

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

BETWEEN:

**BANK OF MONTREAL**

Applicant

and

**BRANT INSTORE CORPORATION**

Respondent

**FACTUM OF THE APPLICANT, BRANT INSTORE CORPORATION  
(APPLICATION TO APPOINT RECEIVER)**

December 15, 2022

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## PART I – OVERVIEW

1. The Bank of Montreal ("**BMO**") brings this Application for the appointment of KSV Restructuring Inc. ("**KSV**") as receiver and manager (the "**Receiver**") of all of the assets, undertaking and property of Brant Instore Corporation (the "**Debtor**" or "**Brant**").
2. The primary objective of this proceeding is to appoint KSV as the Receiver in order to complete a going concern purchase and sale transaction of substantially all of Brant's assets.
3. Brant's provides a variety of printing services (e.g. digital, screen-printing or litho) to clients in North America's retail, restaurant and automotive industries. Over the last several years Brant has suffered declining sales and the loss of key customers, which as more particularly described below, has caused it to default under its secured credit agreement with BMO. The defaults have continued and BMO is in a position to enforce its security against Brant. Brant is indebted to BMO in excess of \$13 million.
4. Brant, with the support of BMO, engaged a financial advisor to assist the Debtor to carry out a sale process for its assets or shares. That sale process has resulted in a purchaser being identified for substantially all of Brant's business and assets. The purchase transaction would result in a repayment of a significant portion of the indebtedness owing to BMO, continuation of the Debtor's business, the preservation of customer and supply relationships and preservation of employment for the vast majority of Brant's employees. As described below, the purchase transaction is conditional upon this Court appointing the Receiver and granting an approval and vesting order so that the transaction can close by December 30, 2022.

5. If KSV is appointed as the Receiver, KSV will immediately seek this Court's authority to enter into the purchase transaction and sell Brant's assets and business to the purchaser.

6. The three issues before the Court on this application are: (i) whether this Court has the jurisdiction to appoint the Receiver; (ii) whether it is just and convenient to appoint the Receiver; and (iii) whether the terms of the proposed order appointing the Receiver are appropriate. BMO submits that the answer to each issue is "yes".

## **PART II – SUMMARY OF FACTS**

7. The relevant facts of this Application are set out in detail in the Affidavit of Joshua Seager sworn December 9, 2022 and the Report of KSV as Proposed Receiver dated December 12, 2022. A brief summary of the relevant facts is set out below.

### **A. The Parties and the Credit Facilities**

8. Brant is a corporation formed by amalgamation under the laws of Ontario.<sup>1</sup> Brant operates as a full service printing business from two leased premises in Brantford, Ontario.<sup>2</sup> Brant's services include signage, displays, banners, floor graphics and other advertising materials.<sup>3</sup> The Debtor's head office is located in on of Brant's leased premises located in Brantford.<sup>4</sup> The Company employs approximately 139 employees, comprised of 97 hourly unionized employees and 42 salaried employees.<sup>5</sup>

9. BMO is the primary secured creditor of Brant pursuant to a credit agreement

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<sup>1</sup> Affidavit of Joshua Seager sworn December 9, 2022 ("**Seager Affidavit**") at para. 8, Application Record, Tab 2 at p. 20.

<sup>2</sup> Seager Affidavit at para. 11, Application Record, Tab 2 at pp. 20-21.

<sup>3</sup> Seager Affidavit at para. 10, Application Record, Tab 2 at p. 20.

<sup>4</sup> Seager Affidavit at para. 11, Application Record, Tab 2 at pp. 20-21.

<sup>5</sup> Seager Affidavit at para. 12, Application Record, Tab 2 at p. 21.



between BMO, as agent and lender, and the Debtor dated December 19, 2012 (as amended and restated, the “**Credit Agreement**”).<sup>6</sup> Pursuant to the Credit Agreement, BMO provided Brant with credit facilities, including a revolving capital facility and a capital expenditures facility (the “**Credit Facilities**”).<sup>7</sup>

