

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

BETWEEN:

KINGSETT MORTGAGE CORPORATION AND DORR CAPITAL CORPORATION

Applicants

- and -

**VANDYK – UPTOWNS LIMITED, VANDYK – HEART LAKE LIMITED, 2402871
ONTARIO INC., VANDYK – THE RAVINE LIMITED AND VANDYK – LAKEVIEW-
DXE-WEST LIMITED**

Respondents

**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 OF THE APPLICANTS
(Returnable November 14, 2023)**

November 11, 2023

BENNETT JONES LLP
3400 One First Canadian Place
P.O. Box 130
Toronto, ON M5X 1A4

Sean Zweig (LSO# 57307I)
Tel: (416) 777-6254
Email: zweigs@bennettjones.com
Aiden Nelms (LSO# 74170S)
Tel: (416) 777-4642
Email: nelmsa@bennettjones.com
Joshua Foster (LSO# 79447K)
Tel: (416) 777-7906
Email: fosterj@bennettjones.com

Lawyers for the Applicants

TO: THE SERVICE LIST

TABLE OF CONTENTS

PART I: OVERVIEW..... 1

PART II: FACTS 3

 A. The Parties 3

 B. The Real Property and the Loan Facilities..... 4

 C. The Debtors' Other Secured and Unsecured Creditors 8

 D. The Events of Default, Demands and Notices of Intention to Enforce Security 9

PART III: ISSUES..... 11

PART IV: LAW AND ANALYSIS 11

 A. This Court has the Jurisdiction to Appoint the Proposed Receiver 11

 B. The Proposed Receiver's Appointment is Just and Convenient..... 13

 C. The Terms of the Proposed Receivership Order are Appropriate..... 17

PART V: RELIEF REQUESTED 20

PART I: OVERVIEW

1. The Applicants seek an order (the "**Receivership Order**") appointing a receiver over certain of the Debtors' (as defined below) real and personal property pursuant to subsection 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43 as amended (the "**CJA**") on an urgent basis.
2. Principally, the proposed Receivership Order:
 - (a) appoints KSV Restructuring Inc. ("**KSV**") as receiver and manager (in such capacity, the "**Receiver**") without security, of the real property legally described in Schedule "A" to the Receivership Order (collectively, the "**Real Property**") and all of the Debtors' present and future assets, undertakings and personal property located at, related to, used in connection with or arising from or out of the Real Property or which is necessary to the use and operation of the Real Property, including all of the proceeds therefrom (collectively with the Real Property, the "**Property**"); and
 - (b) grants two super-priority charges over the Property to facilitate the exercise of the Receiver's powers and these proceedings (these "**Receivership Proceedings**").
3. The Debtors are privately held real estate development companies and are the registered owners of the Real Property. The Real Property consists of lands located in Brampton, Etobicoke and Mississauga, Ontario on which the Debtors are intending to develop five residential projects (collectively, the "**Projects**").
4. In connection with the acquisition, refinancing and development of the Real Property and the Projects, the Applicants extended and, in one case acquired, certain of the Debtors' loan facilities (collectively, the "**Loan Facilities**"). The aggregate principal amount outstanding under

the Loan Facilities is \$182,766,770.17 (together with all interest, fees and costs thereunder, the "**Indebtedness**").

5. Several significant events of default have arisen and are continuing under the Loan and Security Documents (as defined below), which include the diversion of more than \$37 million for unpermitted and improper purposes, and the non-payment of monthly interest. Such events of default, among others, prompted the issuance of demand letters (collectively, the "**Demand Letters**"), demanding the repayment of the Indebtedness, and the delivery of notices of intention to enforce security in accordance with section 244 of the BIA (collectively, the "**NITES**").

6. The ten-day period afforded to the Debtors under the Demand Letters and the NITES to repay the Indebtedness prior to any enforcement action being taken has long-since elapsed. Notwithstanding the expiration of such time and the issuance of the Demand Letters, the entirety of the Indebtedness remains outstanding and no prospect for immediate repayment, in whole or in part, has materialized to date. In the circumstances, the Applicants have lost all confidence in the Debtors' management to continue to satisfy the Debtors' significant obligations, obtain refinancing, manage the Property, and complete the Projects in a timely manner or at all.

7. The Loan Documents confer upon the Applicants a contractual right to appoint a receiver or receiver manager over the Property. In furtherance of their contractual rights, the Applicants have commenced these Receivership Proceedings to protect their respective investments and preserve and maximize the value of the Property.

8. The Applicants are seeking the proposed Receiver's appointment on an urgent basis given, among other things, the critical and value-preserving steps that are required to prevent the deterioration of certain of the Property. Such steps include immediately engaging and re-engaging certain trades (many of which have gone unpaid for months) and commencing work to ensure the safety of the Projects undertaken thereon. In the case of the Uptowns Lands (as defined below),

construction must be advanced imminently and, in any event, before the existing shoring systems destabilize or fail in the winter months to come. Dewatering, site security and ongoing monitoring are also urgently needed. In the absence of a receivership, such value-preserving steps would require that the numerous construction liens registered against the Real Property be vacated or otherwise addressed, and the incurrence of additional costs that the Debtors evidently do not have the wherewithal to pay.

