

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

B E T W E E N:

PIVOT FINANCIAL I LIMITED PARTNERSHIP

Applicant

- and -

BRIGHTPATH CAPITAL CORPORATION

Respondent

IN THE MATTER OF an 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

**FACTUM AND AUTHORITIES OF THE COURT-APPOINTED
RECEIVER, KSV RESTRUCTURING INC.
(Returnable June 5, 2026)**

June 3, 2026

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PART I: OVERVIEW

1. KSV Restructuring Inc. (“**KSV**”)¹, in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”), without security, of all of the assets, undertakings and properties (collectively, the “**Property**”) of Brightpath Capital Corporation (the “**Debtor**”), seeks an order (the “**Distribution and OSC Authorization Order**”) authorizing the Receiver to (i) comply with requests made by the Ontario Securities Commission (the “**OSC**”), and (ii) make one or more distributions (collectively, the “**Distributions**”) to the Debtor’s senior secured creditor, Pivot Financial I Limited Partnership (“**Pivot**”), from the proceeds of Pivot’s collateral that constitutes Property, absent any potential personal liability imposed by certain statutes.

2. The Debtor is a privately held company, which originated and underwrote mortgages secured by residential properties, facilitated the funding of mortgage loans and certain receivables through special purpose securitization vehicles (together, the “**Securitization Parties**”) and provided servicing in respect thereof (the “**Business**”). These proceedings are intended to provide a stabilized environment in which the Receiver can preserve the Property, ensure the completion or transition of the Debtor’s mortgage servicing obligations, and oversee an orderly wind-down of the Business for the benefit of the Debtor’s creditors.

3. Following the Receiver’s appointment, the OSC made certain inquiries of the Receiver regarding the Debtor, the Business and the Property. While the Receivership Order (as defined below) explicitly authorizes the Receiver to have meetings and discussions with the OSC, it does not unambiguously permit the provision of information or documentation requested by it. To avoid

¹ On June 1, 2026, an affiliate of AlixPartners acquired KSV. The process required by the Office of the Superintendent of Bankruptcy Canada to transfer KSV’s corporate trustee license to AlixPartners is nearing completion. Once completed, AlixPartners will hold the corporate trustee license previously held by KSV.

interfering with the OSC's mandate and ensure the Receiver does not act beyond the scope of its appointment, the Receiver seeks explicit authorization to comply with the OSC's requests, subject to confidentiality and applicable privilege. The proposed authorization is permissive and not obligatory.

4. As the operation and orderly wind-down of the Business and the exercise of the Receiver's powers under the Receivership Order has and will continue to give rise to proceeds that constitute Pivot's collateral ("**Pivot Cash Collateral**"), the Receiver also seeks authorization to make the Distributions to Pivot and protection from potential personal liability arising under certain statutes in connection therewith. The Distributions will limit the undue accrual of interest, thereby maximizing recoveries to the Debtor's creditors, and are subject to the Receiver's ability to hold back amounts it considers necessary or appropriate to satisfy priority claims and fund these proceedings.

5. The proposed Distribution and OSC Authorization Order is appropriate in the circumstances and, if granted, will facilitate the orderly and efficient administration of these proceedings.

PART II: FACTS

6. The facts underlying this motion are more fully set out in the First Report of the Receiver dated June 1, 2026 (the "**First Report**").² All capitalized terms used but not defined herein have the respective meanings ascribed to them in the First Report.

² First Report of the Receiver dated June 1, 2026 [First Report], Motion Record of the Receiver dated June 1, 2026 at Tab 2 [Motion Record].

A. Background

7. The Debtor is a privately held company incorporated and amalgamated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, with a head office located at 17 Benton Street, Kitchener, Ontario, N2G 3G9.³

8. As at the commencement of these proceedings, the Debtor originated and underwrote first and second mortgages secured by residential properties, which were either funded entirely by the Debtor or partially with third-party co-lenders or co-investors. Additionally, the Debtor facilitated the funding of mortgage loans and certain eligible receivables through the Securitization Parties from third-party capital providers and provided servicing in respect thereof.⁴

9. Prior to the commencement of these proceedings, the Debtor funded the Business principally pursuant to:

- (a) an amended and restated credit agreement dated September 30, 2021 (as amended from time to time, the “**Senior Credit Agreement**”), between Pivot and the Debtor, pursuant to which Pivot extended a revolving loan facility to the Debtor in the maximum principal amount of \$60 million, together with certain additional accommodations;
- (b) a demand promissory note dated as of August 30, 2024, issued by the Debtor in favour of Pivot (the “**Subordinate Promissory Note**”) in the original principal amount of \$6.5 million; and

³ *Ibid*, at s 2.1 para 1, Motion Record at Tab 2.

⁴ *Ibid*, at s 2.1 para 2, Motion Record at Tab 2.

- (c) numerous unsecured promissory notes issued by the Debtor in favour of approximately 141 separate noteholders (collectively, “**Unsecured Noteholders**”) in the aggregate principal amount of \$59.6 million.⁵

10. The payment and performance of the Debtor’s obligations under the Senior Credit Agreement are secured by:

- (a) an amended and restated general security agreement dated as of September 30, 2021 (the “**Senior GSA**”), granted by the Debtor in favour of Pivot; and
- (b) a blocked account agreement made as of April 12, 2022, and effective as of September 30, 2021, among the Debtor, Pivot and Bank of Montreal.⁶

11. The payment and performance of the Debtor’s obligations under the Subordinate Promissory Note are secured by:

- (a) a general security agreement dated as of August 16, 2018 (the “**GSA**”), granted by the Debtor in favour of Pivot (as successor in interest to Pivot Financial Inc.); and
- (b) the Senior GSA.⁷

12. On October 31, 2025, following the occurrence of certain defaults under the Senior Credit Agreement, the Senior GSA and the GSA, Pivot issued notices of default and notices of intention to enforce security in accordance with section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”).⁸

⁵ *Ibid*, at s 3.0 para 1, Motion Record at Tab 2.

⁶ *Ibid*, at s 3.0 para 3, Motion Record at Tab 2.

⁷ *Ibid*, at s 3.0 para 4, Motion Record at Tab 2.

⁸ *Ibid*, at s 2.1 para 6 and s 3.0 para 6, Motion Record at Tab 2.

B. The Receivership Proceedings

13. On April 10, 2026, Pivot obtained an order in the within proceedings (the “**Receivership Order**”) pursuant to subsection 243(1) of the BIA and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the “**CJA**”), appointing KSV as the Receiver.⁹ Among other things, the Receivership Order also:

- (a) granted a first-ranking super-priority charge over the Property in favour of the Receiver and its counsel to secure their fees and disbursements in respect of these proceedings (the “**Receiver’s Charge**”);
- (b) granted a second-ranking super-priority charge over the Property for the purpose of funding the exercise of the powers and duties conferred upon the Receiver pursuant to the Receivership Order;
- (c) ordered that all funds, monies, cheques, instruments, and other forms of payment received or collected by the Receiver from any source whatsoever shall be deposited into one or more new accounts opened by the Receiver, and the monies standing to the credit of such accounts, net of any disbursements provided for in the Receivership Order, shall be held by the Receiver to be paid in accordance with the Receivership Order or any further order of the Court; and
- (d) authorized and empowered the Receiver to:
 - (i) hold and exercise the rights and perform the duties, as applicable, of the Debtor as a servicer under servicing agreements with any Securitization

⁹ *Ibid*, at s 2.2 para 1, Motion Record at Tab 2; [Pivot Financial I Limited Partnership v Brightpath Capital Corporation \(April 10, 2026\), Toronto, CL-26-00000152-0000 \(Order\) \(ONSC\)](#) [Receivership Order].

Party, and to amend existing or enter into new servicing agreements with the Securitization Parties and the lenders thereto, including transitioning and relinquishing servicing duties thereunder, with the consent of or at the direction of the Securitization Parties and the lenders thereto (collectively, the “**Servicing Agreements**”);

- (ii) manage, operate, and carry on the Business, including performing under the Servicing Agreements;
- (iii) sell, convey, transfer, lease or assign the Property (or any part thereof) pursuant to power of sale or foreclosure proceedings;
- (iv) receive and remit to the Securitization Parties the amounts collected in connection with their respective Securitization Party Collateral (as defined in the Receivership Order), subject to the Servicing Agreements;
- (v) apply to the Court for such further relief or advice and directions as the Receiver may determine necessary or desirable from time to time;
- (vi) report to and meet and discuss with such affected persons as the Receiver deems appropriate, and the Securitization Parties and their respective lenders, on all matters relating to the Property, the Securitization Party Collateral and the receivership, and to share information, subject to existing applicable confidentiality provisions and such terms as to confidentiality as the Receiver deems advisable or as the Court may direct;
- (vii) meet and discuss with the Financial Services Regulatory Authority of Ontario, the Financial Services Authority, the OSC, the British Columbia

Securities Commission and any other governmental or regulatory authority (collectively, “**Regulators**”) with respect to the matters addressed in the Receivership Order or otherwise related to the receivership of the Debtor or the Property, or any related proceeding, and to execute any agreement pertaining to such matters with any Regulator for and on behalf of the Debtor; and

- (viii) take any steps reasonably incidental to the exercise of the Receiver’s powers under the Receivership Order, the rights and duties of the Debtor as servicer under the Servicing Agreements or the performance of any statutory obligations.¹⁰

C. Authorization to Provide Information and Documents to the OSC

14. Prior to the Receiver’s appointment, the OSC, being the statutory body responsible for regulating Ontario’s capital markets and administering and enforcing Ontario’s securities laws, made certain inquiries of the Debtor regarding the Business and the Property.¹¹ The Receiver understands that the Debtor cooperated with the OSC and responded to such requests.¹²

15. Following the Receiver’s appointment, the OSC has made certain inquiries of the Receiver regarding the Debtor, the Business and the Property. While the Receivership Order explicitly authorizes and empowers the Receiver to have meetings and discussions with Regulators such as the OSC, and report to such persons, including governmental bodies or agencies, as the Receiver

¹⁰ *Ibid*, at s 2.2 para 1, Motion Record at Tab 2; [Receivership Order](#), *supra* at paras 3, 15, 20, 23.

