

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

BETWEEN:

KINGSETT MORTGAGE CORPORATION

Applicant

- and -

**759 WINSTON CHURCHILL GP INC., 759 WINSTON CHURCHILL L.P., 688
SOUTHDOWN GP INC., 688 SOUTHDOWN LP, 2226 ROYAL WINDSOR GP INC. and
2226 ROYAL WINDSOR LP**

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 APPLICANT

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BENNETT JONES LLP

One First Canadian Place, Suite 3400
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

Milan Singh-Cheema (LSO# 88258Q)

Tel: (416) 777-5527

Email: singhcheemam@bennettjones.com

Lawyers for the Applicant

TO: THE SERVICE LIST

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PART I: OVERVIEW

1. This Court is faced with competing receivership and CCAA applications in respect of the Debtors (as defined below), which are single-purpose privately held real estate development entities. On the evidence and law, a receivership is the only proper course of action. The proposed receivership is sought pursuant to a contractual right that the Applicant (the Debtors' senior-secured creditor) bargained for to deal with the exact situation before this Court, and presents a viable path forward to secure and advance the relevant real estate projects and effect a sale of property, all with a view to maximizing recoveries in a cost-effective and efficient manner.

2. On the other hand, the Debtors' proposed CCAA application does not present any well-developed plan or proposal, does not have the support of its secured creditors (with the Applicant holding a blocking position in respect of any proposed CCAA plan), will continue to empower the management in which the Debtors' creditors have lost faith, and potentially seeks to disguise equity capital as DIP financing that would prime the Applicant's security to its severe prejudice with no corresponding benefit, all in a process that would be more costly and time consuming than the proposed receivership. The correct outcome - a receivership - is plain and obvious and wholly supported by the case law.

3. The receivership order sought by the Applicant over certain of the Debtors' real and personal property (the "**Receivership Order**") is sought pursuant to subsection 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "**BIA**") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43 (the "**CJA**").

4. 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"**);

- (b) grants 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 proceedings (the **"Receivership Proceedings"**); and
- (c) grants 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.

5. The Debtors are special purpose privately held real estate development entities. Churchill GP, Southdown GP and Royal Windsor GP are the registered owners of the Real Property and hold the Real Property for the benefit of Churchill LP, Southdown LP and Royal Windsor LP (each as defined below), respectively. None of the Debtors have any employees or active business operations. The Real Property consists of lands located in Mississauga, Ontario on which the Debtors are intending to develop three real-estate development projects (the **"Projects"**).

6. In connection with the acquisition and development of the Real Property and the Projects, the Applicant extended loan facilities to the Debtors (collectively, the **"Loan Facilities"**), under which there are aggregate principal amounts outstanding: as of January 11, 2024, \$328,327,905.79 for Churchill and Southdown (each as defined below); and as of January 22, 2024, \$35,252,643.84 for Royal Windsor.

7. Several events of default have arisen and are continuing under the various Loan and Security Documents (as defined below) including, among other things, the failure to pay monthly interest payments, in some instances for more than four months, and the failure to pay amounts owing under certain of the Loan Facilities in full by the maturity date. Such events of default, among others, prompted the issuance of demand letters (the “**Demand Letters**”), demanding repayment of all amounts owing under the Loan Facilities (the “**Indebtedness**”) and the delivery of notices of intention to enforce security in accordance with section 244 of the BIA (the “**NITES**”).

8. The ten-day periods afforded to the Debtors under the Demand Letters and the NITES to repay the Indebtedness prior to any enforcement action being taken have long-since elapsed. However, the entirety of the Indebtedness remains outstanding and no viable prospect for immediate repayment, in whole or in part, has materialized to date. In the circumstances, the Applicant has 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.

9. The Loan and Security Documents confer upon the Applicant a contractual right to appoint a receiver or receiver manager over the Property. In furtherance of its contractual right, the Applicant has commenced these Receivership Proceedings to protect its investment and preserve and maximize the value of the Property.

10. The relief is being sought given, among other things, the Debtors’ inability to properly address liquidity issues or develop a restructuring plan, the status of the Projects, the need to avoid a further deterioration of the Applicant’s security position, and the potential irreparable deterioration of value that may otherwise occur.

11. The appointment of the Receiver pursuant to the proposed Receivership Order is just and convenient in the circumstances. 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 Applicant and all of the Debtors' other stakeholders. The clear path forward presented by the Applicant is the most appropriate and efficient one in the circumstances and is preferable to a CCAA proceeding.

PART II: FACTS

12. The facts underlying this application are more fully set out in the affidavit of Daniel Pollack sworn February 12, 2024 (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

13. The Applicant, KingSett Mortgage Corporation ("**KingSett**") is the Debtors' senior-secured lender.²

14. KingSett is incorporated pursuant to the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("**CBCA**") with a registered head office located at 40 King Street West, Toronto, 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 KingSett Capital Inc. has bought/sold approximately \$5.1 billion of industrial property in the last five years, and has extensive experience in major redevelopment/expansion projects across Canada.