9. The Applicants submit that the appointment of the Receiver pursuant to the proposed Receivership Order is just and convenient in the circumstances. If the Receiver is appointed on the terms of the proposed Receivership Order, these Receivership Proceedings will provide the stability, structure and supervision required to preserve and maximize the value of the Property, including each of the Projects, for the benefit of the Applicants and the Debtors' stakeholders.

PART II: FACTS

10. The facts underlying this application are more fully set out in the affidavit of Daniel Pollack sworn November 7, 2023 (the "**Pollack Affidavit**").¹ All capitalized terms used but not defined herein have the meanings ascribed to them in the Pollack Affidavit, and all monetary amounts referred to herein are in Canadian currency unless otherwise stated.

A. The Parties

11. The Applicants, KingSett Mortgage Corporation ("**KingSett**") and Dorr Capital Corporation ("**Dorr**"), are the Debtors' senior-secured lenders.²

12. KingSett is incorporated pursuant to the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended, with a registered head office located at 40 King Street West, Toronto,

¹ Affidavit of Daniel Pollack sworn November 7, 2023 [Pollack Affidavit], Applicants' Application Record dated November 7, 2023 at Tab 2 [Application Record].

² *Ibid* at para 5, Application Record at Tab 2.

Ontario, M5H 3Y2. KingSett is a subsidiary of KingSett Capital Inc., a private equity real estate investment firm with approximately \$19.5 billion in assets under management.³

13. Dorr is incorporated pursuant to the *Business Corporations Act*, R.S.O. 1990, c. B. 16 (the "**OBCA**"), with a registered head office located at 41 Scarsdale Road, Unit 6, North York, Ontario, M3B 2R2. Dorr is a leading private provider of commercial mortgage investments and commercial real estate and equity financing.⁴

14. The Respondents, Vandyk – Uptowns Limited ("**Uptowns**"), Vandyk – Heart Lake Limited ("**Heart Lake**"), 2402871 Ontario Inc. ("**240**"), Vandyk – The Ravine Limited ("**Ravine**"), and Vandyk – Lakeview-DXE-West Limited ("**Lakeview**", and collectively with Uptowns, Heart Lake, 240 and Ravine, the "**Debtors**"), are privately held real estate development companies.⁵

15. Each of the Debtors is incorporated under the OBCA and has a registered head office located at 1944 Fowler Drive, Mississauga, Ontario, L5K 0A1.⁶

B. The Real Property and the Loan Facilities

16. The Debtors are the owners of the Real Property and are intending to develop five Projects thereon.⁷ The Real Property and the Projects are comprised of the following:

- (a) a property located at 10302 Heart Lake Road, Brampton, Ontario (the "**Uptowns Lands**"). The Uptowns Lands are approximately 6.5 acres and are owned by Uptowns. The Uptowns Lands are currently being developed with 342 stacked townhouses providing approximately 379,842 square feet of gross floor area. The

³ *Ibid* at para 10, Application Record at Tab 2.

⁴ *Ibid* at para 11, Application Record at Tab 2.

⁵ *Ibid* at para 12, Application Record at Tab 2.

⁶ *Ibid*, Application Record at Tab 2.

⁷ *Ibid* at para 3, Application Record at Tab 2.

development is approximately 28% constructed and pre-sales have been completed for 329 of the 342 townhomes;

- (b) a property located at 10194 Heart Lake Road, Brampton, Ontario (the "**Jordan Lands**"). The Jordan Lands are approximately 22.47 acres, of which 9.67 acres are developable, and are owned by Heart Lake. The Jordan Lands are currently zoned for the development of 200 townhomes providing approximately 242,602 square feet of gross floor area. Approximately half of the 200 townhomes have been pre-sold, but construction on the Jordan Lands has not yet commenced;
- (c) a property located at 327 Royal York Road, Etobicoke, Ontario (the "**Royal York Lands**"). The Royal York Lands are owned by 240 and were intended to be developed with a two-tower project consisting of 692 residential condo units providing approximately 516,000 square feet of residential space, approximately 5,726 square feet of ground floor retail space, approximately 75,000 square feet of office space, and approximately 16,416 square feet of Metrolinx station space. Although the zoning of the Royal York Lands has been completed, no pre-sales have been made and construction has not yet commenced;
- (d) a property located at 336 Waterhouse Cres N, Mississauga, Ontario (f/k/a 320 Derry Road, Mississauga, Ontario) (the "**Derry Road Lands**"). The Derry Road Lands are owned by Ravine and have been approved for the development of 39 detached and 6 semi-detached residential units. The Derry Road Lands have been zoned as anticipated, each of the residential lots are serviced and approximately 5 of the 45 residential units to be developed thereon have been pre-sold. However, no construction has been commenced on the Derry Road Lands; and

- (e) a property located at 1345 Lakeshore Road East, Mississauga, Ontario (the "**Lakeview Lands**"). The Lakeview Lands are approximately 3.13 acres and are owned by Lakeview. The Lakeview Lands were intended to be developed with two mid-rise condominium towers consisting of 478 residential units, approximately 10,218 square feet of commercial space and two levels of underground parking providing 433 parking spaces. Despite pre-sales having been completed for 395 residential units, no construction has been commenced.⁸