¹¹ First Report, *ibid* at s 5.0 para 5, Motion Record at Tab 2.

¹² *Ibid*, at s 5.0 para 5, Motion Record at Tab 2.

deems appropriate, the Receiver is not unambiguously permitted to provide information or documentation requested by the OSC.¹³

16. To avoid interfering with the OSC's mandate and ensure the Receiver does not act beyond the scope of its appointment, the Receiver seeks explicit authorization pursuant to the proposed Distribution and OSC Authorization Order to provide information or documentation in respect of the Debtor or any transaction to which it was or is a party, to the extent such information or documentation is within the Receiver's possession or control or comes within the Receiver's possession or control, to the OSC. Such authorization is subject to such terms as to confidentiality as the Receiver deems advisable and any applicable privilege or statutory provision prohibiting such disclosure.¹⁴

17. The Receiver is not aware of any prejudice to any stakeholder in these proceedings that will result from the provision of information or documentation in respect of the Debtor or any transaction to which it was or is a party that would outweigh the public policy interests served by facilitating the OSC's requests.¹⁵

D. Authorization to Make Distributions to Pivot

18. The continued operation of the Business and the exercise of the Receiver's powers under the Receivership Order have, and are expected to continue to, give rise to Pivot Cash Collateral.¹⁶

19. To limit the undue accrual of interest and thereby maximize recoveries to the Debtor's creditors, the Receiver seeks authorization to make the Distributions using the Pivot Cash Collateral up to the full amount of the Debtor's indebtedness to Pivot, subject to such holdbacks

¹³ *Ibid*, at s 5.0 paras 1-2, Motion Record at Tab 2.

¹⁴ *Ibid*, at s 5.0 para 3, Motion Record at Tab 2.

¹⁵ *Ibid*, at s 5.0 paras 4 and 6, Motion Record at Tab 2.

¹⁶ *Ibid*, at s 6.0 para 1, Motion Record at Tab 2.

as the Receiver considers necessary or appropriate to satisfy any priority claims and/or to fund these proceedings, including, without limitation, the Receiver's fees and the fees of its counsel.¹⁷

20. The Distributions are expected to be applied first in satisfaction of the Debtor's indebtedness under the Senior Credit Agreement, and thereafter, to the Receiver's borrowings advanced by Pivot pursuant to the Receiver's Certificates.¹⁸

21. As set out in the First Report, the Receiver's counsel has provided a written opinion that the security granted in favour of Pivot constitutes valid security, enforceable in accordance with its terms, and perfected where necessary by registration.¹⁹

E. Protection From Certain Statutory Liabilities

22. To ensure the Receiver continues to benefit from the protections embodied in the Receivership Order and to avoid delays in making the Distributions and the attendant interest expense, the proposed Distribution and OSC Authorization Order shields the Receiver from liability when making the Distributions that may be imposed upon legal representatives or similar persons under certain statutes.²⁰ In particular, the proposed Distribution and OSC Authorization Order provides that the Receiver shall not incur any liability under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), the *Taxation Act*, 2007, S.O. 2007, c. 11, Sch. A, the *Excise Tax Act*, R.S.C. 1985, c. E-15, the *Employment Insurance Act*, S.C. 1996, c. 23, the *Retail Sales Tax Act*, R.S.O. 1990, c. R.31, the *Corporations Tax Act*, R.S.O. 1990, c. C.40 or any other similar applicable federal, provincial or territorial tax legislation (collectively, the "**Statutes**"), for facilitating any of

¹⁷ *Ibid*, at s 6.0 para 2, Motion Record at Tab 2.

¹⁸ *Ibid*, at s 6.0 para 3, Motion Record at Tab 2.

¹⁹ *Ibid*, at s 3.0 para 9 and s 6.0 para 4, Motion Record at Tab 2.

²⁰ *Ibid*, at s 6.0 para 5, Motion Record at Tab 2.

the Distributions as contemplated by and in accordance with the proposed Distribution and OSC Authorization Order.²¹

23. While affording protection to the Receiver from liabilities arising under the Statutes in connection with the Distributions, the proposed Distribution and OSC Authorization Order does not make declarations regarding whether the Receiver is a “representative” or “legal representative” of the Debtor or making “distributions” or “distributing” within the respective meanings of such terms in the Statutes.²² Nor does the proposed Distribution and OSC Authorization Order extinguish or vary any obligations of the Debtor under such Statutes (the Receiver being aware of none).²³

PART III: ISSUES

24. The issues to be determined on this motion are whether this Court should:

- (a) authorize the Receiver to comply with certain requests of the OSC;
- (b) authorize the Receiver to make the Distributions to Pivot; and
- (c) shield the Receiver from any liability arising under the Statutes.

²¹ *Ibid*, at s 1.1 para 1(c)(iii) and s 6.0 para 5, Motion Record at Tab 2.

²² *Ibid*, at s 6.0 para 6(e), Motion Record at Tab 2.

²³ *Ibid*, at s 6.0 para 6(f), Motion Record at Tab 2.

PART IV: LAW AND ANALYSIS

A. The Receiver Should be Authorized to Comply with the OSC's Requests

25. The Receivership Order contemplates the Receiver taking, and subsection 243(1) of the BIA vests this Court with jurisdiction to permit the Receiver to take, steps to share information with a Regulator such as the OSC.²⁴

26. The Receivership Order, from which the Receiver's authority emanates,²⁵ empowers the Receiver to, among other things:

- (a) report to, meet with and discuss with such affected Persons, including governmental bodies or agencies, as the Receiver deems appropriate, on all matters relating to the Property, the Securitization Party Collateral and the receivership, and to share information, subject to existing applicable confidentiality provisions and such terms as to confidentiality as the Receiver deems advisable or as the Court may direct;
- (b) meet and discuss with the Regulators with respect to the matters addressed in the Receivership Order or otherwise related to the receivership of the *Debtor* or the *Property*, or any related proceeding; and
- (c) take any steps reasonably incidental to the exercise of the Receiver's powers or the performance of any statutory obligations.²⁶

²⁴ [Receivership Order](#), *supra* at paras 3(p), 3(u), 3(w); [Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 243\(1\)\(c\)](#) [BIA].

²⁵ [Re Mundo Media Ltd, 2022 ONCA 607](#) at para 35 [*Mundo*]; [Peace River Hydro Partners v Petrowest Corp, 2022 SCC 41](#) at para 57 [*Petrowest*].

²⁶ [Receivership Order](#), *supra* at paras 3(p), 3(u), 3(w).

27. The precise scope of the powers conferred by the Receivership Order are to be determined having regard to, and may be supplemented under, subsection 243(1) of the BIA.²⁷

28. Subsection 243(1) of the BIA authorizes Courts to appoint a receiver to, among other things, take possession of all of the accounts receivable or other property of an insolvent debtor, exercise control over such property and take *any other action* that the Court considers advisable.²⁸

29. When “interpreted in light of the legislative history and the statutory object and purpose”, subsection 243(1) of the BIA provides “supervising judges with the broadest possible mandate in insolvency proceedings to enable them to react to the unique circumstances of each case and to do what ‘justice dictates’ and ‘practicality demands’”.²⁹ By implication, the broad powers conferred under subsection 243(1) of the BIA extend beyond those expressly granted to include “all powers which are practically necessary for the accomplishment” of the purpose of a receivership – “to ‘enhance and facilitate the preservation and realization of the assets for the benefit of creditors’” – or that are essential to the receivership.³⁰

30. Exercising the broad jurisdiction conferred under subsection 243(1) of the BIA, this Court frequently authorizes receivers to share information with affected persons, including governmental bodies or agencies, subject to such confidentiality provisions as the receiver deems advisable,³¹

²⁷ [Mundo](#), *supra* at para 35; [Petrowest](#), *supra* at para 57; [Royal Bank of Canada v Mundo Media Ltd.](#), 2022 ONSC 2147 at paras 29-30, *aff'd* 2022 ONCA 607 [*Royal Bank*].

²⁸ [BIA](#), *supra* s 243(1); [Royal Bank](#), *ibid* at para 29; [Petrowest](#), *ibid* at para 56; [Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.](#), 2019 ONCA 508 at para 45 [*Third Eye*].

²⁹ [Royal Bank](#), *ibid* at para 30; [Third Eye](#), *ibid* at paras 43, 56-58, 72.

³⁰ [Third Eye](#), *ibid* at paras 72-73, 76-77; [ATCO Gas & Pipelines Ltd. v Alberta \(Energy & Utilities Board\)](#), 2006 SCC 4 at para 51 [*ATCO*]; [Business Development Bank of Canada v Astoria Organic Matters Ltd.](#), 2019 ONCA 269 at paras 36, 46, 50-51, 59 [*Astoria*]; [Ontario Securities Commission v Bridging Finance Inc.](#), 2023 ONSC 2140 at para 18 [*Bridging*].

³¹ See for instance, [Commercial List Model Receivership Order](#) at para 3(m) [Model Receivership Order]. See also, [In the Matter of the Receivership of Scollard Development Corporation et al.](#), and [In the Matter of the Receivership of Textbook \(445 Princess Street\) Inc. and In the Matter of the Receivership of Textbook Ross Park Inc. et al](#) (February 25, 2019), Toronto, CV-17-11689-00CL, CV-17-589078-00CL, and CV-16-11567-00CL (Order) (ONSC) at para 1 and [In the Matter of the Receivership of Scollard Development Corporation et al.](#), and [In the Matter of the Receivership of Textbook \(445 Princess Street\) Inc. and In the Matter of the](#)

provided that (i) such information sharing is not a veiled third-party production request³² and (ii) such receiver cannot be *compelled* to produce documents created and obtained as part of its duties for a collateral purpose.³³

31. Here, the Receiver submits that it is appropriate for this Court to exercise its discretion to authorize the Receiver to comply with the OSC's requests given that:

- (a) the Receivership Order empowers the Receiver to share information related to the Property with governmental bodies and agencies and to meet and discuss with Regulators, including the OSC, with respect to the matters addressed in the Receivership Order or otherwise related to the receivership of the Debtor or the Property, or any related proceeding, and authorizes the Receiver to take steps reasonably incidental to such powers or the performance of any statutory obligations;

[Receivership of Textbook Ross Park Inc. et al \(April 15, 2019\), Toronto, CV-17-11689-00CL, CV-17-589078-00CL, and CV-16-11567-00CL \(Order\) \(ONSC\)](#) at paras 1-2 where this Court authorized a Court-appointed receiver to comply with multiple production orders, and any further production orders, obtained by the Ontario Provincial Police from the Ontario Superior Court of Justice in Brampton in connection with a fraud investigation conducted by the Royal Canadian Mounted Police and the Ontario Provincial Police.