¹ Affidavit of Daniel Pollack sworn February 12, 2024 [Pollack Affidavit], Applicant's Application Record dated February 12 at Tab 4 [Application Record].

² *Ibid* at para 7, Application Record at Tab 4.

³ *Ibid* at para 18, Application Record at Tab 4.

15. 759 Winston Churchill GP Inc. (“**Churchill GP**”) is incorporated under the *Business Corporations Act* (Ontario), R.S.O. 1990, c. B.16 (“**OBCA**”) with a registered head office at 7080 Derrycrest Drive, Mississauga, Ontario, Canada, L5W 0G5.⁴ Churchill GP is the sole general partner of 759 Winston Churchill L.P. (“**Churchill LP**” and together with Churchill GP, “**Churchill**”), an entity formed under the *Limited Partnerships Act* (Ontario), R.S.O. 1990, c. L.16 (the “**LPA**”) having its principal place of business at 5300-66 Wellington Street West, Toronto, Ontario, M5K 1E6.⁵

16. 688 Southdown GP Inc. (“**Southdown GP**”) is incorporated under the CBCA with a registered head office at 5300-66 Wellington Street West, Toronto, Ontario, M5K 1E6.⁶ Southdown GP is the sole general partner of 688 Southdown LP (“**Southdown LP**” and together with Southdown GP, “**Southdown**”), an entity formed under the LPA having its principal place of business as 5300-66 Wellington Street West, Toronto Ontario.⁷

17. 2226 Royal Windsor GP Inc. (“**Royal Windsor GP**”) is incorporated under the OBCA with a registered head office at 2680 Royal Windsor Drive, Mississauga, Ontario, Canada L5J 1K7.⁸ Royal Windsor GP is the sole general partner of 2226 Royal Windsor LP (“**Royal Windsor LP**” and together with Royal Windsor GP, “**Royal Windsor**” and collectively with Churchill and Southdown, the “**Debtors**”), an entity formed under the LPA having its principal place of business at 2680 Royal Windsor Drive, Mississauga, Ontario, Canada, L5J 1K7.⁹

18. Michael Moldenhauer is a director of each of the Debtors.¹⁰

⁴ *Ibid* at para 19, Application Record at Tab 4.

⁵ *Ibid* at para 19, Application Record at Tab 4.

⁶ *Ibid* at para 21, Application Record at Tab 4.

⁷ *Ibid* at paras 21-22, Application Record at Tab 4.

⁸ *Ibid* at para 23, Application Record at Tab 4.

⁹ *Ibid* at paras 23-24, Application Record at Tab 4.

¹⁰ *Ibid* at paras 20, 22 and 24, Application Record at Tab 4.

19. On February 12, 2024, at 10:25 p.m., more than six hours after the agreed upon deadline, the Debtors delivered a competing application (the “**CCAA Application**”) under the *Companies’ Creditors Arrangement Act* (R.S.C., 1985, c. C-36) (the “**CCAA**”) seeking an initial order which, among other things, contemplates the approval of a priming debtor-in-possession (“**DIP**”) loan along with other prejudicial super-priority charges. The CCAA Application provides limited details on any restructuring proposal or plan, fails to provide an evidentiary basis for why it is more appropriate in the circumstances, and did not append a cash flow forecast or DIP loan term sheet. As at the time of finalizing this factum, the Applicant has still not received the cash flow forecast or DIP loan term sheet, despite various requests therefor.

B. The Real Property and the Loan Facilities

20. The Debtors are either the registered or beneficial owners of the Real Property and intend on developing three Projects thereon.¹¹ The Real Property and the Projects are comprised of:

- (a) a property located at 759 Winston Churchill Boulevard, Mississauga, Ontario (the “**Churchill Lands**”). The Churchill Lands are 47.15 acres and are owned by Churchill. The Churchill Lands are intended to be developed into 750,354 square feet of industrial facilities, comprised of three Class A industrial buildings. Currently, one of the buildings is complete and fully leased, one is under construction and one has yet to have construction commence. As per the affidavit of Michael Moldenhauer sworn February 12, 2024 (the “**Moldenhauer Affidavit**”) the costs associated with the Churchill Lands have gone approximately \$60 million over-budget;

¹¹ *Ibid* at para 5, Application Record at Tab 4.

- (b) a property located at 688 Southdown Road, Mississauga, Ontario (the “**Southdown Lands**”). The Southdown Lands are approximately 91 acres, of which 80 acres are developable and owned by Southdown. The Southdown Lands are currently zoned for industrial use and require remediation. While KingSett confirmed that the agreed-upon industrial remediation was complete and funded the remediation claim, it understands that Southdown unilaterally opted to spend significant additional funds remediating to residential standards. As a result, it is unclear what has or has not been completed, with the Moldenhauer Affidavit alleging that the majority of the remediation has been completed at a cost of \$30 million to date. To KingSett’s knowledge, no construction has been commenced on the Southdown Lands; and
- (c) a property located at 2226 Royal Windsor Drive, Mississauga, Ontario (the “**Royal Windsor Lands**”). The Royal Windsor Lands are comprised of approximately 74.5 acres of industrial zoned land and are owned by Royal Windsor. The Royal Windsor Lands were to be re-zoned for residential use, however, to the best of KingSett’s knowledge, such re-zoning efforts have not yet commenced or have not materially advanced. To KingSett’s knowledge, there is currently no active construction on the Royal Windsor Lands.¹²

¹² *Ibid* at para 5, Application Record at Tab 4; Moldenhauer Affidavit at paras 25 and 42, Respondents’ Application Record dated February 12 at Tab 2 [Respondent’s Application Record].