10. As security for its obligations under the Credit Facilities, Brant entered into a series of security documents (the “**Security Documents**”) in favour of BMO, pursuant to which it (a) granted BMO a security interest in substantially all of its property, assets and undertakings (the “**Secured Property**”), and (b) agreed that upon the occurrence of an event default under the Credit Agreement, BMO may, among other things, take steps to appoint a receiver over the Secured Property.<sup>8</sup>

11. BMO registered its security under the *Personal Property Security Act* (Ontario) (the “**PPSA**”) on December 7, 2012 and December 20, 2012.<sup>9</sup> PPSA searches against the Debtor show that in addition to BMO, the following parties have registered a security interest against certain of Brant’s property: (a) Carrier Truck Center Inc., (b) Xerox Canada Ltd., (c) Hewlett-Packard Financial Services Canada Company, (d) De Lage Landen Financial Services Canada Inc., and (e) CWB National Leasing Inc. (collectively, the “**Equipment Lessors**”).<sup>10</sup> Each of the Equipment Lessors registered their interest after BMO registered its security interest and their registrations relate to specific equipment leased by Brant.<sup>11</sup>

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<sup>6</sup> Seager Affidavit at para. 15, Application Record, Tab 2 at p. 22. On December 19, 2012, BMO and 235 Ontario Inc., a predecessor of Brant, entered into a credit agreement, which was amended and restated on October 28, 2016 and further amended and restated on July 17, 2017.

<sup>7</sup> Seager Affidavit at para. 16, Application Record, Tab 2 at p. 22.

<sup>8</sup> Seager Affidavit at para. 18, Application Record, Tab 2 at p. 23.

<sup>9</sup> Seager Affidavit at para. 19, Application Record, Tab 2 at p. 23.

<sup>10</sup> Seager Affidavit at para. 20, Application Record, Tab 2 at p. 24.

<sup>11</sup> Seager Affidavit at para. 20, Application Record, Tab 2 at p. 24.

12. Searches under the *Bank Act* (Canada), a bankruptcy search, an execution search in the City of Toronto, and a litigation search in the Ontario Superior Court of Justice against Brant have all returned clear other than an action that has been commenced against Brant by Miller Zell Inc. in the Ontario Superior Court of Justice in respect of an unpaid account.<sup>12</sup>

#### **B. Default under the Credit Facilities**

13. Commencing at least the first quarter of 2020, Brant has been in default of its obligations under the Credit Agreement for, among other things, failure to comply with certain financial covenants (the “**Defaults**”).<sup>13</sup> While certain of the Defaults have been cured or otherwise resolved (and new defaults have arisen and since been cured), Brant has at all relevant times since 2020 been in breach of its financial covenants concerning its fixed charge coverage ratio and the ratio of Brant’s debt to its EBITDA.<sup>14</sup>

14. Notwithstanding the Defaults, Brant requested BMO to forbear from exercising any of its rights and remedies and to provide Brant with an opportunity to address the Defaults.<sup>15</sup> Between April 2020, and January 2022, BMO entered into a series<sup>16</sup> of forbearance agreements with Brant whereby BMO agreed to forbear from enforcing its

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<sup>12</sup> Seager Affidavit at paras. 21-22, Application Record, Tab 2 at p. 25.

<sup>13</sup> Seager Affidavit at para. 23, Application Record, Tab 2 at p. 25.

<sup>14</sup> Seager Affidavit at para. 23, Application Record, Tab 2 at p. 25.

<sup>15</sup> Seager Affidavit at para. 24, Application Record, Tab 2 at p. 26.

<sup>16</sup> BMO entered into the following forbearance agreements with Brant during this time: (a) a forbearance and credit amending agreement dated April 8, 2020; (b) an amended and restated forbearance agreement dated June 15, 2020; (c) a second amended and restated forbearance on June 15, 2020; (d) a third amended and restated forbearance dated December 23, 2020; and (e) a fourth amended and restated forbearance and credit amending agreement dated January 21, 2022.

security on certain terms and conditions (as amended and amended and restated, the “**Forbearance Agreement**”).<sup>17</sup>