17. In connection with the Debtors' acquisition, refinancing and development of the Real Property and the Projects, KingSett and Dorr extended and, in one case acquired, the Loan Facilities.⁹ The Loan Facilities consist of the following:

- (a) a blanket mortgage facility in the principal amount of \$59,380,000 provided by KingSett, and serviced by Dorr, for the benefit of Uptowns and Heart Lake;
- (b) a first mortgage non-revolving construction loan in the principal amount of \$112,000,000 provided by MCAP Financial Corporation ("**MCAP**"), and acquired by KingSett, for the benefit of Uptowns;
- (c) a first mortgage, non-revolving demand loan in the principal amount of \$45,000,000 provided by KingSett for the benefit of 240;
- (d) a first mortgage, revolving demand loan in the principal amount of \$15,000,000, and a \$6,000,000 cash-in-lieu letter of credit facility, provided by KingSett for the benefit of Ravine;

⁸ *Ibid* at para 4, Application Record at Tab 2.

⁹ *Ibid* at para 5, Application Record at Tab 2.

- (e) a second mortgage, non-revolving demand loan in the principal amount of \$32,400,000 provided by KingSett for the benefit of Ravine; and
- (f) a first mortgage, non-revolving demand loan in the principal amount of \$34,000,000 provided by Dorr for the benefit of Lakeview.¹⁰

18. The payment and performance of the Indebtedness under the Loan Facilities is secured by various security and collateral security (collectively with all commitment letters related thereto, the "**Loan and Security Documents**").¹¹ The following table illustrates substantially all of the mortgages/charges and the collateral mortgages/charges registered on title to the Real Property, in order of priority:

| Mortgages and Collateral Mortgages Registered on Title to the Real Property¹² | | | | | |
|---|--|---|--|---|---|
| | Uptowns Lands | Jordan Lands | Royal York Lands | Derry Lands | Lakeview Lands |
| 1st Priority | <i>KingSett first mortgage/charge</i> \$140,000,000 | <i>KingSett first mortgage/charge</i> \$68,750,000 | <i>KingSett first mortgage/charge</i> \$56,250,000 | <i>KingSett first mortgage/charge</i> \$25,000,000 | <i>Dorr first mortgage/charge</i> \$40,000,000 |
| 2nd Priority | Trisura Guarantee Insurance Company second mortgage/charge \$45,750,000 | N/A | 1820277 Ontario Limited second mortgage/charge \$7,500,000 | <i>KingSett second mortgage/charge</i> \$37,000,000 | Westmount Guarantee Services Inc. second mortgage/charge \$100,000,000 |
| 3rd Priority | <i>KingSett third mortgage/charge</i> \$68,750,000 | N/A | <i>KingSett third collateral mortgage/charge</i> \$68,750,000 | <i>KingSett third collateral mortgage/charge</i> \$68,750,000 | 2471867 Ontario Limited third mortgage/charge \$3,300,000 |
| 4th Priority | N/A | N/A | N/A | <i>KingSett fourth collateral mortgage/charge</i> \$56,250,000 | <i>KingSett fourth collateral mortgage/charge</i> \$68,750,000 |

¹⁰ *Ibid* at para 14, Application Record at Tab 2.

¹¹ *Ibid* at para 15, Application Record at Tab 2.

¹² This table excludes a mortgage/charge registered by O Canada Capital Inc. on title to the Uptowns Lands in the amount of \$3,000,000.

| | | | | | |
|--------------------------------|-----|-----|-----|---|---|
| 5th Priority | N/A | N/A | N/A | <i>Dorr fifth collateral mortgage/charge \$40,000,000</i> | <i>KingSett fifth collateral mortgage/charge \$56,250,000</i> |
| 6th Priority | N/A | N/A | N/A | N/A | <i>KingSett sixth collateral mortgage/charge \$25,000,000</i> |
| 7th Priority | N/A | N/A | N/A | N/A | <i>KingSett seventh collateral mortgage/charge \$37,000,000</i> |

19. Detailed descriptions of the Loan Facilities and the Loan and Security Documents are provided in the Pollack Affidavit. Such descriptions are not repeated herein.¹³

C. The Debtors' Other Secured and Unsecured Creditors

20. In addition to the security and collateral security granted to the Applicants and MCAP, the Debtors have granted security interests in the Property in favour of numerous subordinate creditors. The Debtors' other secured creditors include Trisura Guarantee Insurance Company, 1820277 Ontario Limited, Westmount Guarantee Services Inc., O Canada Capital Inc., 2471867 Ontario Limited, Tarion Warranty Corporation, and Meridian Credit Union. The details of such creditors' subordinate security interests are discussed in the Pollack Affidavit and are not repeated herein.¹⁴

21. The Debtors' other creditors also include construction lien and litigation claimants. Specifically, approximately eleven claimants have filed construction liens against the Uptowns Lands, the Royal York Lands and the Lakeview Lands while the Jordan Lands are subject to a certificate of pending litigation. Ravine is also named as a defendant in two related actions

¹³ Pollack Affidavit, *supra* note 1 at paras 17-65, Application Record at Tab 2.