21. In connection with the Debtors' acquisition, refinancing and development of the Real Property and the Projects, KingSett advanced certain Loan Facilities to the Debtors.¹³ The Loan Facilities consist of the following:

- (d) a loan to Churchill in the principal amount of \$205,000,000 (the "**Churchill Mortgage Facility**");
- (e) cash in lieu of letters of credit in the principal amount of \$7,653,864 for the benefit of Churchill (the "**Churchill LC Facility**" and together with the Churchill Mortgage Facility, the "**Churchill Facilities**");
- (f) a loan to Southdown in the principal amount of \$165,000,000 (the "**Southdown Facility**"); and
- (g) a loan to Royal Windsor in the principal amount of \$35,000,000 (the "**Royal Windsor Facility**").¹⁴

22. 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**").¹⁵

23. Detailed descriptions of the Loan Facilities and the Loan and Security Documents are provided in the Pollack Affidavit.¹⁶

¹³ *Ibid* at para 25, Application Record at Tab 4.

¹⁴ *Ibid* at para 25, Application Record at Tab 4.

¹⁵ *Ibid* at para 15, Application Record at Tab 4.

¹⁶ *Ibid* at paras 25-51, Application Record at Tab 4.

C. The Debtors' Other Secured and Unsecured Creditors

24. In addition to the security and collateral security granted to the Applicant, the Debtors have granted security to two other secured creditors. Southdown granted a second mortgage/charge in the Southdown Lands (the “**Subordinate Security**”) to 7037619 Canada Inc.¹⁷ The Subordinate Security is postponed and subordinate to the security held by the Applicant as further described in the Pollack Affidavit.¹⁸ Additionally, the Toronto-Dominion Bank holds a registration in the accounts of Churchill GP.¹⁹

25. The Debtors' other creditors also include several construction lien claimants. Approximately seven claimants have filed construction liens against the Churchill Lands, while the Southdown Lands currently have two construction liens registered against them.²⁰ The liens filed against the Churchill Lands and the Southdown Lands have a balance of \$3,755,712 and \$13,522,685 respectively.²¹

D. The Events of Default, Demands and NITES

26. Several events of default under the Loan and Security Documents have occurred and are continuing, including:

- (a) Churchill's failure to pay the monthly payments of interest under the Churchill Facility;
- (b) the registration of construction liens against the Churchill Lands;

¹⁷ *Ibid* at para 58, Application Record at Tab 4.

¹⁸ *Ibid* at para 58, Application Record at Tab 4.

¹⁹ *Ibid* at para 56, Application Record at Tab 4.

²⁰ *Ibid* at para 55-57, Application Record at Tab 4.

²¹ *Ibid* at paras 56 and 58, Application Record at Tab 4.

- (c) Southdown's failure to pay indebtedness owing under the Southdown Facility in full by the maturity date; and
- (d) the registration of construction liens against the Southdown Lands.²²

27. The events of default committed by Southdown resulted in a cross-default under the Royal Windsor Facility.

28. Given the occurrence of the foregoing events of default, KingSett issued demand letters on January 12, 2024 to each of Southdown and Churchill and their respective guarantors advising that events of default had occurred and demanding repayment in full of all of Southdown's and Churchill's indebtedness under the Churchill Facilities and Southdown Facility, respectively.²³ Similarly, KingSett issued demand letters on January 22, 2024 to Royal Windsor and the applicable guarantors advising that events of default had occurred under the Royal Windsor Facility and demanding repayment of the Debtors' indebtedness to KingSett.²⁴

29. The Demand Letters were delivered to the Debtors and the applicable guarantors contemporaneously with the NITES in accordance with section 244 of the BIA.²⁵ The ten-day periods afforded to the Debtors and the applicable guarantors under the Demand Letters and NITES to repay the Indebtedness prior to any enforcement action being taken have long-since expired.²⁶

30. On January 29, 2024, counsel to the Debtors sent counsel to KingSett a letter outlining a restructuring proposal (the "**January 29 Letter**").²⁷ The January 29 Letter was not actionable, contained minimal details and lacked any comprehensive solution for a refinancing or restructuring

²² *Ibid* at paras 60-68, Application Record at Tab 4.

²³ *Ibid* at paras 8-9, Application Record at Tab 4.

²⁴ *Ibid* at para 10, Application Record at Tab 4.