³² See for instance, [Enlightened Funding Corporation v Velocity Asset and Credit Corporation et al., 2024 ONSC 5917](#) at paras [21-33](#), where this Court refused to direct a Court-appointed receiver to turn over documents obtained by it in the course of its mandate to a creditor of the debtors to prosecute a bankruptcy application against such debtors' former principal.

³³ See for instance, [KEB Hana Bank v Mizrahi Commercial \(The One\) LP et al., 2024 ONSC 4488](#) at paras [15-21](#), where this Court refused to direct a Court-appointed receiver to turn over certain construction-related documents requested by an affiliate of the debtor where such request was intended to assist the debtor's principal in assessing his exposure under a personal guarantee outside of the receivership proceedings, and [SA Capital Growth Corp. v Mander Estate, 2012 ONCA 681](#) at paras [6-9](#) where the Ontario Court of Appeal held that a Court-appointed receiver could not be compelled to produce documents obtained in the exercise of its mandate to the appellant for use in an OSC proceeding. See also, *Re Sbaraglia* (2013), 36 OSCB 2931 at paras 4-6, Schedule C – Abbreviated Authorities at Tab 1 – where the Ontario Securities Commission quashed a summons issued at the request of Peter Sbaraglia and served on a Court-appointed receiver on the basis that a receiver cannot be compelled to produce documents for a proceeding outside of or unrelated to the receivership.

- (b) the OSC's requests have been made in its capacity as the statutory body responsible for regulating Ontario's capital markets and administering and enforcing Ontario's securities laws;
- (c) the OSC is not currently seeking to, and the proposed Distribution and OSC Authorization Order does not, *compel* the Receiver to comply with the OSC's requests for information or documentation in respect of the Debtor or any transaction to which it was or is a party – rather the proposed authorization is permissive;
- (d) prior to its appointment, the Receiver understands that the Debtor was cooperating with the OSC and responding to requests akin to those made of the Receiver by the OSC;
- (e) since the Receiver's appointment, the Debtor's sole director has continued to cooperate and assist the Receiver in compiling information in response to the OSC's requests;
- (f) the proposed authorization to provide information or documentation in respect of the Debtor or any transaction to which it was or is a party, to the extent such information or documentation is within the Receiver's possession or control or comes within the Receiver's possession or control, is subject to such terms as to confidentiality as the Receiver deems advisable and any applicable privilege or statutory provision prohibiting such disclosure;
- (g) the proposed Distribution and OSC Authorization Order is expected to avoid the professional costs and judicial resources that would be expended if the Receiver

were required to respond to, and potentially contest, a summons issued by the OSC pursuant to section 13 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended, and is therefore beneficial to the Debtor and its creditors in these proceedings; and

- (h) the Receiver is not aware of any prejudice to any stakeholder in these proceedings that will result from granting the Receiver explicit authorization to provide information or documentation in respect of the Debtor or any transaction to which it was or is a party that would outweigh the public policy interests served by facilitating the OSC's requests.³⁴

B. The Receiver Should be Authorized to Make Distributions to Pivot

32. Distributions, including interim distributions, are frequently authorized in insolvency proceedings.³⁵ The power to authorize a Court-appointed receiver to make distributions is “implicit in the *BIA*”, “practically necessary for the accomplishment of the objectives of the legislation”, and frequently incorporated in receivership orders, as it is here.³⁶

33. When determining whether to authorize a distribution to a senior ranking secured creditor, Courts have considered, among other things:

- (a) the validity and enforceability of such creditor's security;

³⁴ First Report, *supra* at s 5.0 at paras 1-6, Motion Record at Tab 2; *Securities Act*, R.S.O. 1990, c. S.5 s 13.

³⁵ *KingSett Mortgage Corporation v Churchill Lands United Inc.*, 2024 ONSC 7127 at para 43 [Churchill]; *First Source Financial Management v Chacon Strawberry Fields Inc.*, 2024 ONSC 7229 at para 44 [Chacon].

³⁶ *Forjay Management Ltd. v 625536 B.C. Ltd.*, 2019 BCCA 368 at paras 26, 31 [Forjay]; *Churchill, ibid.* *Cameron Stephens Mortgage Capital Ltd. v 135637 Ontario Limited et al.*, March 18, 2026, Toronto CL-25-00753580-0000 (Distribution and Ancillary Relief Order) (ONSC); *Royal Bank of Canada, in its Capacity as Financial Services Agent v Tpine Canada Securitization LP et al.*, January 13, 2026, Toronto CV-24-00728055-00CL (Ancillary Relief Order) (ONSC); *Marshallzehr Group Inc. v La Pue International Inc.*, January 7, 2025, Toronto CV-23-00700695-00CL (Ancillary and Interim Distribution Order) (ONSC); *Genesis Mortgage Investment Corporation v 1774611 Ontario Ltd. et al.*, October 8, 2024, Toronto CV-23-00706813-00CL (Distribution and Ancillary Relief Order) (ONSC).

- (b) whether the debtor/estate will have sufficient liquidity subsequent to the distribution;
- (c) the economy to be achieved by the proposed distribution; and
- (d) whether any objecting creditor has an economic interest in the assets that gave rise to the proceeds to be distributed.³⁷

34. The application of the foregoing considerations in this case makes clear that the proposed Distributions are appropriate in the circumstances. Specifically:

- (a) as set out in the First Report, the Receiver's counsel has provided a written opinion that, subject to customary qualifications and assumptions, the security granted by the Debtor in favour of Pivot constitutes valid security, enforceable in accordance with its terms, and perfected where necessary by registration;
- (b) except for the Receiver's Charge, the Receiver is not aware of any encumbrance against the Collateral that ranks in priority to Pivot's security securing the Debtor's indebtedness under the Senior Credit Agreement and the Receiver's Certificates;
- (c) the Distributions will limit the undue accrual of interest;
- (d) the reduction of the Debtor's interest obligations will preserve value for the Debtor's creditors, including the Unsecured Noteholders that are expected to suffer a complete or substantial shortfall;

³⁷ *Re AbitibiBowater*, 2009 QCCS 6461 at paras 70-75; *Chacon*, *supra* at para 45; *Churchill*, *ibid* at paras 43-44.

- (e) pursuant to the proposed Distribution and OSC Authorization Order, the Receiver will be entitled to holdback monies in an amount it determines necessary and will thereby be able to ensure that the Receiver has access to sufficient funds to complete the administration of these proceedings; and
- (f) the Receiver is not aware of any objections to the proposed Distributions.³⁸

C. This Court Should Shield the Receiver From Liability Under the Statutes

35. As recently made clear in *Re One Bloor West Toronto Group (The One) Inc.* (“**The One**”), the “broad discretion” conferred under section 11 of the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) vests this Court with jurisdiction to “shield its officers from statutory liability that they might otherwise face”, including under the Statutes, that “extends beyond the general shield of liability of its court officers”.³⁹ The exercise of such discretion, as this Court observed in *The One*, does not “engage paramountcy issues or constitutional questions” and is consistent with:

- (a) the protections afforded to Court-appointed monitors, which, “like virtually every order appointing a court officer”, provide that the monitor cannot be personally liable except for gross negligence or wilful misconduct;
- (b) “the generally accepted principle that insolvency professionals who take a step that is specifically authorized by this court should not be held personally liable for taking that step”; and

³⁸ First Report, *supra* at s 6.0 para 2 and 4 at Motion Record at Tab 2.

³⁹ *Re One Bloor West Toronto Group (The One) Inc.*, 2026 ONSC 1854 at paras 53, 61 [*The One*].

- (c) the priorities of the withholding obligations potentially applicable to the distributions.⁴⁰

36. Interpreted purposively, the Receiver submits that subsection 243(1) of the BIA similarly authorizes this Court to shield the Receiver from any liability under the Statutes in connection with the Distributions. Such interpretation is not only consistent with the Supreme Court of Canada's direction that the BIA and the CCAA be interpreted harmoniously to the extent possible,⁴¹ but also the Ontario Court of Appeal's affirmation in *Potentia Renewables Inc. v Deltro Electric Ltd.* that a "Receiver is not a legitimate target" for dissatisfied creditors,⁴² this Court's decision in *The One* and section 142 of the CJA.⁴³

1. This Court has Jurisdiction to Shield the Receiver From Liability

37. In *Comerica Bank v Dragonwave Inc.* ("**Dragonwave**") and *Re: 1000156489 Ontario Inc.* ("**489**"), this Court declined to expressly relieve a Court-appointed receiver and a Court-appointed monitor, respectively, from liability that may arise under the Statutes in connection with Court-approved distributions.⁴⁴ In each case, this Court did not conclude that it lacked the jurisdiction to grant such relief or that the existing protections in favour of its Court-appointed officer were inapplicable. Instead, it noted that a complete factual and legal record and, in the case of *489*, notice to taxation authorities, was required to consider granting the relief requested.⁴⁵

⁴⁰ *Ibid*, at paras [35-37](#), [43](#), [51](#), [60](#).

⁴¹ *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 at paras [24](#), [47](#). See also, *Re Urbancorp Cumberland 1 GP Inc.*, 2020 ONSC 7920 at para [23](#) [*Urbancorp*].

⁴² *Potentia Renewables Inc. v Deltro Electric Ltd.*, 2019 ONCA 779 at para [48](#) [*Potentia*].