¹⁴ *Ibid* at paras 66-87, Application Record at Tab 2.

commenced in Toronto, Ontario bearing Court File Numbers CV-22-00686376-0000 and CV-22-00689146-0000 (together, the "**Exquisite Actions**"), each of which will be stayed under the proposed Receivership Order.¹⁵

D. The Events of Default, Demands and Notices of Intention to Enforce Security

22. Several events of default under the Loan and Security Documents, including the Acquired Loan and Security Documents, have occurred and are continuing. Among other things, these events of default include:

- (a) Uptowns' and Lakeview's diversion or misuse of certain funds and/or purchaser deposits in the aggregate amount of approximately \$37 million contrary to the purposes for which such monies were advanced;
- (b) Uptowns' failure to inject further equity to address cost overruns in connection with the development of the Uptowns Lands and to make scheduled payments under the Acquired Commitment Letter, including interest reserve payments due July 1, August 1 and September 1, 2023;
- (c) Lakeview's failure to make its monthly interest payments under the Lakeview Commitment Letter due July 31, August 31 and September 30, 2023;
- (d) Ravine's and 240's failures to make their respective monthly interest payments due September 30 and October 31, 2023;

¹⁵ *Ibid* at paras 88-90, 92, Application Record at Tab 2. As set out in the Pollack Affidavit, the Debtors' construction lien claimants include Roni Excavating Limited, Orin Enterprises Inc., Consolidated Shotcrete Inc., Myer Salit Limited, Viola Ready Mix Inc., Stephenson's Rental Services Inc., 560789 Ontario Inc., MGI Construction Corp., Kohn Partnership Architects Inc., PCL Constructors Canada Inc. and Read Jones Christoffersen Ltd. The certificate of pending litigation was registered against the Jordan Lands by J. Lang Management Inc.

- (e) Uptowns' and Heart Lake's failure to make their monthly interest payment under the Uptowns/Heart Lake Commitment Letter due September 30, 2023;
- (f) Uptowns', 240's and Lakeview's respective failures to discharge construction liens registered on title to the Uptowns Lands, the Royal York Lands and the Lakeview Lands;
- (g) the Debtors' failure to pay any and all property taxes in respect of the Real Property when due; and
- (h) O Canada Capital Inc.'s registration of a mortgage/charge on title to the Uptowns Lands.¹⁶

23. Given certain of the foregoing events of default, MCAP issued a demand letter on September 11, 2023 for the repayment of all of Uptowns' indebtedness to MCAP. Similarly, the Applicants issued demand letters on September 29, 2023 to each of the Debtors and the applicable guarantors advising that events of default had occurred under certain of the Loan and Security Documents and demanding repayment of the Debtors' indebtedness to KingSett and Dorr.¹⁷

24. The Demand Letters were delivered to the Debtors and the applicable guarantors contemporaneously with the NITES in accordance with section 244 of the BIA. The ten-day period afforded to the Debtors and the applicable guarantors under the Demand Letters and NITES to repay all of the Indebtedness prior to any enforcement action being taken has long-since expired.¹⁸

25. Notwithstanding the issuance of the Demand Letters, the entirety of the Indebtedness remains outstanding.¹⁹

¹⁶ *Ibid* at paras 97-102, Application Record at Tab 2.

¹⁷ *Ibid* at paras 96, 103, Application Record at Tab 2.

¹⁸ *Ibid* at paras 96, 103, 104, Application Record at Tab 2.

¹⁹ *Ibid* at paras 7, 104, Application Record at Tab 2.

PART III: ISSUES

26. The issues to be considered on this application are whether:
- (a) this Court has jurisdiction to appoint the proposed Receiver;
 - (b) it is just or convenient to appoint the proposed Receiver; and
 - (c) the terms of the proposed Receivership Order are appropriate in the circumstances.

PART IV: LAW AND ANALYSIS

A. This Court has the Jurisdiction to Appoint the Proposed Receiver

27. Subsection 243(1) of the BIA and section 101 of the CJA vest Courts with jurisdiction to appoint a receiver where it is "just or convenient to do so".²⁰ In the case of the BIA, subsections 243(1)-(1.1) provide as follows:

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

²⁰ [Bankruptcy and Insolvency Act, RSC 1985, c. B-3 s 243\(1\)](#) [BIA]; [Courts of Justice Act, RSO 1990, c. C. 43 s 101](#) [CJA]; [Meridian v Okje Cho & Family Enterprise Ltd, 2021 ONSC 3755](#) at para 19 [Meridian]; [Elleway Acquisitions Ltd v Cruise Professionals Ltd, 2013 ONSC 6866](#) at paras 24-25 [Elleway]; [Bank of Montreal v Sherco Properties Inc, 2013 ONSC 7023](#) at paras 38-40 [Sherco]; [Bank of Montreal v Carnival National Leasing Ltd, 2011 ONSC 1007](#) at para 23 [Carnival]; [Foremost Financial Corporation et al v Alai Developments Inc et al \(July 23, 2023\), Toronto, CV-23-00702528-00CL \(Endorsement\) \(ONSC\)](#) at para 27 [Foremost].