²⁵ *Ibid* at paras 8-10, Application Record at Tab 4.

²⁶ *Ibid* at para 10, Application Record at Tab 4.

²⁷ *Ibid* at para 12, Application Record at Tab 4.

plan.²⁸ This was communicated to the Debtors via a response letter from counsel to KingSett dated January 31, 2024.²⁹ The responding letter also explained why a CCAA proceeding is not required, and a receivership is appropriate in the circumstances.³⁰

31. Notwithstanding the issuance of the Demand Letters and NITES, the entirety of the Indebtedness remains outstanding and the Debtors have failed to table any viable solution.³¹

PART III: ISSUES

32. 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;
- (c) a receivership proceeding is more appropriate than a CCAA proceeding; and
- (d) 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

33. Subsection 243(1) of the BIA and section 101 of the CJA vest courts with the jurisdiction to appoint a receiver where it is “just or convenient to do so”.³² In the case of the BIA, subsections 243(1)-(1.1) provide in part:

²⁸ *Ibid* at para 12, Application Record at Tab 4.

²⁹ *Ibid* at para 12, Application Record at Tab 4.

³⁰ *Ibid* at para 13, Application Record at Tab 4.

³¹ *Ibid* at para 10, Application Record at Tab 4.

³² [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](#)

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:

...

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

...

34. The Applicant is the Debtors' senior-secured creditor, having aggregate claims in excess of \$328,327,905.79 against Churchill and Southdown, and claims in excess of \$35,252,643.84 against Royal Windsor.³³ In addition, the Applicant holds perfected security interests pursuant to its real property registrations and registrations under the *Personal Property Security Act*, R.S.O. 1990, c. P.10.³⁴ As such, the Applicant is permitted to bring the within application under subsection 243(1) of the BIA. Such appointment is not precluded by subsection 243(1.1) of the BIA as the Applicant has delivered the NITES in accordance with section 244 of the BIA and the ten-day notice periods prescribed thereunder have long-since expired.³⁵

35. 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

[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*].

³³ Pollack Affidavit, *supra* note 1 at para 7. Application Record at Tab 4.

³⁴ *Ibid* at paras 35, 43 and 51.

³⁵ [BIA](#), *supra* note 32 s.244.

36. 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”.³⁶

37. The Real Property is located in Mississauga, Ontario and the Debtors have registered head offices in Toronto, Ontario and Mississauga, Ontario.³⁷ Thus, the locality of the Debtors is Ontario and this application is properly before the Ontario Superior Court of Justice (Commercial List).³⁸

2. The Receiver is a Trustee under the BIA³⁹

38. 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.⁴⁰

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

39. In determining whether it is just or convenient to appoint a receiver, 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”.⁴¹ This necessarily requires that the Court consider the rights of the secured creditors seeking the receiver’s appointment.⁴² It does not, however, require

³⁶ *Ibid* s 243(5). The “locality of the debtor” is defined in section 2 of the BIA as 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.”

³⁷ Pollack Affidavit, *supra* note 1 at paras 19-22, Application Record at Tab 4.

³⁸ See *Foremost*, *supra* note 32 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.

³⁹ *BIA*, *supra* note 32 s.243(4).

⁴⁰ Pollack Affidavit, *supra* note 1 at para 74, Application Record at Tab 4.

⁴¹ *Bank of Nova Scotia v Freure Village on Clair Creek*, [1996] OJ No. 5088 at para 10 [Freure]; *Carnival*, *supra* note 32 at para 24; *Elleway*, *supra* note 32 at para 26; *Meridian*, *supra* note 32 at para 20; *Sherco*, *supra* note 32 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 (Endorsement) at para 6; *Macquarie Equipment Finance Limited v Validus Power Corp et al.*, 2023 ONSC 4772 (Endorsement) at para 5 [Validus].

⁴² *1731861*, *ibid* at para 30; *Western Bank*, *ibid* at para 6; *Validus*, *ibid* at para 5.

that the Court 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.⁴³ Although, in this case, the Applicant submits that these factors are also present.

40. Where, as is the case here, the moving secured creditor has a contractual right to the appointment of a receiver, the extraordinary nature of such remedy "is significantly reduced".⁴⁴ In such circumstances, the burden on the moving secured creditor is relaxed as the applicant is simply seeking to enforce a term of an agreement assented to by the parties.⁴⁵ What is more, the "appointment of a receiver becomes even less extraordinary when dealing with a default under a mortgage".⁴⁶

41. When evaluating whether, in all the circumstances, the appointment of a receiver is just or convenient, courts have considered numerous factors, including:

- (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;

⁴³ *Carnival*, supra note 32 at paras 24, 28; *Freure*, at para 10; *Foremost*, supra note 32 at paras 28, 30-31; *Validus*, *ibid* at para 10; *Western Bank*, supra note 41 at para 11.