⁴³ *Courts of Justice Act*, R.S.O. 1990, c. C.43 s [142](#) [CJA].

⁴⁴ See generally, *Comerica Bank v Dragonwave Inc.*, 2017 ONSC 6104 [*Dragonwave*]; *Re: 1000156489 Ontario Inc.*, 2026 ONSC 610 [*489*].

⁴⁵ *Dragonwave*, *ibid* at paras [9-12](#); *489*, *ibid* at paras [7-10](#), [13-16](#). Notably, notwithstanding that this Court was not prepared to grant a specific release from potential liability arising under the Statutes in *489*, it granted a Distribution Order containing a general release in favour of the Court-appointed monitor from "any liability or obligation as a result of carrying out any duties or work in connection with the Proposed Distribution

38. With the benefit of a complete record, including submissions on *Dragonwave* and 489,⁴⁶ and notice to Canada Revenue Agency, the Department of Justice Tax Law Section, and the Ministry of Finance (Ontario) Insolvency Unit, none of which appeared, opposed or otherwise responded, this Court held in *The One* that it had jurisdiction under section 11 of the CCAA to shield and release its officers – a monitor and Chief Restructuring Officer – from the “specific statutory liability” under the Statutes from which the Receiver now seeks relief.⁴⁷ In so doing, the Court noted that:

- (a) absent the granting of relief from the potential statutory liability under the Statutes, certain of their provisions “could have the effect of frustrating distributions to secured creditors in CCAA and receivership proceedings notwithstanding that the distributions have priority at law over the relevant tax authority” as a result of the “potential personal liability” attending any distribution to a senior creditor;
- (b) “[o]btaining a clearance certificate each time a court officer is distributing money in accordance with a court order is not a realistic solution [...] in insolvency

Methodology and/or this Order, whether in its personal capacity or its capacity as Monitor, save and except for any gross negligence or willful misconduct on its part” (see [In The Matter of a Plan of Compromise or Arrangement of 1000156489 Ontario Inc. \(January 30, 2026\), Toronto, CV-22-00691990-00CL \(Distribution Order\) \(ONSC\)](#) at para 13).

⁴⁶ In *The One*, *supra* at paras 38-40, this Court also considered the approach adopted by the Superior Court of Quebec in [9210-6905 Québec inc. \(Proposition de\), 2015 QCCS 6559](#), wherein the Court determined that an interim receiver was exempt from the requirement to obtain a clearance certificate under the [Income Tax Act, R.S.C. 1985, c. 1 \(5th Supp.\)](#) because an interim receiver may only be appointed under the BIA if it is a licensed insolvency trustee. Pursuant to subsection 243(4) of the BIA, that reasoning is equally applicable to a receiver appointed under section 243 of the BIA. However, as this Court observed in *The One* at para 41, this reasoning can only be extended to the Statutes that provide an exemption in favour of a “trustee in bankruptcy”. Although such exemption appears in the [Corporations Tax Act, R.S.O. 1990, c. C.40 s 107\(2\)](#), [Employment Insurance Act, S.C. 1996, c. 23 s 86\(7\)](#), [Excise Tax Act, R.S.C. 1985, c. E-15 s 81\(1\)](#) (but see also, subsection [270\(2\)](#)), [Retail Sales Tax Act, R.S.O. 1990, c. R.31 s 22\(5\)](#), and the [Income Tax Act, R.S.C. 1985, c. 1 \(5th Supp.\) s 159\(2\)](#), this Court in *The One* at para 40 noted that it does not appear in each of the Statutes in respect of which the relief was sought.

⁴⁷ *The One*, *ibid* at paras 47-49, 52, 53, 61. See also, [In the Matter of a Plan of Compromise or Arrangement of One Bloor West Toronto Group \(The One\) Inc. and One Bloor West Toronto Commercial \(The One\) GP Inc. \(March 20, 2026\), Toronto, CV-25-00740512-00CL \(Order\) \(ONSC\)](#) at para 7.

situations”, as they can “take a long time to obtain” and are often unavailable due to tax arrears – creating a “quandary if there are other creditors of the debtors whose claims have priority over any claims arising under the Tax Statutes”;

- (c) this Court “has the jurisdiction to protect its officers from liability” and does so in “virtually every order appointing a court officer”, which “eliminates liability under any statute or common law principle that does not involve gross negligence or wilful misconduct”;
- (d) the rationale underlying the granting of a “limited liability shield against the potential for court officers incurring personal liability for carrying out court-approved actions” is the same as that supporting the granting of specific relief from the Statutes; and
- (e) by granting the requested relief, the Court “is not being asked here to extinguish the entitlement of the Tax Authorities to be paid taxes owing or to override either the provincial or federal Taxation Statutes.” Rather, the Court “is simply being asked to shield the court-appointed Monitor and CRO from potential personal liability for not withholding tax when making a court-authorized distribution in respect of which no Tax Authority appeared to argue that tax should be withheld, nor raised any objection”.⁴⁸

39. The foregoing considerations apply equally in receivership proceedings. And, when interpreted purposively and harmoniously with section 11 of the CCAA, subsection 243(1) of the

⁴⁸ *The One*, *ibid* at paras [35](#), [37](#), [43-44](#), [53](#).

BIA provides this Court with jurisdiction to shield its officer – the Receiver – from any liability under the Statutes in connection with the Distributions.

40. As discussed above, subsection 243(1) of the BIA provides “supervising judges with the broadest possible mandate in insolvency proceedings to enable them to react to the unique circumstances of each case and to do what ‘justice dictates’ and ‘practicality demands’”.⁴⁹ The broad powers conferred under subsection 243(1) of the BIA, by implication, include all those practically necessary for the accomplishment of the objectives of, or that are essential to, a receivership.⁵⁰ Indeed, by empowering Courts to appoint a receiver, as an officer of the Court, to take any action the Court considers advisable if just and convenient to do so, “Parliament must be taken to have clothed the court with the power to make orders that are essential to the functioning of its officer [...] and to the court’s role in supervising it.”⁵¹

41. To date, Courts, including this Court, have exercised their broad powers under subsection 243(1) – whether expressed as “any other action the Court deems advisable” or implied in the Court’s authority to appoint a receiver – to approve sales proposed by Court-appointed receivers,⁵² grant vesting orders,⁵³ authorize Court-appointed receivers to make distributions,⁵⁴ and direct the assignment of a consent-required contract.⁵⁵ Importantly, Courts also exercise such jurisdiction when granting:

⁴⁹ *Royal Bank*, *supra* at para 30; *Third Eye*, *supra* at paras 43, 56-58, 72.

⁵⁰ *Third Eye*, *ibid* at paras 72-73, 76-77; *ATCO*, *supra* at para 51; *Astoria*, *supra* at paras 36, 46, 50-51, 59; *Bridging*, *supra* at para 18.

⁵¹ *Astoria*, *ibid* at paras 50-51.

⁵² *Third Eye*, *supra* at paras 73-77.

⁵³ *Ibid*, at paras 73-77, 80-81.

⁵⁴ *Forjay*, *supra* at para 26.

⁵⁵ *Urbancorp*, *supra* at paras 29-31.

- (a) (virtually all) receivership orders requiring leave to sue the receiver and shielding it from any liability or obligation (whether under statute or common law) as a result of its appointment or carrying out the provisions of the order, save for any gross negligence or wilful misconduct;⁵⁶ and
- (b) discharge orders containing a release in favour of the receiver of any and all liability (whether under statute or common law), save for any gross negligence or wilful misconduct.⁵⁷

42. The same rationale underpinning the exercise of the Court’s jurisdiction to grant general releases to ensure the “proper and orderly conduct of the receivership” and execution of the receiver’s duties, avoid “unnecessary and unjustified proceedings”, shield the receiver from claims incidental to the performance of its Court-authorized duties and provide finality, supports this Court’s jurisdiction to grant specific releases in respect of the Statutes.⁵⁸ It would be anomalous to interpret subsection 243(1) of the BIA as conferring jurisdiction to grant *general* releases in favour of Court officers and authorize distributions, while prohibiting *specific* releases of claims arising from the performance of the *essential duty* – the distribution of the proceeds of a debtor’s assets – authorized and directed thereunder.

43. For the foregoing reasons, the Receiver submits that this Court has jurisdiction to shield its officer from any liability under the Statutes in connection with the Distributions.

⁵⁶ [Model Receivership Order](#) at paras 8, 17.

⁵⁷ [Commercial List Model Discharge Order](#) at para 5; [Yukon \(Government of\) v Yukon Zinc Corporation, 2022 YKSC 58](#) at paras 26-28 [*Yukon*]; [Pinnacle v Kraus, 2012 ONSC 6376](#) at para 47 [*Pinnacle*].

⁵⁸ [Potentia, supra](#) at paras 48-50; [Pinnacle, ibid](#) at para 47; [Yukon, ibid](#) at paras 26-28; [The One, supra](#) at para 44.