(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.²¹

28. The Applicants are the Debtors' senior-secured creditors, having claims in excess of \$186,431,085.71 and perfected security interests pursuant to their real property registrations and registrations under the *Personal Property Security Act*, R.S.O. 1990, c. P.10, as amended.²² As such, the Applicants are permitted to bring the within application to appoint the proposed Receiver under subsection 243(1) of the BIA. Such appointment is not precluded by subsection 243(1.1) of the BIA as the Applicants have delivered the NITES in accordance with section 244 of the BIA and the ten-day notice period prescribed thereunder has long-since expired.²³

29. As set out immediately below, each of the remaining technical requirements enumerated under the BIA for the appointment of the proposed Receiver are satisfied.

1. The Locality of the Debtor is Ontario

30. Where an application is brought for the appointment of a receiver under subsection 243(1) of the BIA, subsection 243(5) requires that it be filed in "a court having jurisdiction in the judicial district in the locality of the debtor".²⁴ Section 2 of the BIA defines the "locality of a debtor" as the principal place:

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

²¹ *BIA*, *ibid* s 243(1), s 243(1.1). See also, *CJA*, *ibid* s 101(1), which provides that "[i]n the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so."

²² Pollack Affidavit, *supra* note 1 at paras 5, 23-24, 31-33, 40-41, 48-49, 56-57, 64-65, Application Record at Tab 2.

²³ *BIA*, *supra* note 20 s 244.

²⁴ *Ibid* s 243(5).

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

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated.²⁵

31. As previously discussed, the Real Property is located in Brampton, Etobicoke and Mississauga, Ontario and the Debtors are incorporated under the OBCA, with their registered head office in Mississauga, Ontario.²⁶ Thus, the locality of the Debtors is Ontario and this application is properly before the Ontario Superior Court of Justice (Commercial List).²⁷

2. The Receiver is a Trustee under the BIA

32. Pursuant to subsection 243(4), only a "trustee" may be appointed as a receiver under the BIA.²⁸ KSV is a trustee under the BIA, has provided its consent to act as the Receiver if so appointed and is qualified to act in such capacity.²⁹

B. The Proposed Receiver's Appointment is Just and Convenient

33. In determining whether it is just or convenient to appoint a receiver under subsection 243(1) of the BIA and section 101 of the CJA, Courts must have regard to "all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto".³⁰ This necessarily requires that Courts consider the rights of the secured creditors seeking

²⁵ *Ibid* s 2, "locality of a debtor".

²⁶ Pollack Affidavit, *supra* note 1 at para 4, Application Record at Tab 2.

²⁷ See *Foremost*, *supra* note 20 at paras 15-22 where Kimmel J. observed that the Ontario Superior Court of Justice is the sole Court within the Province of Ontario with jurisdiction under subsection 183(1)(a) of the BIA and that there is no jurisdictional issue precluding a judge of the Ontario Superior Court of Justice (Commercial List) sitting in Toronto from hearing an application under subsection 243(1) of the BIA where the locality of the debtor is Ontario.

²⁸ *BIA*, *supra* note 20 s 243(4).

²⁹ Pollack Affidavit, *supra* note 1 at para 111, Application Record at Tab 2.

³⁰ *Bank of Nova Scotia v Freure Village on Clair Creek*, [1996] OJ No. 5088 at para 10 [*Freure*]; *Carnival*, *supra* note 20 at para 24; *Elleway*, *supra* note 20 at para 26; *Meridian*, *supra* note 20 at para 20; *Sherco*, *supra* note 20 at para 41; *Royal Bank of Canada v 1731861 Ontario Inc.*, 2023 ONSC 3292 at para 30 [1731861]; *Canadian Western Bank v 2563773 Ontario Inc.*, 2023 ONSC 4766 at para 6 [*Western Bank*]; *Macquarie Equipment Finance Limited v Validus Power Corp et al.*, 2023 ONSC 4772 at para 5 [*Validus*].

the receiver's appointment.³¹ It does not however, require that Courts be satisfied that such secured creditors will suffer irreparable harm if a receiver is not appointed, that the receiver's appointment is urgently required or that other available remedies are defective.³²

34. Where, as is the case here, the moving secured creditors have a contractual right to the appointment of a receiver, the extraordinary nature of such remedy "is significantly reduced".³³ In such circumstances, the burden on the moving secured creditors is relaxed as the applicants are simply seeking to enforce a term of an agreement assented to by the parties.³⁴ What is more, the "appointment of a receiver becomes even less extraordinary when dealing with a default under a mortgage".³⁵

35. When evaluating whether, in all the circumstances, the appointment of a receiver is just or convenient, Courts have considered numerous factors, including, among others:

- (a) the nature of the property;
- (b) the likelihood of preserving and maximizing the return on the subject property;
- (c) the relationship between the debtors and their creditors;
- (d) the risk of the lenders' security deteriorating;
- (e) the loss of confidence in the debtors' management;
- (f) whether the lenders have a contractual right to the receiver's appointment;

³¹ [1731861](#), *ibid*; [Western Bank](#), *ibid*; [Validus](#), *ibid*.

³² [Carnival](#), *supra* note 20 at paras [24](#), [28](#); [Freure](#), *supra* note 30 at para [10](#); [Foremost](#), *supra* note 20 at paras [28](#), [30-31](#); [Validus](#), *ibid* at para [10](#); [Western Bank](#), *ibid* at para [11](#).