⁴⁴ *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc*, 2020 ONSC 1953 at para 43 [BCIMC]; *Freure*, at para 12; *Meridian*, supra note 32 at para 21; *Elleway*, supra note 32 at para 27; *Carnival* supra note 32, at paras 24-25; *Sherco*, supra note 32 at para 42; *Foremost*, at para 29; *1731861*, supra note 32 at para 31; *Western Bank*, *ibid* at para 7; *Validus*, at paras 6-7.

⁴⁵ *Sherco*, at para 42; *Elleway*, at para 27; *1731861*, at para 31; *Western Bank*, *ibid* at para 7; *Validus*, at paras 6-7.

⁴⁶ *BCIMC*, supra note 44 at para 44; *Western Bank* *ibid* at para 8; *Validus*, at para 7.

- (g) the potential costs of the receiver; and
- (h) the best way of facilitating the work and duties of the receiver.⁴⁷

42. Having regard to the foregoing considerations, it is just and convenient for the proposed Receiver to be appointed in the circumstances:

- (a) the Property is comprised of real estate development projects that are held by single purpose corporations, which are well-suited to (and arguably presumptively appropriate for) receivership proceedings;
- (b) these Receivership Proceedings will provide the most effective and appropriate means of attending to, securing and advancing the development of the Projects and, where appropriate, effecting a sale of the Property, in each case, with a view to maximizing recoveries for the Debtors' stakeholders. The Receiver with the assistance of the Applicant, is well-positioned to maximize value;
- (c) the Applicant is the senior-secured lender in respect of each of the Debtors;
- (d) numerous serious events of default have occurred and are continuing under the Loan and Security Documents, including: (i) Churchill's failure to pay the monthly payments of interest under the Churchill Facilities; (ii) the registration of construction liens against the Churchill Lands; (iii) Southdown's failure to pay indebtedness owing under the Southdown Facility in full by the maturity date; (iv) the registration of construction liens against the Southdown Lands; and (v) the cross-default under the Royal Windsor Facility. The risk of further events of default

⁴⁷ *Elleway*, *supra* note 32 at para 28; *BCIMC*, *ibid* at para 45; *Western Bank*, *supra* note 41 at para 9; *Validus*, *supra* note 32 at para 8.

such as, among other things, the registration of additional construction liens put the Applicant's security at risk of a potential irreparable deterioration of value;

- (e) the Applicant has 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 Applicant has likewise lost all faith in the Debtors' ability to protect the Property by which the Indebtedness is secured;
- (f) the Loan and Security Documents provide the Applicant with a contractual right to the appointment of a receiver over the Property upon an event of default. There is no reason to deprive the Applicant of the contractual right for which it bargained to protect its investments;
- (g) the costs of a receivership in these circumstances would be reasonable and appropriate; and
- (h) the proposed Receiver's appointment is sought at this time in light of, among other things, the critical and value-preserving steps that are required to prevent the further deterioration of the Property. Such steps include engaging trades, continuing the pursuit of remediation and re-zoning efforts, and commencing work to ensure the safety of the Projects undertaken thereon.⁴⁸

⁴⁸ See: [*Genesis Mortgage Investment Corp v 1776411 Ontario Ltd and 1333 Weber Street Kitchener LP* \(October 12, 2023\), Toronto, CV-23-00706813-00CL \(Endorsement\) \(ONSC\); *KingSett Mortgage Corporation and Dorr Capital Corporation v Vandyk Uptowns Limited et al* \(October 18, 2023\), Toronto, CV-23-00709180-00CL \(Order Appointing Receiver\), \(ONSC\) \[Vandyk\]; *KingSett Mortgage Corporation and Dorr Capital Corporation vs. Stateview Homes \(Minu Towns\) Inc., et al \(Order Appointing Receiver, \(June 5, 2023\), Toronto, CV-23-00698576-00CL \(Order Appointing Receiver\) \(ONSC\) \[Stateview\]; *Mizrahi Commercial \(The One\) LP, Mizrahi Development Group \(The One\) Inc., And Mizrahi Commercial \(The One\) GP Inc* \(October 18, 2023\), Toronto, CV-23-00707839-00CL \(Order Appointing Receiver\) \(ONSC\); Pollack Affidavit, *supra* note 1 at paras 8, 17-18, 60-72, Application Record at Tab 4.*](#)

C. A Receivership Proceeding is more appropriate than a CCAA proceeding

43. As has occurred in prior cases, this Court is faced with competing CCAA and receivership applications. And consistent with those cases, the correct outcome on these facts is to dismiss the CCAA Application and grant the Applicant's Receivership Application.

44. The fact remains that the use of the CCAA for real estate companies is rare, and this case does not meet the extraordinary circumstances in which it is justified. This Court has also cautioned against the use of the CCAA in cases where the end goal is liquidation and where less costly alternatives that can accomplish the same goal – such as a receivership – exist.⁴⁹

45. The oft-cited statement on this issue originates from *Cliffs Over Maple Bay*:

“[...] in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by [exercising] their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or [debtor-in-possession] financing”.⁵⁰

46. Commentators have summarized the case law as confirming that receiverships or other enforcement proceedings are generally more appropriate than CCAA proceedings for real estate projects because, among other things: (i) senior secured creditors typically have no incentive to vote for or accept a CCAA plan and, as a result, the CCAA is unlikely to succeed and the fundamental purpose of the CCAA would not be achieved; and (ii) if no such plan is put forth, the CCAA proceedings are likely to result in an outcome identical to a receivership or other

⁴⁹ [Dondeb Inc., Re, 2012 ONSC 6087 \(Commercial List\)](#) at para 34.