15. On February 25, 2020, BMO engaged KSV Advisory Inc.<sup>18</sup> as its financial advisor to assist BMO with assessing the financial circumstances of the Debtor and to consider ways to improve its operational and financial performance.<sup>19</sup> Brant continued to be in default of its obligations and on January 5, 2021 with the consent of BMO, the Debtor engaged KSV Advisory Inc. as its chief restructuring advisor (and the financial advisor mandate with BMO was terminated). In this role, KSV assisted the Debtor with, among other things, a review of strategies to address operational inefficiencies and strategies to increase revenue.<sup>20</sup>

16. Despite the indulgences afforded to Brant under the Forbearance Agreement and the cost-saving and revenue generation strategies undertaken by the Debtor, Brant continued to generate recurring financial losses, be offside its financial covenants and failed to make a payment of principal due under the Credit Agreement on April 1, 2022, which constituted an event of default under the Credit Agreement (the “**Payment Default**” and together with the Defaults, the “**Existing Defaults**”).<sup>21</sup>

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<sup>17</sup> Seager Affidavit at para. 24, Application Record, Tab 2 at p. 26.

<sup>18</sup> KSV provides advisory services under KSV Advisory Inc.

<sup>19</sup> Seager Affidavit at para. 25, Application Record, Tab 2 at p. 26.

<sup>20</sup> Seager Affidavit at paras. 26-27, Application Record, Tab 2 at p. 26.

<sup>21</sup> Seager Affidavit at para. 30, Application Record, Tab 2 at p. 28.

17. Consequently, on or about April 25, 2022, BMO noted Brant in default as a result of the Payment Default and advised that the forbearance contemplated under the Forbearance Agreement ceased to be in effect.<sup>22</sup>

18. As at December 6, 2022, the total indebtedness owing to BMO is \$13,022,365. The Existing Defaults have not been remedied and the indebtedness has not been paid and is continuing to accrue interest and fees thereon.<sup>23</sup>

### **C. The Sale Process and Asset Purchase Transaction**

19. Following the Payment Default, Brant, with the support of BMO, engaged New Direction Partners, LLC ("**NDP**") as its financial advisor to assist Brant to carry out a sale or investor solicitation process (the "**SISP**") for all or substantially all of its assets or shares.<sup>24</sup>

20. The SISP was commenced in August 2022 and required parties to submit non-binding letters of intent on or before October 14, 2022.<sup>25</sup> On October 6, 2022, JAL Equity Corp. ("**JAL**") submitted a non-binding letter of intent to purchase substantially all of the assets of Brant.<sup>26</sup>

21. In the weeks that followed, KSV, counsel for BMO, counsel for the proposed Receiver and counsel for JAL negotiated and settled the terms of a definitive asset purchase agreement ("**APA**") for the sale of substantially all of the Debtor's assets and

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<sup>22</sup> Seager Affidavit at para. 31, Application Record, Tab 2 at p. 28.

<sup>23</sup> Seager Affidavit at para. 41, Application Record, Tab 2 at p. 31.

<sup>24</sup> Seager Affidavit at para. 33, Application Record, Tab 2 at p. 28.

<sup>25</sup> Seager Affidavit at para. 36(c), Application Record, Tab 2 at p. 29.

<sup>26</sup> Seager Affidavit at para. 37, Application Record, Tab 2 at p. 30.

business (the “**Transaction**”) to 1000369798 Ontario Inc. (the “**Purchaser**”), an affiliate of JAL.<sup>27</sup>

22. The purchase price for the Transaction will be comprised of the assumption of certain liabilities and a cash purchase price of \$9,500,000. The Transaction contemplates that the Purchaser will assume Brant’s real property leases and material contracts (including the collective agreement in respect of the Debtor’s unionized employees) and offer employment to substantially all of Brant’s 139 employees.<sup>28</sup>

23. Certain conditions to the closing of the Transaction are (a) an order shall have been made appointing KSV as the receiver and manager over all of the assets, undertaking and property of Brant, (b) an approval and vesting order shall be made transferring Brant’s assets to the Purchaser free and clear of all claims, and (c) the Transaction closes by December 30, 2022.<sup>29</sup>

#### **D. The Receivership**

24. As described above, the primary purpose of this receivership is to appoint KSV as Receiver to effect a sale of substantially all of the Debtor’s assets and business as a going concern to the Purchaser. KSV, if appointed as the Receiver, has brought a separate motion to be heard immediately following this Application to seek this Court’s authority to enter into the APA and complete the Transaction.