³³ [BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc, 2020 ONSC 1953](#) at para [43](#) [[BCIMC](#)]; [Freure](#), *ibid* at para [12](#); [Meridian](#), *supra* note 20 at para [21](#); [Elleway](#), *supra* note 20 at para [27](#); [Carnival](#), *ibid* at paras [24-25](#); [Sherco](#), *supra* note 20 at para [42](#); [Foremost](#), *ibid* at para [29](#); [1731861](#), *supra* note 30 at para [31](#); [Western Bank](#), *ibid* at para [7](#); [Validus](#), *ibid* at paras [6-7](#).

³⁴ [Sherco](#), *ibid*; [Elleway](#), *ibid*; [1731861](#), *ibid*; [Western Bank](#), *ibid*; [Validus](#), *ibid*.

³⁵ [BCIMC](#), *supra* note 33 at para [44](#); [Western Bank](#), *ibid*; [Validus](#), *ibid* at para [7](#).

- (g) the potential costs of the receiver; and
- (h) the best way of facilitating the work and duties of the receiver.³⁶

36. Having regard to the foregoing considerations, the Applicants submit that it is just and convenient for the proposed Receiver to be appointed in the circumstances given that, among other things:

- (a) numerous serious events of default have occurred and are continuing under the Loan and Security Documents, including: (i) Uptowns' and Lakeview's diversion or misuse of certain funds and/or purchaser deposits in the aggregate amount of approximately \$37 million contrary to the purposes for which such monies were advanced; (ii) Uptowns', 240's and Lakeview's respective failures to discharge construction liens registered on title to the Uptowns Lands, the Royal York Lands and the Lakeview Lands; and (iii) the Debtors' failure to make certain of their monthly interest payments and pay any and all property taxes in respect of the Real Property when due;
- (b) despite having received the Demand Letters and NITES and the expiration of the ten-day period provided for therein, the entirety of the Indebtedness demanded under the Demand Letters, being \$186,431,085.71, remains outstanding and interest, fees and costs continue to accrue. No viable prospect for the immediate repayment of the Indebtedness, in whole or in part, has materialized to date;
- (c) the Loan and Security Documents, including the Acquired Loan and Security Documents, provide the Applicants with a contractual right to the appointment of a receiver over the Property upon an event of default. There is no reason to deprive

³⁶ *Elleway*, *supra* note 20 at para [28](#); *BCIMC*, *ibid* at para [45](#); *Western Bank*, *ibid* at para [9](#); *Validus*, *ibid* at para [8](#).

the Applicants of the contractual rights for which they bargained to protect their respective investments;

- (d) in the circumstances, the Applicants have lost all confidence in the Debtors' management to continue to satisfy the Debtors' significant obligations, obtain refinancing, manage the Property, and complete the Projects in a timely manner or at all. The Applicants have likewise lost all faith in the Debtors' ability to protect the Property by which the Indebtedness is secured;
- (e) the proposed Receiver's appointment is sought on an urgent basis in light of, among other things, the critical and value-preserving steps that are required to prevent the deterioration of certain of the Property. Such steps include immediately engaging and re-engaging certain trades (many of which have gone unpaid for months) and commencing work to ensure the safety of the Projects undertaken thereon. In the case of the Uptowns Lands, construction must be advanced imminently and, in any event, before the existing shoring systems destabilize or fail in the winter months to come, which would likely require the excavation to be backfilled for safety reasons, materially deteriorating the value of the site. Dewatering, site security and ongoing monitoring are also needed immediately. In the absence of a receivership, such value-preserving steps would require that the numerous construction liens registered against the Real Property be vacated or otherwise addressed, and the incurrence of additional costs that the Debtors do not have the wherewithal to pay;
- (f) these Receivership Proceedings will provide the most effective and appropriate means of attending to, securing and advancing the development of the Projects as and where appropriate and effecting the sale of the Property, in each case, with a view to maximizing recoveries for the Debtors' stakeholders;

- (g) the proposed Receiver will have access to value-maximizing remedies not currently available to the Debtors, including, the potential disclaimer of existing agreements of purchase and sale associated with the Projects and the sale of the Property free and clear of claims and encumbrances; and
- (h) the proposed Receiver will be able to equitably deal with the interests of all of the Debtors' secured and unsecured creditors, including with respect to the distribution of funds realized from any Court-authorized sale of the Property.³⁷

C. The Terms of the Proposed Receivership Order are Appropriate

37. The proposed Receivership Order is substantially similar to the terms of the Ontario Superior Court of Justice (Commercial List)'s model receivership order (the "**Model Order**"),³⁸ consistent with prior orders of this Court,³⁹ and appropriate in the circumstances.⁴⁰ Certain terms of the proposed Receivership Order are discussed immediately below.

1. The Super-Priority Charges are Appropriate

38. As contemplated by the Model Order, the proposed Receivership Order grants the following super-priority charges:

³⁷ Pollack Affidavit, *supra* note 1 at paras 96-109, Application Record at Tab 2.

³⁸ Blackline to CLUC Model Receivership Order Application Record at Tab 4.