⁵⁰ [Cliffs Over Maple Bay Investments Ltd v Fisgard Capital Corp, 2008 BCCA 327](#) at para 36 [*Cliffs*];

enforcement proceeding at a significantly increased cost and directly to the detriment of the senior secured creditor.⁵¹

47. The Quebec Court in *Arrangement relatif à 9186-9297 Québec inc.* (“**Arrangement Relatif**”), while it was considering whether to appoint a receiver or grant a CCAA application, cited commentary with approval that in the vast majority of cases involving unfinished real estate projects, there is a preference to favour receiverships.⁵² To that end, it explained, there are largely two forms of prejudice that explain the courts’ inclination to appoint a receiver over granting a CCAA application: (i) secured creditors’ funds being unrecoverable, and put at risk, during the pendency of the CCAA; and (ii) secured creditors’ collateral being primed by the costs of the CCAA.⁵³

48. Further, the Court in *Arrangement Relatif* noted that courts were generally only willing to consider CCAA relief and dismiss a receivership application in the context of single purpose real estate development entities, citing the following passage from Oplonsky, Babad and Noel: “[...] in situations where (1) a CCAA proposal was already well-developed by the time of the contested application and (2) the debtor presented evidence showing the plan was highly likely to succeed”.⁵⁴

49. In *BCIMC Construction Fund Corporation and BCIMC Specialty Fund Corporation v The Clover on Younge Inc et al*, another case in which a receivership was preferred over the CCAA, the Ontario Court noted that the secured creditor would have a blocking position to any plan; there was no concrete proposal developed to pay the secured creditor; approving the CCAA application would force the creditor to continue to be bound by the debtors in whom they no longer had any confidence; and there was no evidence that a CCAA proceeding would have a material impact on

⁵¹ Jeremy Opolsky, Jacob Babad & Mike Noel, “[Receivership versus CCAA in Real Property Development: Constructing a Framework for Analysis](#)” (2020) 18 Annual Review of Insolvency Law 199.

⁵² [Arrangement relatif à 9186-9297 Québec inc 2022 QCCS 1707](#) at para 36;

⁵³ *Ibid.*

⁵⁴ *Ibid* at para 37.

safeguarding jobs nor was there evidence it would materially safeguard the interests of other creditors more than a receivership.⁵⁵

50. On the other hand, the few cases in which a CCAA application has been preferred highlight its inappropriateness here. For example, in *Port Capital Development*,⁵⁶ the debtor had already “made a complex and substantive proposal to which the two secured creditors have agreed”; that proposal did not contain a compromise requiring the consent of creditors beyond the agreeing parties; and the proposal was within the CCAA’s overarching objectives and would potentially avoid liquidation.⁵⁷ As another example, in *Alderbridge Way GP Ltd.*,⁵⁸ the three major secured creditors (owed approximately \$350 million) supported the CCAA relief sought and the only party objecting was a general contractor; the debtor was seeking to explore various options within a SISF under the CCAA (not to simply achieve a sale that could potentially be addressed in a receivership); and the interim financing sought was appropriate in the circumstances.⁵⁹

51. In choosing between a receivership and a CCAA process, the Court must balance the competing interests of the stakeholders to determine which process is more appropriate. The relevant factors in this analysis include:

- (a) payment of the Receivership Applicant;
- (b) reputational damage;
- (c) preservation of employment;
- (d) speed of the process;

⁵⁵ *BCIMC*, *supra* note 44, at para 4.

⁵⁶ *Port Capital Development (EV) Inc. (Re)*, 2021 BCSC 1272.

⁵⁷ *Ibid* at paras 74-75.

⁵⁸ *Alderbridge Way GP Ltd. (Re)*, 2022 BCSC 1436.

⁵⁹ *Ibid.* at paras 16-25.

- (e) protection of all stakeholders;
- (f) cost; and
- (g) nature of the business.⁶⁰

52. The consideration of the above factors, in the context of the principles set out in the case law discussed above, plainly demonstrates that the CCAA Application is inappropriate in this case.⁶¹

53. *First*, the CCAA Application fails to provide any real restructuring proposal or plan, let alone one that is well-developed. It follows that no evidence has been tendered to support the plan or proposal and its likelihood of success, nor has any evidence been presented to set out how the Applicant will be paid. In fact, it does the opposite: the CCAA Application proposes a new secured creditor under a DIP facility which is proposed to be secured by a super-priority charge, among other charges including a D&O Charge, putting the Applicant's collateral further at risk.