2. It is Appropriate for this Court to Shield the Receiver From Liability

44. In addition to being satisfied as to its jurisdiction to shield the Receiver from any liability under the Statutes in connection with the Distributions, this Court must be satisfied that it is appropriate in the circumstances to do so. Appropriateness may be assessed having regard to the purposes of a receivership and Canada's insolvency statutes, including "to 'enhance and facilitate the preservation and realization of the assets for the benefit of creditors'", provide for the "timely, efficient and impartial resolution of a debtor's insolvency" and "to preserve and maximize the value of a debtor's assets".⁵⁹

45. Having regard to the purposes of a receivership and Canada's insolvency statutes, the Receiver submits that it is appropriate for this Court to exercise its jurisdiction to shield the Receiver from any liability under the Statutes in connection with the Distributions in the circumstances, given that:

- (a) while the Receiver is not currently aware of any outstanding tax obligations, obtaining clearance or other certificates contemplated under certain of the Statutes is neither practical nor feasible where, as in this case, the Debtor's substantial senior secured indebtedness will continue to accrue interest and thereby erode subordinate recoveries, to the detriment of the Debtor's junior creditors (many of which are anticipated to receive no or little recovery), until such certificates are obtained – if they can be obtained at all;
- (b) if the proposed relief is not granted and the Debtor's books and records incorrectly demonstrate that the Debtor has no outstanding tax liabilities, (i) the Receiver will

⁵⁹ [Third Eye](#), *ibid* at para 73; [Urbancorp](#), *supra* at para 24; [9354-9186 Quebec Inc. v Callidus Capital Corp.](#), 2020 SCC 10 at para 40.

not be able to obtain clearance or other certificates in respect of tax obligations that may be *subordinate* to the Debtor's indebtedness under the Senior Credit Agreement, and (ii) it will be open to taxing authorities to assert that the Receiver's existing protections, which exempt gross negligence and wilful misconduct, do not apply to any distributions made by the Receiver without first obtaining a clearance or other applicable certificate;

- (c) the proposed Distribution and OSC Authorization Order mitigates any potential prejudice to a taxing authority having claims that are *senior* to those of Pivot's under the Senior GSA or the Receivership Order (the Receiver is aware of none) by authorizing the Receiver to holdback any amounts it considers necessary or appropriate to satisfy priority claims;
- (d) in granting the Receivership Order, this Court affirmed its jurisdiction to shield, and did shield, the Receiver from any liability or obligation as a result of its appointment or the carrying out of the provisions of the Receivership Order, save and except for any gross negligence or wilful misconduct on its part;
- (e) the proposed Distribution and OSC Authorization Order does not make declarations regarding whether the Receiver is a "representative" or "legal representative" of the Debtor or making "distributions" or "distributing" within the respective meanings of such terms in the Statutes, nor does it extinguish or vary any obligations of the Debtor under such Statutes or, as this Court concluded in *The One*, raise constitutional questions or implicate the doctrine of federal paramountcy;
- (f) shielding the Receiver from any liability arising under the Statutes in connection with the making of the Distributions in accordance with the proposed Distribution

and OSC Authorization Order is consistent with section 142 of the CJA, which provides that a “person is not liable for any act done in good faith in accordance with an order or process of a court in Ontario”; and

- (g) notice of the within motion has been provided to Canada Revenue Agency, the Department of Justice Tax Law Section, and the Ministry of Finance (Ontario) Insolvency Unit.⁶⁰

PART V: RELIEF REQUESTED

46. The Receiver submits that the relief sought on the within motion is appropriate in the circumstances and respectfully requests that the proposed Distribution and OSC Authorization Order be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3rd DAY OF JUNE 2026

Bennett Jones LLP

Bennett Jones LLP

⁶⁰ First Report, *supra* at s 6.0 at para 6, Motion Record at Tab 2; *CJA*, *supra* s 142; *The One*, *supra* at para 60.

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. [*ATCO Gas & Pipelines Ltd. v Alberta \(Energy & Utilities Board\)*, 2006 SCC 4](#)
2. [*Business Development Bank of Canada v Astoria Organic Matters Ltd.*, 2019 ONCA 269](#)
3. [*Century Services Inc. v Canada \(Attorney General\)*, 2010 SCC 60](#)
4. [*Comerica Bank v Dragonwave Inc.*, 2017 ONSC 6104](#)
5. [*Enlightened Funding Corporation v Velocity Asset and Credit Corporation et al.*, 2024 ONSC 5917](#)
6. [*First Source Financial Management v Chacon Strawberry Fields Inc.*, 2024 ONSC 7229](#)
7. [*Forjay Management Ltd. v 625536 B.C. Ltd.*, 2019 BCCA 368](#)
8. [*KEB Hana Bank v Mizrahi Commercial \(The One\) LP et al.*, 2024 ONSC 4488](#)
9. [*KingSett Mortgage Corporation v Churchill Lands United Inc.*, 2024 ONSC 7127](#)
10. [*Ontario Securities Commission v Bridging Finance Inc.*, 2023 ONSC 2140](#)
11. [*Peace River Hydro v Petrowest Corp.*, 2022 SCC 41](#)
12. [*Pinnacle v Kraus*, 2012 ONSC 6376](#)
13. [*Potentia Renewables Inc. v Deltro Electric Ltd.*, 2019 ONCA 779](#)
14. [*Re AbitibiBowater*, 2009 QCCS 6461](#)
15. [*Re Mundo Media Ltd.*, 2022 ONCA 607](#)
16. [*Re One Bloor West Toronto Group \(The One\) Inc.*, 2026 ONSC 1854](#)
17. [*Re Sbaraglia* \(2013\), 36 OSCB 2931](#)
18. [*Re Urbancorp Cumberland 1 GP Inc.*, 2020 ONSC 7920](#)
19. [*Royal Bank of Canada v Mundo Media Ltd.*, 2022 ONSC 2147](#)
20. [*Re: 1000156489 Ontario Inc.*, 2026 ONSC 610](#)
21. [*SA Capital Growth Corp. v Mander Estate*, 2012 ONCA 681](#)
22. [*Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508](#)
23. [*Yukon \(Government of\) v Yukon Zinc Corporation*, 2022 YKSC 58](#)
24. [*9210-6905 Québec inc. \(Proposition de\)*, 2015 QCCS 6559](#)
25. [*9354-9186 Quebec Inc. v Callidus Capital Corp.*, 2020 SCC 10](#)

Endorsements and Orders

1. [*Cameron Stephens Mortgage Capital Ltd. v 135637 Ontario Limited et al.*, March 18, 2026, Toronto CL-25-00753580-0000 \(Distribution and Ancillary Relief Order\) \(ONSC\)](#)
2. [*Commercial List Model Discharge Order*](#)
3. [*Commercial List Model Receivership Order*](#)
4. [*Genesis Mortgage Investment Corporation v 1774611 Ontario Ltd. et al.*, October 8, 2024, Toronto CV-23-00706813-00CL \(Distribution and Ancillary Relief Order\) \(ONSC\)](#)
5. [*In the Matter of a Plan of Compromise or Arrangement of One Bloor West Toronto Group \(The One\) Inc. and One Bloor West Toronto Commercial \(The One\) GP Inc.* \(March 20, 2026\), Toronto, CV-25-00740512-00CL \(Order\) \(ONSC\)](#)
6. [*In The Matter of a Plan of Compromise or Arrangement of 1000156489 Ontario Inc.* \(January 30, 2026\), Toronto, CV-22-00691990-00CL \(Distribution Order\) \(ONSC\)](#)

7. [*In the Matter of the Receivership of Scollard Development Corporation et al., and In the Matter of the Receivership of Textbook \(445 Princess Street\) Inc. and In the Matter of the Receivership of Textbook Ross Park Inc. et al*](#) (February 25, 2019), Toronto, CV-17-11689-00CL, CV-17-589078-00CL, and CV-16-11567-00CL (Order) (ONSC)
8. [*In the Matter of the Receivership of Scollard Development Corporation et al., and In the Matter of the Receivership of Textbook \(445 Princess Street\) Inc. and In the Matter of the Receivership of Textbook Ross Park Inc. et al*](#) (April 15, 2019), Toronto, CV-17-11689-00CL, CV-17-589078-00CL, and CV-16-11567-00CL (Order) (ONSC)
9. [*Marshallzehr Group Inc. v La Pue International Inc.*](#), January 7, 2025, Toronto CV-23-00700695-00CL (Ancillary and Interim Distribution Order) (ONSC)
10. [*Pivot Financial I Limited Partnership v Brightpath Capital Corporation*](#) (April 10, 2026), Toronto, CL-26-00000152-0000 (Order) (ONSC)
11. [*Royal Bank of Canada, in its Capacity as Financial Services Agent v Tpine Canada Securitization LP et al.*](#), January 13, 2026, Toronto CV-24-00728055-00CL (Ancillary Relief Order) (ONSC)

I certify that I am satisfied as to the authenticity of every authority.

June 3, 2026



SHAWN KIRMMAN

SCHEDULE B – STATUTES AND REGULATIONS RELIED ON

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

Section 243

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.

Definition of receiver

(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)

(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

(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.

Meaning of disbursements

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

1992, c. 27, s. 892005, c. 47, s. 1152007, c. 36, s. 58

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Section 11

General power of court

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this

Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 111992, c. 27, s. 901996, c. 6, s. 1671997, c. 12, s. 1242005, c. 47, s. 128

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

Section 142

Protection for acting under court order

142 A person is not liable for any act done in good faith in accordance with an order or process of a court in Ontario. R.S.O. 1990, c. C.43, s. 142.

Corporations Tax Act, R.S.O. 1990, c. C.40

Section 107

Payment of tax by receivers

107 (1) Every person required under subsection 75 (7) to deliver a return for a corporation for a taxation year shall, immediately on receipt of a notice of assessment or reassessment in respect of the taxation year, pay all taxes, interest, penalties and other amounts payable under this Act by or in respect of the corporation to the extent that the person has or had in the person's possession or control property belonging to the corporation or its estate, at any time since the taxation year, and the person shall thereupon be deemed to have made the payment on behalf of the corporation. 1994, c. 14, s. 50 (1); 2004, c. 16, s. 2 (2).

Certificate of tax paid

(2) Every assignee, liquidator, receiver, receiver-manager, and other agent, other than a trustee in bankruptcy, before distributing any property of the corporation under their control, shall obtain a certificate from the Minister certifying that all taxes, interest, penalties and other amounts payable by the corporation under this Act have been paid or that security for the payment thereof in a form acceptable to the Minister has been given under section 103. 1994, c. 14, s. 50 (1); 2004, c. 16, s. 2 (2).

Personal liability of receivers

(3) Any person referred to in subsection (2) who fails to obtain the certificate referred to therein shall be personally liable to Her Majesty in right of Ontario for an amount equal to the taxes, interest, penalties and other amounts payable under subsection (1) and such debt shall be deemed to be tax owing by such person under this Act and may be enforced in accordance with the provisions of this Act. R.S.O. 1990, c. C.40, s. 107 (3); 1994, c. 14, s. 50 (2); 2004, c. 16, s. 2 (2).

Employment Insurance Act, S.C. 1996, c. 23

Section 86

Recovery

86 (1) All premiums, interest, penalties and other amounts payable by an employer under this Act are debts due to Her Majesty and are recoverable in the Federal Court or any other court of competent jurisdiction or in any other manner provided for by this Act.