25. If appointed, the Receiver will also be empowered by court order to borrow funds pursuant to Receiver’s Certificates, if necessary, for the purposes of, among other things,

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<sup>27</sup> Seager Affidavit at para. 38, Application Record, Tab 2 at p. 30.

<sup>28</sup> Seager Affidavit at para. 39, Application Record, Tab 2 at p. 30.

<sup>29</sup> Seager Affidavit at para. 40, Application Record, Tab 2 at pp. 30-31.

funding the costs and disbursements of the receivership and the fees of NDP for carrying out the sales process. BMO has agreed to a charges in favour of the Receiver, and its counsel, as security for payment of their respective fees and disbursements, which shall form a first charge on the Secured Property in priority to the claims of BMO as secured creditor (described below as the Receiver's Charge), and a charge for the Receiver's borrowings (described below as the Receiver's Borrowings Charge).<sup>30</sup>

### **PART III – STATEMENT OF ISSUES**

26. There are three issues on this Application: (A) whether this Court has the jurisdiction to make the requested order to appoint the Receiver (the "**Appointment Order**"); (B) whether it is just and convenient to appoint KSV as the Receiver; and (C) whether the terms of the proposed Appointment Order are appropriate.

27. BMO submits that the answer to each issue is "yes".

### **PART IV – LAW AND ARGUMENT**

#### **A. This Court has Jurisdiction to Appoint the Receiver**

28. This Court has the jurisdiction to appoint KSV as the Receiver.

##### **(i) Section 243 of the BIA and Section 101 of the CJA Apply to this Case**

29. Section 243(1) of the BIA and section 101 of the CJA authorize a court, on the application of a secured creditor, to appoint a receiver where it is just or convenient to do so, and on such terms as the court considers just.<sup>31</sup> BMO is permitted to bring the within application because it is a secured creditor of Brant with a perfected security interest in

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<sup>30</sup> Seager Affidavit at para. 49, Application Record, Tab 2 at p. 33.

<sup>31</sup> BIA, s. 243(1); CJA s. 101.

the Secured Property.<sup>32</sup> BMO has served the Debtor with a notice of intention to enforce its security under section 244(1) of the BIA and the Debtor has consented to early enforcement pursuant to section 244(2) of the BIA.<sup>33</sup>

**(ii) The Locality of the Debtor is in Ontario**

30. Section 243(5) of the BIA provides that an application for the appointment of a receiver “is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor”.<sup>34</sup>

31. The “locality of the debtor” is defined under the BIA as:

- (a) the principal place where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,
- (b) the principal place where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or
- (c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated.<sup>35</sup>

32. In determining the principal place a debtor has carried on business or resided, courts have considered the following factors, among others: (i) the location of the head office of the debtor; (ii) the jurisdiction of incorporation of the debtor; (iii) the jurisdiction of residence of directors and officers; (iv) the location of the creditors; and (v) where business operations took place.<sup>36</sup>

33. Applying these factors, the locality of Brant within the meaning of the BIA is

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<sup>32</sup> Seager Affidavit at para. 18, Application Record, Tab 2 at p. 23.

<sup>33</sup> Seager Affidavit at para. 43, Application Record, Tab 2 at p. 31; BIA, s. 244(2).

<sup>34</sup> BIA, s. 243(5).

<sup>35</sup> BIA, s. 2.

<sup>36</sup> *Malartic Hygrade Gold Mines Ltd., Re*, 1966 CarswellOnt 30 (Ont. Sup. Ct., In Bankruptcy) at paras. 35-38; *Flax Investment Ltd., Re*, 1979 CarswellOnt 248 (Ont. Sup. Ct., In Bankruptcy) at paras. 5-15; *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, 2001 SCC 92 at paras. 22-23.

Ontario.<sup>37</sup> Brant is formed pursuant to the laws of Ontario and its registered head office and operations are located in Brantford, Ontario.<sup>38</sup> As a result, this Court has jurisdiction and is the appropriate forum to grant the requested Appointment Order.