54. *Second*, to the extent the Debtors allege any reputational damage, as in other cases, this is of their own making; the Applicant should not be required to take on more risk to try to protect the Debtors' reputation.⁶² Additionally, the Debtors do not operate an active business with customers.

55. *Third*, while the Debtors place emphasis in their CCAA Application on the continued employment of individuals employed by "Employment Co", the Debtors do not directly employ these individuals nor is Employment Co a proposed CCAA applicant. There is also no evidence presented that a Receivership would result in a loss of employment for these individuals, nor is there evidence that such employees, if necessary to the Receivership, could not be engaged by the

⁶⁰ [BCIMC](#), *supra* note 44 at para [61](#); [Romspen Investment Corp. v. 6711162 Canada Inc.](#), 2014 ONSC 2781 at para [61](#) [[Romspen](#)].

⁶¹ [Arrangement relatif à Kaloom inc.](#), 2023 QCCS 3688 at para [16](#); See also: [Cliffs](#); [Octagon Properties Group Ltd. \(Re\)](#), 2009 ABOB 500; [Romspen](#);

⁶² [BCIMC](#), *supra* note 44 at paras [72-76](#).

Receiver. Therefore, there is no material benefit in respect of employees – employed by another entity – that would justify the CCAA Application over the proposed Receivership.

56. *Fourth*, the Debtors submit that a CCAA proceeding will be efficient and can be completed in 19 weeks, without providing a specific timeline as to how those 19 weeks would unfold. In all likelihood, a Receivership would be faster. Moreover, the Applicant’s collateral should not be put at risk for such a long period of time in circumstances where no plan has been put forward for repayment, and where the Applicant has (rightfully) lost faith in management.

57. *Fifth*, in considering the protection of all stakeholders, the Applicant is the primary secured creditor and would also have a blocking position over any CCAA plan. Therefore, the time and expense of utilizing the CCAA without the Applicant’s support can only be described as wasteful. There is also no evidence presented that an equitable process cannot be run through a receivership as opposed to the CCAA Application. To the extent a stalking horse or other refinancing transaction does materialize, there is no impediment to implementing that within a receivership. The Receiver is fully capable of executing a fair and equitable process that will maximize recovery for all of the Debtors’ stakeholders.

58. Moreover, the Debtors are seeking DIP financing that would have a priority charge ranking ahead of the Applicant. The Debtors propose to have financing that is later intended to be equitized on a priming basis. In other words, the Debtors (and their DIP provider) are gambling the money of their stakeholders, including the Applicant, to pursue an equity financing. The protection of all stakeholders is clearly not furthered by the CCAA Application.

59. The proposed DIP financing could even be described as akin to an impermissible “loan to own” strategy, whereby they are burdening the Applicant (and other creditors) with the consequences of their actions. The prejudice this imposes on the Applicant and the other secured creditors is highly inappropriate.

60. *Sixth*, it is commonly known that CCAA proceedings are inherently expensive.⁶³ The cost of a CCAA proceeding in this case, particularly where the Applicant has a contractual remedy to the less costly and more efficient Receivership, is not justified. There is also a significant risk that a CCAA proceeding will not be successful particularly where, as noted, the Applicant holds a blocking position in the voting on a CCAA plan or proposal. In that case, the outcome will be similar to what the Applicant is currently proposing but significant amounts of time and money will have first been wasted on a CCAA proceeding.

61. *Seventh*, with respect to the nature of the business, while the Debtors make unsubstantiated and vague claims regarding the purported complexity of the Projects and the specific knowledge and relationships required to conduct remediations and certain negotiations,⁶⁴ these claims do not justify the CCAA Application. The case law demonstrates that absent unique circumstances, and significant creditor support, a CCAA proceeding for a real estate company will not be the best course of action. The same conclusion applies here; regardless of the claims of complex negotiations and remediations, the Debtors are entities holding single real estate Projects.

62. Under the Debtors' current management, among other issues, a number of significant construction liens have been registered against the Real Property.⁶⁵ Furthermore, the projects on the Churchill Lands have gone \$60 million over-budget, while the projects on the Southdown Lands have gone \$26 million over-budget without the completion of remediation efforts.⁶⁶ The growing list of issues is not indicative of a superior ability to manage these Projects.

63. The proposed Receiver is more than capable of completing the necessary tasks given its extensive experience in prior real property proceedings,⁶⁷ and the assistance of KingSett, which is

⁶³ *BCIMC*, *supra* note 44 at para 93.

⁶⁴ Moldenhauer Affidavit, *supra* note 12 at paras 6, 43-44, 69 and 140, Respondent's Application Record at Tab 2.

⁶⁵ Pollack Affidavit, *supra* note 1 at paras 60-72, Application Record at Tab 4.

⁶⁶ Moldenhauer Affidavit, *supra* note 12 at paras 25-26, Respondent's Application Record at Tab 2.