Amounts deducted and not remitted

(2) Where an employer has deducted an amount from the remuneration of an insured person as or on account of any employee's premium required to be paid by the insured person but has not remitted the amount to the Receiver General, the employer is deemed, notwithstanding any security interest (as defined in subsection 224(1.3) of the Income Tax Act) in the amount so deducted, to hold the amount separate and apart from the property of the employer and from property held by any secured creditor (as defined in subsection 224(1.3) of the Income Tax Act) of that employer that but for the security interest would be property of the employer, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

Extension of trust

(2.1) Notwithstanding the Bankruptcy and Insolvency Act (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection (2) to be held by an employer in trust for Her Majesty in the manner and at the time provided under this Act, property of the employer and property held by any secured creditor (as defined in subsection 224(1.3) of the Income Tax Act) of that employer that but for a security interest (as defined in subsection 224(1.3) of the Income Tax Act) would be property of the employer, equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted by the employer, separate and apart from the property of the employer, in trust for Her Majesty whether or not the property is subject to such a security interest, and

(b) to form no part of the estate or property of the employer from the time the amount was so deducted, whether or not the property has in fact been kept separate and apart from the estate or property of the employer and whether or not the property is subject to such a security interest

and is property beneficially owned by Her Majesty notwithstanding any security interest in such property or in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

Meaning of security interest

(2.2) For the purposes of subsections (2) and (2.1), a security interest does not include a prescribed security interest.

Certificate before distribution

(3) Before distributing any property over which a responsible representative has control in that capacity, the responsible representative shall obtain a certificate from the Minister certifying the payment, or acceptance by the Minister of security for payment, of all amounts

(a) for which an employer is liable under this Act up to and including the date of distribution; and

(b) for the payment of which the responsible representative is or can reasonably be expected to become liable in that capacity.

Personal liability

(4) If the responsible representative distributes to one or more persons property over which the responsible representative has control in that capacity, without obtaining the certificate, the responsible representative is personally liable for the payment of the amounts to the extent of the value of the property distributed and the Minister may assess the responsible representative for the amounts in the same manner and with the same effect as an assessment made under section 85.

Security

(5) If the Minister considers it advisable in a particular case, the Minister may accept security for payment of premiums by way of mortgage, hypothec or other charge of any kind whatever on property of the employer or any other person or by way of guarantee from other persons.

Trustee in bankruptcy

(6) If an employer has become bankrupt, the trustee in bankruptcy is deemed to be the agent of the bankrupt for the purposes of this Act.

Definition of responsible representative

(7) For the purposes of this section, responsible representative means a person, other than a trustee in bankruptcy, who is an assignee, liquidator, receiver, receiver-manager, administrator, executor, liquidator of the succession or any other like person administering, winding up, controlling or otherwise dealing with a property, business or estate of another person.

1996, c. 23, s. 861998, c. 19, s. 2662001, c. 4, s. 77(F)

Excise Tax Act, R.S.C. 1985, c. E-15

Section 81

Obligation of Trustees

Certificate before distribution

81 (1) Every executor, liquidator of a succession, administrator, assignee, liquidator or other like person, other than a trustee in bankruptcy, shall, before distributing any assets under his control in that capacity, obtain a certificate from the Minister certifying that no tax, penalty, interest or other sum under this Act, other than Part I, chargeable against or payable by that person in that capacity or chargeable against or payable in respect of those assets, remains unpaid or that security for the payment thereof has, in accordance with section 80.1, been accepted by the Minister.

Personal liability

(2) Any person who distributes assets without a certificate as required by subsection (1) is personally liable to pay to Her Majesty an amount equal to the lesser of

(a) the value of the assets so distributed, and

(b) the amount of any tax, penalty, interest or other sum that remains unpaid and for the payment of which security has not been furnished to the Minister.

[NOTE: Application provisions are not included in the consolidated textsee relevant amending Acts and regulations.] R.S., 1985, c. E-15, s. 81R.S., 1985, c. 15 (1st Supp.), s. 28, c. 7 (2nd Supp.), s. 382001, c. 17, s. 234

Section 270

Definitions

270 (1) In this section,

receiver means a person who is a receiver within the meaning assigned by subsection 266(1); (séquestre)

representative means

(a) a person, other than a trustee in bankruptcy or a receiver, who is administering, winding up, controlling or otherwise dealing with any property, business, commercial activity or estate of a registrant, and

(b) a trustee of a trust that is a registrant. (représentant)

Certificates for receivers

(2) Every receiver shall, before distributing to any person any property or money under the control of the receiver in the receiver's capacity as receiver, obtain a certificate from the Minister certifying that all amounts that are, or can reasonably be expected to become, payable or remittable under this Part by the receiver in that capacity in respect of the reporting period during which the distribution is made, or any previous reporting period, have been paid or that security for the payment or remittance of the amounts has, in accordance with this Part, been accepted by the Minister.

Certificates for representatives

(3) Every representative of a registrant shall, before distributing to any person any property or money under the control of the representative in the representative's capacity as the representative, obtain a certificate from the Minister certifying that

(a) all amounts that are payable or remittable by the registrant under this Part in respect of the reporting period during which the distribution is made, or any previous reporting period, and

(b) all amounts that are, or can reasonably be expected to become, payable or remittable under this Part by the representative in that capacity in respect of the reporting period during which the distribution is made, or any previous reporting period,

have been paid or that security for the payment or remittance of the amounts has, in accordance with this Part, been accepted by the Minister.

Liability for failure to obtain certificate

(4) Any

(a) receiver who distributes property or money without obtaining a certificate as required by subsection (2) in respect of the amounts referred to in that subsection, or

(b) representative who distributes property or money without obtaining a certificate as required by subsection (3) in respect of the amounts referred to in that subsection

is personally liable for the payment or remittance of those amounts to the extent of the value of the property or money so distributed.

[NOTE: Application provisions are not included in the consolidated text see relevant amending Acts and regulations.] 1990, c. 45, s. 121993, c. 27, s. 1231997, c. 10, s. 74

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp)

Section 159

Person acting for another

159 (1) For the purposes of this Act, where a person is a legal representative of a taxpayer at any time,

(a) the legal representative is jointly and severally, or solidarily, liable with the taxpayer

(i) to pay each amount payable under this Act by the taxpayer at or before that time and that remains unpaid, to the extent that the legal representative is at that time in possession or control, in the capacity of legal representative, of property that belongs or belonged to, or that is or was held for the benefit of, the taxpayer or the taxpayer's estate, and

(ii) to perform any obligation or duty imposed under this Act on the taxpayer at or before that time and that remains outstanding, to the extent that the obligation or duty can reasonably be considered to relate to the responsibilities of the legal representative acting in that capacity; and

(b) any action or proceeding in respect of the taxpayer taken under this Act at or after that time by the Minister may be so taken in the name of the legal representative acting in that capacity and, when so taken, has the same effect as if it had been taken directly against the taxpayer and, if the taxpayer no longer exists, as if the taxpayer continued to exist.

Certificate before distribution

(2) Every legal representative (other than a trustee in bankruptcy) of a taxpayer shall, before distributing to one or more persons any property in the possession or control of the legal representative acting in that capacity, obtain a certificate from the Minister, by applying for one in prescribed form, certifying that all amounts

(a) for which the taxpayer is or can reasonably be expected to become liable under this Act at or before the time the distribution is made, and

(b) for the payment of which the legal representative is or can reasonably be expected to become liable in that capacity

have been paid or that security for the payment thereof has been accepted by the Minister.

Personal liability

(3) If a legal representative (other than a trustee in bankruptcy) of a taxpayer distributes to one or more persons property in the possession or control of the legal representative, acting in that capacity, without obtaining a certificate under subsection (2) in respect of the amounts referred to in that subsection,

(a) the legal representative is personally liable for the payment of those amounts to the extent of the value of the property distributed;

(b) the Minister may at any time assess the legal representative in respect of any amount payable because of this subsection; and

(c) the provisions of this Division (including, for greater certainty, the provisions in respect of interest payable) apply, with any modifications that the circumstances require, to an assessment made under this subsection as though it had been made under section 152 in respect of taxes payable under this Part.

Appropriation of property

(3.1) For the purposes of subsections 159(2) and 159(3), an appropriation by a legal representative of a taxpayer of property in the possession or control of the legal representative acting in that capacity is deemed to be a distribution of the property to a person.

(4) and (4.1) [Repealed, 2001, c. 17, s. 154(1)]

Election where certain provisions applicable

(5) Where subsection 70(2), 70(5) or 70(5.2) of this Act or subsection 70(9.4) of the Income Tax Act, chapter 148 of the Revised Statutes of Canada, 1952, is applicable in respect of a taxpayer who has died, and the taxpayer's legal representative so elects and furnishes the Minister with security acceptable to the Minister for payment of any tax the payment of which is deferred by the election, notwithstanding any provision of this Part or the Income Tax Application Rules respecting the time within which payment shall be made of the tax payable under this Part by the taxpayer for the taxation year in which the taxpayer died, all or any portion of such part of that tax as is equal to the amount, if any, by which that tax exceeds the amount that that tax would be, if this Act were read without reference to subsections 70(2), (5) and (5.2) and the Income Tax Act, chapter 148 of the Revised Statutes of Canada, 1952, were read without reference to subsections 70(2), (5), (5.2) and (9.4) of that Act, may be paid in such number (not exceeding 10) of equal consecutive annual instalments as is specified by the legal representative in the election, the first instalment of which shall be paid on or before the day on or before which payment of that tax would, but for the election, have been required to be made and each subsequent instalment of which shall be paid on or before the next following anniversary of that day.

Idem

(5.1) Where, in the taxation year in which a taxpayer dies, an amount is included in computing the taxpayer's income by virtue of paragraph 23(3)(c) of the Income Tax Application Rules, the provisions of subsection 159(5) apply, with such modifications as the circumstances require, as though the amount were an amount included in computing the taxpayer's income for the year by virtue of subsection 70(2) or an amount deemed to have been received by the taxpayer by virtue of subsection 70(5).