**(iii) The Proposed Receiver is a Trustee under the BIA**

34. Subsection 243(4) only permits a “trustee” to be appointed as a receiver under the BIA.<sup>39</sup> KSV is a trustee under the BIA and has provided its consent to act as the receiver and manager if so appointed.<sup>40</sup>

**B. It is Just and Convenient to Appoint the Proposed Receiver**

**(i) The Test for Appointing a Receiver under the BIA and CJA**

35. Subsection 243(1) of the BIA and section 101 of the CJA authorize a court to appoint a receiver where such appointment is “just or convenient”.<sup>41</sup> In determining whether it is just and convenient to appoint a receiver a court must have regard to all of the circumstances of the case.<sup>42</sup>

36. Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because

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<sup>37</sup> Seager Affidavit at para. 8, Application Record, Tab 2 at p. 20.

<sup>38</sup> Seager Affidavit at para. 8, Application Record, Tab 2 at p. 20.

<sup>39</sup> BIA, s. 243(4).

<sup>40</sup> Seager Affidavit at para. 48, Application Record, Tab 2 at p. 32.

<sup>41</sup> BIA, s. 243(1).

<sup>42</sup> *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited et al.*, 2022 ONSC 6186 at para. 23.



the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.<sup>43</sup>

37. In such circumstances, the “just or convenient inquiry” requires the court to determine whether it is in the interests of all concerned to have the receiver appointed by the court. The court should consider the following factors, among others, in making such a determination:

- (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.<sup>44</sup>

**(ii) The Application of the Just and Convenient Test**

38. It is just and convenient to appoint KSV as the Receiver in the circumstances of this case. As described above, Brant has defaulted on its obligations under the Credit Agreement. The Existing Defaults are continuing and have not been remedied as of the date of this Application. This has given rise to BMO’s rights under the Security

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<sup>43</sup> *Meridian v. Okje Cho & Family Enterprise Ltd.*, 2021 ONSC 3755 at para. 21; *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 at para. 43; *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 at para. 27; *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635 at paras. 50 and 75 (B.C. S.C. [In Chambers]); *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498 at para. 18 (S.C.J. [Commercial List]) [*Canadian Tire*]; *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007, [2011] O.J. No. 671 at para. 27 (S.C.J. [Commercial List]) [*Carnival National Leasing*]; *Farallon Investments Ltd. v. Bruce Pallett Fruit Farms Ltd.*, [1992] O.J. No. 330 at paras. 2-6 (Gen. Div.).

<sup>44</sup> *Canadian Tire*, supra at para. 18; *Carnival National Leasing*, supra at paras. 26-29; *Anderson v. Hunking*, 2010 ONSC 4008, [2010] O.J. No. 3042 at para 15 (S.C.J.); *Bank of Nova Scotia v. Freure Village of Clair Creek*, [1996] O.J. No. 5088 at paras. 10-12 (O.N. SC).

Documents to appoint a receiver by instrument in writing and to institute court proceedings for the appointment of a receiver.

39. BMO is not requesting an extraordinary equitable remedy; it is simply seeking to enforce an express term of relief provided for in the Security Documents. As such, BMO can meet its burden that it is "just or convenient" to appoint KSV as the Receiver by simply establishing that it is in the interests of all concerned to have the Receiver appointed.

40. It is submitted that it is just and convenient, or in the interests of all concerned, for the Court to appoint KSV as the Receiver for four main reasons:

- (a) the potential costs of the receivership will be borne by BMO;
- (b) the relationships between Brant and its creditors, including BMO, militate in favour of appointing KSV as the Receiver;
- (c) appointing KSV as the Receiver is the best way to preserve Brant's business and maximize value for all stakeholders; and
- (d) appointing KSV as the Receiver is the best way to facilitate the work and duties of the Receiver.

**(a) Costs of the Receivership**

41. The costs of the receivership will be borne by BMO.<sup>45</sup> The parties intend to close the Transaction, if approved by the Court, by December 30, 2022 and it is not anticipated that the Receiver will require significant funding. As a result, the costs of the receivership weigh in favour of appointing KSV as the Receiver.

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<sup>45</sup> Seager Affidavit at para. 49, Application Record, Tab 2 at p. 33.