³⁹ [KingSett Mortgage Corporation v 30 Roe Investments Corp \(May 9, 2022\), Toronto, CV-22-00674810-00CL](#) (Order Appointing Receiver) (ONSC); [KingSett Mortgage Corporation and Dorr Capital Corporation v Stateview Homes \(Minu Towns\) Inc et al \(May 2, 2023\), Toronto, CV-23-00698576-00CL](#) (Order Appointing Receiver) (ONSC); [PS Holdings 1 LLC, PS Holdings 2 LLC and PS Holdings 3 LLC v 2738283 Ontario Inc et al \(November 9, 2021\), Toronto, CV-21-00670723-00CL](#) (Order Appointing Receiver) (ONSC); [BCIMC Construction Fund Corporation and BCIMC Specialty Fund Corporation v The Clover on Younge Inc et al \(March 27, 2020\), Toronto, CV-20-00637301-00CL](#) (Order Appointing Receiver) (ONSC); [Genesis Mortgage Investment Corp v 1776411 Ontario Ltd and 1333 Weber Street Kitchener LP \(October 12, 2023\), Toronto, CV-23-00706813-00CL](#) (Order Appointing Receiver) (ONSC).

⁴⁰ Blackline to CLUC Model Receivership Order Application Record at Tab 4.

- (a) a first-ranking super-priority charge (the "**Receiver's Charge**") over the Property in favour of the Receiver and the Receiver's counsel to secure their fees and disbursements in respect of these Receivership Proceedings; and
- (b) a second-ranking super-priority charge (the "**Receiver's Borrowings Charge**") over the Property for the purpose of funding the exercise of the powers and duties conferred upon the Receiver pursuant to the proposed Receivership Order.

39. Priority charges sought by a receiver under the BIA, such as the Receiver's Charge and the Receiver's Borrowings Charge, provide the certainty required to ensure the integrity, fairness and predictability of receivership proceedings and achieve their objectives of preserving and maximizing value for the benefit of a debtor's stakeholders.⁴¹ In accordance with subsection 243(6) of the BIA, the Applicant has provided reasonable notice of the proposed Receivership Order to the parties likely to be affected by the Receiver's Charge and the Receiver's Borrowings Charge.⁴²

40. The Applicants submit that the proposed Receiver's Charge and the Receiver's Borrowings Charge are appropriate in the circumstances and commensurate with the status and magnitude of the Projects and the complexity of these Receivership Proceedings.

2. The Stay of Proceedings is Appropriate

41. Consistent with the Model Order, the proposed Receivership Order grants a stay of proceedings, which both:

- (a) prohibits, absent the consent of the proposed Receiver or leave of this Court, the commencement or the continuation of any proceeding or enforcement process

⁴¹ [CCM Master Qualified Fund Ltd v blutip Power Technologies Ltd, 2012 ONSC 1750](#) at paras 21-23; [Edmonton \(City\) v Alvarez & Marsal Canada Inc, 2019 ABCA 109](#) at paras 16-23.

⁴² [BIA](#), *supra* note 20 s 243(6); Pollack Affidavit, *supra* note 1 at para 67, Application Record at Tab 2; Affidavit of Service of Joshua Foster sworn November 8, 2023 at paras 2-3.

against or in respect of any of the Debtors or the Property, including, for greater certainty, the Exquisite Actions in which Ravine is named as a defendant; and

- (b) stays and suspends the exercise of all rights and remedies against the Debtors, the Receiver, or affecting the Property.

42. Courts routinely grant stays of proceedings in favour of debtors and their property in the context of receiverships pursuant to section 106 of the CJA and their general and inherent jurisdiction.⁴³ As observed in *Business Development Bank of Canada v 1673747 Ontario Inc.*:

the appointment of a receiver and simultaneous imposition of a stay of proceedings is designed to establish a temporary oasis of relative financial calm; i.e., a period in which the receiver has an opportunity to consider, reorganize and deal with the affairs of the debtor, (by appropriate and orderly valuation and disposition of the debtor's assets if and as necessary), for the benefit of creditors and the debtor, without facing the pressures of addressing ongoing disputes concerning the debtor. In other words, the attention of the receiver can be focused on a static situation, without having to face new challenges or aim at a "moving target".

Imposition of a formal stay of litigation proceedings involving the debtor facilitates this [...].⁴⁴

43. Here, the stay of proceedings contemplated under the proposed Receivership Order will facilitate these Receivership Proceedings and ensure that the proposed Receiver is not forced to divert time and resources to proceedings, including the Exquisite Actions, commenced, or continued against the Debtors and/or their co-defendants. Further, the Applicants submit that the sole notable modification to the Model Order's stay of proceedings – the express inclusion of the Exquisite Actions – is a change only in form. That is, the Model Order's stay of proceedings would prohibit the continuation of the Exquisite Actions in any case, and their explicit inclusion within

⁴³ CJA, *supra* note 20 s 106; BIA, *supra* note 20 s 183; [Eagle River International Ltd. Re, 2001 SCC 92](#) at para 20; [Business Development Bank of Canada v 1673747 Ontario Inc., 2013 ONSC 286](#) at para 16 [1673747].

⁴⁴ [1673747](#), *ibid* at paras 17-18.

the proposed Receivership Order merely provides certainty and clarity to all parties to such actions and the proposed Receiver.

44. In light of the foregoing, the Applicants submit that the stay of proceedings contemplated under the proposed Receivership Order is appropriate in the circumstances.