Idem

(6) For the purposes of subsection 159(5), the tax payable under this Part by a taxpayer for the taxation year in which the taxpayer died includes any tax payable under this Part by virtue of an election in respect of the taxpayer's death made by the taxpayer's legal representative under subsection 70(2) or under the provisions of that subsection as they are required to be read by virtue of the Income Tax Application Rules.

Election where subsection 104(4) applicable

(6.1) Where a time determined under paragraph 104(4)(a), (a.1), (a.2), (a.3), (a.4), (b) or (c) in respect of a trust occurs in a taxation year of the trust and the trust so elects and furnishes to the Minister security acceptable to the Minister for payment of any tax the payment of which is deferred by the election, notwithstanding any other provision of this Part respecting the time within which payment shall be made of the tax payable under this Part by the trust for the year, all or any portion of the part of that tax that is equal to the amount, if any, by which that tax exceeds the amount that that tax would be if this Act were read without reference to paragraph 104(4)(a), (a.1), (a.2), (a.3), (a.4), (b) or (c), as the case may be, may be paid in the number (not exceeding 10) of equal consecutive annual instalments that is specified by the trust in the election, the first instalment of which shall be paid on or before the day on or before which payment of that tax would, but for the election, have been required to be made and each subsequent instalment of which shall be paid on or before the next following anniversary of that day.

Form and manner of election and interest

(7) Every election made by a taxpayer under subsection 159(4) or 159(6.1) or by the legal representative of a taxpayer under subsection 159(5) shall be made in prescribed form and on condition that, at the time of payment of any amount payment of which is deferred by the election, the taxpayer shall pay to the Receiver General interest on the amount at the prescribed rate in effect at the time the election was made, computed from the day on or before which the amount would, but for the election, have been required to be paid to the day of payment.

[NOTE: Application provisions are not included in the consolidated text see relevant amending Acts and regulations.] R.S., 1985, c. 1 (5th Supp.), s. 1591994, c. 7, Sch. II, s. 131, Sch. VIII, s. 95, c. 21, s. 781998, c. 19, s. 1852001, c. 17, s. 1542013, c. 34, ss. 140(E), 312

Retail Sales Act, R.S.O. 1990, c. R.31

Section 22

Trust for money collected

22 (1) Any amount collected or collectable as or on account of tax under this Act by a vendor shall be deemed, despite any security interest in the amount so collected or collectable, to be held in trust for the Crown in right of Ontario and separate and apart from the vendor's property and from property held by any secured creditor that but for the security interest would be the vendor's property and shall be paid over by the vendor in the manner and at the time provided under this Act and the regulations. 1997, c. 43, Sched. D, s. 6.

Extension of trust

(2) Despite any provision of this or any other Act, where at any time an amount deemed by subsection (1) to be held in trust is not paid as required under this Act, property of the vendor and property held by any secured creditor of the vendor that but for a security interest would be property of the vendor, equal in value to the amount so deemed to be held in trust shall be deemed,

(a) to be held, from the time the amount was collected or collectable by the vendor, separate and apart from the property of the vendor in trust for the Crown in right of Ontario whether or not the property is subject to a security interest; and

(b) to form no part of the estate or property of the vendor from the time the amount was so collected or collectable whether or not the property has in fact been kept separate and apart from the estate or property of the vendor and whether or not the property is subject to such security interest. 1997, c. 43, Sched. D, s. 6.

Same

(3) The property described in subsection (2) shall be deemed to be beneficially owned by the Crown in right of Ontario despite any security interest in such property or in the proceeds of such property, and the proceeds of such property shall be paid to the Minister in priority to all such security interests. 1997, c. 43, Sched. D, s. 6.

(4) Repealed: 2012, c. 8, Sched. 54, s. 2.

Minister's certificate

(5) Every person who, as assignee, liquidator, administrator, receiver, receiver-manager, secured or unsecured creditor or agent of the creditor, trustee or other like person, other than a trustee appointed under the Bankruptcy and Insolvency Act (Canada), takes control or possession of the property of any vendor shall, before distributing such property or the proceeds from the realization thereof under that person's control, obtain from the Minister a certificate that the amount deemed by subsection (1) to be held in trust, including any interest and penalties payable by the vendor, has been paid or that security acceptable to the Minister has been given. 1997, c. 43, Sched. D, s. 6.

No distribution without Minister's certificate

(6) Any person described in subsection (5) who distributes any property described in that subsection or the proceeds of the realization thereof without having obtained the certificate required by that subsection is personally liable to the Crown in right of Ontario for an amount equal to the amount deemed by subsection (1) to be held in trust, including any interest and penalties payable by the vendor. 1997, c. 43, Sched. D, s. 6.

Notice to be given

(7) The person described in subsection (5) shall, within 30 days from the date of that person's assumption of possession or control, give written notice thereof to the Minister. 1997, c. 43, Sched. D, s. 6.

Minister to advise of indebtedness

(8) As soon as practicable after receiving such notice, the Minister shall advise the person described in subsection (5) of the amount deemed by subsection (1) to be held in trust, including any interest and penalties thereon. 1997, c. 43, Sched. D, s. 6.

Definitions

(9) In this section and in subsection 36 (2.1),

“**secured creditor**” means a person who has a security interest in the property of another person or who acts for or on behalf of that person with respect to the security interest, and includes a trustee appointed under a trust deed relating to a security interest, a receiver or receiver-manager appointed by a secured creditor or by a court on the application of a secured creditor and any other person performing a similar function; (“*créancier garanti*”)

“**security interest**” means any interest in property that secures payment or performance of an obligation, and includes an interest created by or arising out of a debenture, mortgage, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatsoever or whenever arising, created or deemed to arise or otherwise provided for, but does not include a security interest prescribed by the Minister as one to which this section does not apply. (“*sûreté*”) 1997, c. 43, Sched. D, s. 6.

Application

(10) This section and clause 43 (2) (b) apply in respect of any tax collected or collectable by a vendor on or after January 1, 1998, whether or not the security interest was acquired before that date. 1997, c. 43, Sched. D, s. 6.

Securities Act, R.S.O. 1990, c. S.5

Section 13

Power of investigator or examiner

13 (1) A person making an investigation or examination under section 11 or 12 has the same power to summon and enforce the attendance of any person and to compel him or her to testify on oath or otherwise, and to summon and compel any person or company to produce documents and other things, as is vested in the Superior Court of Justice for the trial of civil actions, and the refusal of a person to attend or to answer questions or of a person or company to produce such documents or other things as are in his, her or its custody or possession makes the person or company liable to

be committed for contempt by the Superior Court of Justice as if in breach of an order of that court. 1994, c. 11, s. 358; 2006, c. 19, Sched. C, s. 1 (1).

Rights of witness

(2) A person or company giving evidence under subsection (1) may be represented by counsel and may claim any privilege to which the person or company is entitled. 1994, c. 11, s. 358.

Inspection

(3) A person making an investigation or examination under section 11 or 12 may, on production of the order appointing him or her, enter the business premises of any person or company named in the order during business hours and inspect any documents or other things that are used in the business of that person or company and that relate to the matters specified in the order, except those maintained by a lawyer in respect of his or her client's affairs. 1994, c. 11, s. 358.

Authorization to search

(4) A person making an investigation or examination under section 11 or 12 may apply to a judge of the Ontario Court of Justice in the absence of the public and without notice for an order authorizing the person or persons named in the order to enter and search any building, receptacle or place specified and to seize anything described in the authorization that is found in the building, receptacle or place and to bring it before the judge granting the authorization or another judge to be dealt with by him or her according to law. 1994, c. 11, s. 358; 2006, c. 19, Sched. C, s. 1 (2).

Grounds

(5) No authorization shall be granted under subsection (4) unless the judge to whom the application is made is satisfied on information under oath that there are reasonable and probable grounds to believe that there may be in the building, receptacle or place to be searched anything that may reasonably relate to the order made under section 11 or 12. 1994, c. 11, s. 358.

Power to enter, search and seize

(6) A person named in an order under subsection (4) may, on production of the order, enter any building, receptacle or place specified in the order between 6 a.m. and 9 p.m., search for and seize anything specified in the order, and use as much force as is reasonably necessary for that purpose. 1994, c. 11, s. 358.

Expiration

(7) Every order under subsection (4) shall name the date that it expires, and the date shall be not later than fifteen days after the order is granted. 1994, c. 11, s. 358.

Application

(8) Sections 159 and 160 of the Provincial Offences Act apply to searches and seizures under this section with such modifications as the circumstances require. 1994, c. 11, s. 358.

Private residences

(9) For the purpose of subsections (4), (5) and (6),

“building, receptacle or place” does not include a private residence.

SCHEDULE C – ABBREVIATED AUTHORITIES

TAB 1

3.1.2 Peter Sbaraglia – Rule 4.7(2) of the OSC Rules of Procedure

**IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED**

AND

**IN THE MATTER OF
PETER SBARAGLIA**

**ORAL REASONS AND DECISION ON A MOTION TO QUASH A SUMMONS
(Rule 4.7(2) of the Ontario Securities Commission's
Rules of Procedure (2012), 35 O.S.C.B. 10009)**

Hearing: February 27, 2013

Oral Ruling: February 27, 2013

Decision: March 14, 2013

Panel: Alan J. Lenczner, QC – Commissioner

Counsel: Matthew Gottlieb – For Robert Kofman, the Moving Party

Kevin D. Toyne – For Peter Sbaraglia, the Respondent on the Motion
Richard Niman

Pamela Foy – For Staff of the Ontario Securities Commission
Catherine Weiler

The following text has been prepared for purposes of publication in the Ontario Securities Commission Bulletin and is based on excerpts of the transcript of the hearing. The excerpts have been edited and supplemented and the text has been approved by the Panel for the purpose of providing a public record of the decision.