**(b) Relationship between Brant and its Creditors**

42. None of Brant's creditors will be adversely affected by the appointment of KSV as the Receiver.

43. First, and most importantly, as a senior secured creditor to whom Brant owes approximately \$13,022,365 as at December 6, 2022,<sup>46</sup> BMO is a stakeholder with a significant economic interest in Brant's proposed receivership. The relationship between BMO and Brant will not be disturbed by KSV's appointment.

44. The only other secured creditors are the Equipment Lessors described in paragraph 11 above, who may<sup>47</sup> have a priority over BMO in respect of certain of the Debtor's equipment. If KSV is appointed as the Receiver, and the Transaction is approved by the Court, the Purchaser will assume substantially of the contracts with the Equipment Lessors. All other creditors of Brant are unsecured and rank behind BMO.

45. Therefore, all of Brant's creditors will be in the same relative priority position after the consummation of the Transaction as their present position. It cannot be said that the relationship between Brant and any of its creditors will be adversely affected by the appointment of KSV as the Receiver or the consummation of the Transaction.

**(c) Preserving the Debtor's Business and Maximizing Value**

46. Brant is insolvent and unable to pay its debts as they come due. Despite BMO entering into a series of forbearance arrangements with Brant, and the Debtor taking steps to reduce costs and turnaround its business, Brant's revenues have continued to

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<sup>46</sup> Seager Affidavit at para. 41, Application Record, Tab 2 at p. 31.

<sup>47</sup> Depending on the nature of the equipment lease, BMO's security interest may not be attached to the particular equipment to which the lease relates.

decline and those losses are expected to continue indefinitely to the detriment of BMO's security interest.

47. In recent months, the challenges facing the Debtor have increased: (a) Brant learned that its second largest customer, representing 18% of its annual sales, intends to discontinue its relationship, which resulted in the Purchaser decreasing the purchase price it was offering for the Debtor's assets, (b) Miller Zell Inc., Brant's largest unsecured creditor commenced an action against Brant seeking payment of US\$457,975 (described in paragraph 12 above), (c) certain key employees have resigned, (d) the Debtor's printing equipment is in need of repair, requiring Brant to outsource certain projects, and (e) certain of Brant's suppliers have stopped supplying to Brant, or refusing to supply on credit.<sup>48</sup>

48. The Transaction resulting from the SISP will allow Brant's business to continue, preserve substantially all of the jobs of the Debtor's employees and the continued performance of contracts with key suppliers and customers of the Debtor.<sup>49</sup> NDP widely canvassed the market for purchasers of Brant's assets or business and the offer from the Purchaser was the best available in the circumstances.<sup>50</sup> The Transaction also maximizes recoveries to BMO and will result in a significant portion (but not all) of the indebtedness owing by Brant to be repaid.<sup>51</sup>

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<sup>48</sup> Prefiling Report of the Proposed Receiver dated December 12, 2022 at para. 7, Motion Record of KSV Restructuring Inc., Tab 4 at p. 54.

<sup>49</sup> Seager Affidavit at para. 39, Application Record, Tab 2 at p. 30.

<sup>50</sup> Seager Affidavit at para. 44, Application Record, Tab 2 at p. 31.

<sup>51</sup> Seager Affidavit at para. 6, Application Record, Tab 2 at p. 19.

49. As described above, the APA requires the Transaction to be completed through a receivership and close by December 30, 2022. If the Transaction is not completed, the Debtor's business will likely be wound-down and its assets liquidated.<sup>52</sup>

50. If KSV is appointed as the Receiver, it will take steps to implement the Transaction, if approved, on the terms and conditions set out therein. The receivership is therefore necessary to both preserve the Debtor's business and to maximize value.

**(d) Facilitating the Work of the Receiver**

51. The appointment of KSV as the Receiver is the best way to facilitate the work of the Receiver, including the implementation of the Transaction. KSV has been working with Brant since February 2020<sup>53</sup> and has developed a comprehensive understanding of Brant's business and operations. As an officer of the court, KSV will be obliged to act in a fiduciary capacity to all parties in ensuring that the Transaction is effected in a fair and equitable manner that considers the interests of all stakeholders.