PART V: RELIEF REQUESTED

45. The Applicants submit that it is just and convenient to appoint KSV as Receiver over the Property, and respectfully request that this Court grant the proposed Receivership Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11TH DAY OF NOVEMBER
2023**

Bennett Jones LLP

BENNETT JONES LLP

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. [*Bank of Montreal v Carnival National Leasing Ltd*, 2011 ONSC 1007](#)
2. [*Bank of Montreal v Sherco Properties Inc*, 2013 ONSC 702](#)
3. [*Bank of Nova Scotia v Freure Village on Clair Creek*, \[1996\] OJ No. 5088](#)
4. [*BCIMC Construction Fund Corporation and BCIMC Specialty Fund Corporation v The Clover on Yonge Inc et al* \(March 27, 2020\), Toronto, CV-20-00637301-00CL \(Order Appointing Receiver\) \(ONSC\)](#)
5. [*BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc*, 2020 ONSC 1953](#)
6. [*Business Development Bank of Canada v 1673747 Ontario Inc*, 2013 ONSC 286](#)
7. [*Canadian Western Bank v 2563773 Ontario Inc*, 2023 ONSC 4766](#)
8. [*CCM Master Qualified Fund Ltd v blutip Power Technologies Ltd*, 2012 ONSC 1750](#)
9. [*Eagle River International Ltd, Re*, 2001 SCC 92](#)
10. [*Edmonton \(City\) v Alvarez & Marsal Canada Inc*, 2019 ABCA 109](#)
11. [*Elleway Acquisitions Ltd v Cruise Professionals Ltd*, 2013 ONSC 6866](#)
12. [*Foremost Financial Corporation et al v Alai Developments Inc et al* \(July 23, 2023\), Toronto, CV-23-00702528-00CL \(Endorsement\) \(ONSC\)](#)
13. [*Genesis Mortgage Investment Corp v 1776411 Ontario Ltd and 1333 Weber Street Kitchener LP* \(October 12, 2023\), Toronto, CV-23-00706813-00CL \(Order Appointing Receiver\) \(ONSC\)](#)
14. [*KingSett Mortgage Corporation and Dorr Capital Corporation v Stateview Homes \(Minu Towns\) Inc et al* \(May 2, 2023\), Toronto, CV-23-00698576-00CL \(Order Appointing Receiver\) \(ONSC\)](#)
15. [*KingSett Mortgage Corporation v 30 Roe Investments Corp* \(May 9, 2022\), Toronto, CV-22-00674810-00CL \(Order Appointing Receiver\) \(ONSC\)](#)
16. [*Macquarie Equipment Finance Limited v Validus Power Corp et al*, 2023 ONSC 4772](#)
17. [*Meridian v Okje Cho & Family Enterprise Ltd*, 2021 ONSC 3755](#)
18. [*PS Holdings 1 LLC, PS Holdings 2 LLC and PS Holdings 3 LLC v 2738283 Ontario Inc et al* \(November 9, 2021\), Toronto, CV-21-00670723-00CL \(Order Appointing Receiver\) \(ONSC\)](#)
19. [*Royal Bank of Canada v 1731861 Ontario Inc*, 2023 ONSC 3292](#)

SCHEDULE B – STATUTES AND REGULATIONS RELIED ON

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

Section 2

locality of a debtor means the principal place

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

Section 183

Courts vested with jurisdiction

(1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

- (a) in the Province of Ontario, the Superior Court of Justice;
- (b) [Repealed, 2001, c. 4, s. 33]
- (c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;
- (d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;
- (e) in the Province of Prince Edward Island, the Supreme Court of the Province;
- (f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;
- (g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and
- (h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

Superior Court jurisdiction in the Province of Quebec

(1.1) In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and

in chambers.

Courts of appeal — common law provinces

(2) Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

Court of Appeal of the Province of Quebec

(2.1) In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with power and jurisdiction, according to its ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the Superior Court.

Supreme Court of Canada

(3) The Supreme Court of Canada has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.

Section 243

Court may appoint receiver

(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.

Section 244

Advance Notice

(1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

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

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

Section 101

Injunctions and receivers

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

Terms

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

Section 106

Stay of proceedings

A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

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

**KINGSETT MORTGAGE CORPORATION
AND DORR CAPITAL CORPORATION**

and

**VANDYK – UPTOWNS LIMITED, VANDYK – HEART LAKE
LIMITED, 2402871 ONTARIO INC., VANDYK – THE RAVINE
LIMITED AND VANDYK – LAKEVIEW-DXE-WEST LIMITED**
Respondents

Court File No.: CV-23-00709180-00CL

Applicants

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

Proceedings commenced in Toronto

**FACTUM OF THE APPLICANTS
(Returnable November 14, 2023)**

BENNETT JONES LLP

3400 One First Canadian Place
P.O. Box 130
Toronto, Ontario M5X 1A4

Sean Zweig (LSO# 57307I)

Tel: (416) 777-6254

Email: zweigs@bennettjones.com

Aiden Nelms (LSO# 74170S)

Tel: (416) 777-4642

Email: nelmsa@bennettjones.com

Joshua Foster (LSO# 79447K)

Tel: (416) 777-7906

Email: fosterj@bennettjones.com

Lawyers for the Applicants