ORAL REASONS AND DECISION ON A MOTION TO QUASH A SUMMONS

[1] Robert Kofman (“**Kofman**”) of Duff & Phelps Canada Restructuring Inc. (“**D&P**” or the “**Receiver**”) moves to quash a summons which was issued by the Ontario Securities Commission (the “**Commission**”) and served on him by Peter Sbaraglia (“**Sbaraglia**”) on January 17, 2013 (the “**Summons**”). In March 2010, the Ontario Superior Court of Justice (the “**Court**”) appointed D&P as the Receiver over the assets, property and undertaking of the late Robert Mander (“**Mander**”), his company, E.M.B. Asset Group Inc. (“**EMB**”) and related companies (the “**Mander Receivership**”). In December 2010, on the application of Enforcement Staff of the Commission (“**Staff**”), D&P was also appointed the Receiver over the assets, property and undertaking of Sbaraglia, his wife and their companies (the “**Sbaraglia Receivership**”).

[2] In a Statement of Allegations filed on February 24, 2011, Staff alleged that Mander, through EMB, operated a fraudulent Ponzi scheme (“**Mander’s Ponzi Scheme**”), and that Sbaraglia, through his company, C.O. Capital Growth Inc. (“**CO**”), participated in Mander’s Ponzi Scheme in a manner which he knew or ought reasonably to have known perpetrated a fraud on investors contrary to s. 126.1(b) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the “**Act**”) and contrary to the public interest. Staff also alleges that Sbaraglia made statements to Staff, during the course of its investigation, that were materially misleading or untrue and/or failed to state facts which were required to be stated, contrary to subsection 122(1)(a) of the Act and contrary to the public interest.

[3] The Summons requires Kofman to attend to give evidence at the hearing on the merits in this matter, which is scheduled to begin on March 18, 2013, and requires Kofman to bring with him and produce at the hearing the documents and things set out in Appendix “A” to the Summons. The Summons asks for documents in various categories and quite broadly, including copies of all documents relevant to the Statement of Allegations, all documents provided by 15 named individuals, all notes taken during interviews with the named individuals, all recordings of any interviews, and all documents provided to the Commission. Sbaraglia submits that these documents may be relevant to the allegations against him and may assist him in making full answer and defence.

[4] Kofman moves to quash the Summons on three bases: (1) on the basis of *res judicata* or issue estoppel, and, as a subsidiary point, abuse of process; (2) on the basis of the non-compellability of the Receiver to produce documents in a proceeding outside the receivership; and (3) on the basis that the documents are not likely to be relevant to the allegations contained in the Statement of Allegations (the “**Motion**”).

[5] Having considered the matter, I am granting the Motion on the basis of grounds (2) and (3). There is a long line of unbroken, consistent authority that a receiver cannot be compelled to produce documents for a proceeding outside of or unrelated to the

receivership. The latest case in that long line is related to this Motion. It is the decision of the Court of Appeal in *SA Capital Growth Corp. v. Christine Brooks*, 2012 ONCA 681, 112 O.R. (3rd) 16, which incorporates a number of important elements as to why the Receiver is not compellable in these circumstances. I make particular reference to paragraphs 8, 9 and 10 of that decision:

The reach of the phrase “interested person” was discussed and applied by Greer J. in *Battery Plus Inc. (Re)*, [2002] O.J. No. 261, 31 C.B.R. (4th) 196 (S.C.J.), where “interested person” was held to include parties who have a direct interest in the subject matter of the receivership itself but to exclude parties who seek production of documents that do not “relate to a specific purpose” concerning the receivership itself. This approach is in line with the case law that states that receivers are not subject to cross-examination on their reports except in exceptional or unusual circumstances: see *Bell Canada International Inc. (Re)*, [2003] O.J. No. 4738, 126 A.C.W.S. (3d) 790 (S.C.J.); *Impact Tool & Mould Inc. (Re)*, [2007] O.J. No. 5492, 41 C.B.R. (5th) 112 (S.C.J.), affd [2008] O.J. No. 962, 41 C.B.R. (5th) 1 (C.A.), leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 220; and *Anvil Range Mining Corp. (Re)*, [2001] O.J. No. 1125, 21 C.B.R. (4th) 194 (S.C.J.). It is also consistent with bankruptcy case law that establishes that a court officer (trustee in bankruptcy) will not be compelled to produce documents created and obtained as part of its duties in one proceeding for a collateral purpose; see, for example, *Impact Tool & Mould Inc. (Estate Trustee of) v. Impact Tool & Mould Inc. (Interim Receiver of)* (2006), 79 O.R. (3d) 241, [2006] O.J. No. 958 (C.A.); *GMAC Commercial Credit Corp.-- Canada v. TCT Logistics Inc.*, [2002] O.J. No. 4210, 37 C.B.R. (4th) 267 (S.C.J.).

The OSC proceedings are clearly separate and distinct from the receivership. The appellant does not seek production for the purpose of advancing any legal claim or interest in the receivership, but rather for a purpose collateral to the receivership, namely, his defence before the OSC. Accordingly, in our view, the appellant is not an interested person as his request was made for a purpose collateral to the receivership proceeding.

We agree with the receiver's submission that to recognize a right to require the receiver to produce material for purposes collateral to the receivership could lead to serious mischief. A court-appointed receiver is an officer of the court, not a regular litigant. Officers of the court should be left to perform their functions and duties without the distraction, added cost and potential chilling effect on their investigations that could result from permitting open-ended access to the fruits of their investigation.

[6] There is a rationale for the determinative elements that I've just read into the record, and I say, on my own behalf, that each one of those elements applies to these particular circumstances.

[7] On the next point, I recognize the right of a respondent, in a section 127 hearing before the Commission, to be able to make full answer and defence, and to have the necessary production and disclosure sufficient to make that right meaningful; but the required disclosure and production must be tied and linked to the allegations levelled against him.

[8] In this case the respondent has received 55 volumes of disclosure encompassing loan agreements, banking documents and other original documents relating to the specific factual allegations that are in paragraphs 9 to 11 and 14 to 20 of the Statement of Allegations.

[9] I am satisfied that Dr. Sbaraglia has received disclosure enabling him to fully respond to these allegations. What Dr. Sbaraglia now seeks are primarily interview notes from the Receiver which the Receiver himself describes as follows in his Thirteenth Report, at paragraph 3.1(d) of that Report:

The primary purpose of the interviews was to gather background information regarding the Mander Debtors. However, a majority of the information obtained from the individuals was highly speculative, unsupported and anecdotal; much of it related to the stories woven by Mander to justify his investment techniques and the whereabouts of investor monies. Accordingly, in preparing its reports to the court, the Receiver relied on the financial information that it analyzed.

[10] The financial information that is relevant has also been provided to Dr. Sbaraglia.

[11] I refer to paragraph 3.1(e) of the Receiver's Thirteenth Report in which he says:

Over the course of carrying out its mandate, the Receiver generated various notes and internal memoranda regarding the interviews, which were created solely for its internal purposes and were not intended to be relied upon by other parties. The notes were not reviewed by the individuals. The notes prepared were not intended to be a verbatim transcript of what was said by the individuals, and the Receiver cannot confirm that the notes are an accurate or complete review of all that was discussed. The Receiver cannot confirm that its notes summarize all of the discussions that the Receiver had with the individuals. The notes were only meant to be used by the Receiver for its purposes in the context of the discussions that were had with the respective individuals.

[12] Dr. Sbaraglia states that these notes might lead to other avenues of inquiry or might provide some corroboration for his own evidence.

[13] In my view, such statements do not meet the material requirement of “likely relevant” under the test set out in *R. v. O'Connor*, [1995] 4 S.C.R. 411. I can do no better than relate what Justice Pattillo said when he made a review of Dr. Sbaraglia’s claim for these notes in his decision, *SA Capital Corp. v. Christine Brooks* 2012 ONSC 2800, 110 O.R. (3d) 765, at paragraphs 47-50:

In my view, Sbaraglia has not established, based on the allegations in the OSC’s Notice of Hearing and the evidence or lack thereof before me, that the information or documents provided to the Receiver by the 11 individuals who were former partners, associates, employees or clients of Mander is likely relevant to his defence to the OSC allegations. Sbaraglia has not established that the information requested is either logically probative to an issue before the OSC or relates to the credibility of a witness or the reliability of other evidence in the case.

First, and given that the Receiver has had no communication with either of Walton and Fluke, there is no evidence that there is any record in the hands of the Receiver concerning them that is likely relevant to Sbaraglia’s due diligence defence.

Of the nine individuals remaining, there is no evidence that any of them have refused to speak to Sbaraglia or his counsel about their dealings with the Receiver or to provide copies of the documents they provided to the Receiver, if any. In fact, [the] Sbaraglia affidavit indicates that in the case of three of the individuals, Zurini, Auriemma and Ward, either he or his wife spoke with them after they met with the Receiver. Sbaraglia has listed the nine individuals specifically and the Receiver has confirmed that it had discussions with them. Any information or documents given to the Receiver that Sbaraglia now seeks to obtain came from the individuals and one would have thought they would be first persons to speak to about it. It is no answer, in my view, to say that the discussions with the Receiver took place a long time ago and the Receiver’s record is therefore the best evidence when no attempt whatsoever has been made to speak with these individuals in the first instance.

Further, some of the individuals have been cross-examined at length by Sbaraglia’s counsel in the CO Group receivership application. No explanation has been provided by Sbaraglia as to why the information obtained from that proceeding about individuals’ relationship with Mander and Sbaraglia is not sufficient. In fact, it was not mentioned at all by Sbaraglia in his affidavit.

[14] I echo what Justice Pattillo has said and I come to the same determination.

[15] For these reasons, the Motion to quash is granted. I thank counsel.

[16] An Order will issue accordingly.

DATED at Toronto this 14th day of March, 2013.

“Alan Lenczner”

PIVOT FINANCIAL I LIMITED PARTNERSHIP
Applicant

-and-

BRIGHTPATH CAPITAL CORPORATION

Respondent

Court File No.: CL-26-00000152-0000

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced in Toronto

**FACTUM AND AUTHORITIES OF THE COURT-
APPOINTED RECEIVER, KSV RESTRUCTURING
INC.**

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as the Court-appointed Receiver of Brightpath Capital
Corporation and not in its personal or corporate capacity