**C. The Terms of the Proposed Appointment Order are Appropriate**

**(i) The Terms of the Proposed Appointment Order**

52. The proposed Appointment Order is based on the Commercial List model order.<sup>54</sup> To the extent there are any deviations from such order, they are made to address powers that the Receiver may require in connection with the Transaction (e.g. disclaiming contracts).<sup>55</sup> In BMO's respectful submission, these provisions are reasonable and necessary to enable the Receiver to fulfill its mandate.

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<sup>52</sup> Seager Affidavit at para. 47, Application Record, Tab 2 at p. 32.

<sup>53</sup> Seager Affidavit at para. 25, Application Record, Tab 2 at p. 26.

<sup>54</sup> Draft Order, Application Record, Tab 3 at p. 478.

<sup>55</sup> Blackline of Draft Order Compared to Model Order, Application Record, Tab 4 at p. 495.

(ii) **The Receiver's Charge and the Receiver's Borrowing Charge**

53. The Court has express statutory jurisdiction pursuant to section 243(6) of the BIA to make an order respecting the payment and fees of the receiver, including to grant a charge ranking ahead of any secured creditors over the debtor's property, provided that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.<sup>56</sup>

54. In addition, section 101(2) of the CJA provides that any order under section 101(1) of the CJA may include such terms as are considered just.<sup>57</sup>

55. The proposed Appointment Order provides for a "Receiver's Charge" on the Secured Property to secure the fees and disbursements of the Proposed Receiver and its counsel and a "Receiver's Borrowings Charge" to secure monies loaned to the Proposed Receiver from time to time for the purposes of funding the receivership (collectively, the "**Charges**").<sup>58</sup>

56. The Charges will rank ahead of BMO's security interest.<sup>59</sup> BMO has served notice of this application on the Equipment Lessors, who are the only parties that may be impacted by the Charges.

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<sup>56</sup> BIA, s. 243(6).

<sup>57</sup> CJA, s. 101(2).

<sup>58</sup> Draft Order at paras. 18, 21, Application Record, Tab 3 at p. 488.

<sup>59</sup> Seager Affidavit at para. 49, Application Record, Tab 2 at p. 33.

**PART V – ORDER REQUESTED**

57. BMO respectfully requests: (i) an order appointing KSV as receiver and manager over the assets, undertakings and property of Brant pursuant to section 243 of the BIA and section 101 of the CJA, as amended; and (ii) ancillary relief as set out in the proposed Appointment Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 15th day of December, 2022.



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**SCHEDULE “A”**  
**LIST OF AUTHORITIES**

**Cases**

1. *Anderson v. Hunking*, 2010 ONSC 4008
2. *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007
3. *Bank of Nova Scotia v. Freure Village of Clair Creek*, [1996] O.J. No. 5088 (O.N. SC)
4. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953
5. *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited et al.*, 2022 ONSC 6186
6. *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616
7. *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866
8. *Farallon Investments Ltd. v. Bruce Pallett Fruit Farms Ltd.*, [1992] OJ No 330 (Gen. Div.)
9. *Flax Investment Ltd., Re*, 1979 CarswellOnt 248 (Ont. Sup. Ct., In Bankruptcy)
10. *Malartic Hygrade Gold Mines Ltd., Re*, 1966 CarswellOnt 30 (Ont. Sup. Ct., In Bankruptcy)
11. *Meridian v. Okje Cho & Family Enterprise Ltd.*, 2021 ONSC 3755
12. *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, 2001 SCC 92
13. *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477



## SCHEDULE "B"

### TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

#### Interpretation

2 In this Act,

[...]

**locality of a debtor** means the principal place

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

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

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

[...]

#### 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

**243(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.

### **Definition of receiver**

**243(2)** Subject to subsections (3) and (4), in this Part, receiver means a person who

(a) is appointed under subsection (1); or

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

(i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

### **Definition of receiver — subsection 248(2)**

**243(3)** For the purposes of subsection 248(2), the definition receiver in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

### **Trustee to be appointed**

**243(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**

**243(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**

**243(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.

### **Terms**

**101(2)** An order under subsection (1) may include such terms as are considered just.

BANK OF MONTREAL  
Applicant

-and- BRANT INSTORE CORPORATION  
Respondent

Court File No. CV-22-020691546 -00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT  
TORONTO

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