⁶⁷ See: [Stateview; Vandyk; KingSett Mortgage Corporation v 30 Roe Investments Corp \(May 9, 2022\), Toronto, CV-22-00674810-00CL \(Order Appointing Receiver\) \(ONSC\) \[30 Roe\]](#);

a part of Canada's leading private equity real estate investment firm with the experience of over \$5.1 billion of industrial transactions in the last five years alone.⁶⁸ The Receiver would also have the power and authority to engage whatever employees, consultants or advisors it deems fit, including any individual currently employed by Employment Co.

64. In considering all of the foregoing, the Receivership Application is clearly more appropriate in the circumstances.

D. The Terms of the Proposed Receivership Order are Appropriate

65. The proposed Receivership Order is substantially similar to the Ontario Superior Court of Justice (Commercial List)'s model receivership order (the "**Model Order**"),⁶⁹ consistent with prior orders of this Court,⁷⁰ and appropriate in the circumstances.⁷¹ Select terms of the proposed Receivership Order are discussed further immediately below.

1. The Super-Priority Charges are Appropriate

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

- (a) the first-ranking super-priority 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

⁶⁸ Pollack Affidavit, *supra* note 1 at Exhibit "B", Application Record at Tab 4.

⁶⁹ Blackline to CLUC Model Receivership Order Application Record at Tab 3.

⁷⁰ [Vandy; 30 Roe; Stateview; 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 Young 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 \(Order Appointing Receiver\) \(ONSC\)](#).

⁷¹ Blackline to CLUC Model Receivership Order Application Record at Tab 4.

- (b) the second-ranking super-priority 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.

67. Priority charges sought by a receiver under the BIA provide the certainty required to ensure the integrity, fairness and predictability of receivership proceedings and achieve the objective of preserving and maximizing value for the benefit of a debtor's stakeholders.⁷² 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.⁷³

68. The proposed Receiver's Charge and the Receiver's Borrowings Charge are appropriate in the circumstances and commensurate with the status of the Projects and the complexity of these Receivership Proceedings.

2. The Stay of Proceedings is Appropriate

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

- (a) prohibits, absent the consent of the proposed Receiver or leave of this Court, the commencement or continuation of any proceeding or enforcement process against or in respect of any of the Debtors or the Property; and
- (b) stays and suspends the exercise of all rights and remedies against the Debtors, the Receiver or affecting the Property.

⁷² [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.

⁷³ [BIA](#), *supra* note 20 s 243(6); Pollack Affidavit, *supra* note 1 at para 57, Application Record at Tab 4; Affidavit of Service of Milan Singh-Cheema sworn February 9, 2024 at paras 2-3.

70. 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.⁷⁴ 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 [...].⁷⁵

71. 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 commenced, or continued, against the Debtors.

72. In light of the foregoing, the Applicant submits that the stay of proceedings contemplated under the proposed Receivership Order is appropriate in the circumstances.

PART V: RELIEF REQUESTED

73. The Applicant respectfully requests that this Court grant the proposed Receivership Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 16TH DAY OF FEBRUARY
2024**

Bennett Jones LLP

BENNETT JONES LLP

⁷⁴ CJA, *supra* note 32 s 106; BIA, *supra* note 32 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].

⁷⁵ [1673747](#), *ibid* at paras 17-18.

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. [*Alderbridge Way GP Ltd. \(Re\)*, 2022 BCSC 1436.](#)
2. [*Arrangement relatif à Kaloom inc.*, 2023 QCCS 3688](#)
3. [*Arrangement relatif à 9186-9297 Québec inc* 2022 QCCS 1707](#)
4. [*Bank of Montreal v Carnival National Leasing Ltd*, 2011 ONSC 1007](#)
5. [*Bank of Montreal v Sherco Properties Inc*, 2013 ONSC 702](#)
6. [*Bank of Nova Scotia v Freure Village on Clair Creek*, \[1996\] OJ No. 5088](#)
7. [*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 \(Order Appointing Receiver\) \(ONSC\)](#)
8. [*BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc*, 2020 ONSC 1953](#)
9. [*Business Development Bank of Canada v 1673747 Ontario Inc*, 2013 ONSC 286](#)
10. [*Canadian Western Bank v 2563773 Ontario Inc*, 2023 ONSC 4766](#)
11. [*CCM Master Qualified Fund Ltd v blutip Power Technologies Ltd*, 2012 ONSC 1750](#)
12. [*Cliffs Over Maple Bay Investments Ltd v Fisgard Capital Corp*, 2008 BCCA 327](#)
13. [*Dondeb Inc., Re*, 2012 ONSC 6087 \(Commercial List\)](#)
14. [*Eagle River International Ltd, Re*, 2001 SCC 92](#)
15. [*Edmonton \(City\) v Alvarez & Marsal Canada Inc*, 2019 ABCA 109](#)
16. [*Elleway Acquisitions Ltd v Cruise Professionals Ltd*, 2013 ONSC 6866](#)
17. [*Foremost Financial Corporation et al v Alai Developments Inc et al* \(July 23, 2023\), Toronto, CV-23-00702528-00CL \(Endorsement\) \(ONSC\)](#)
18. [*Genesis Mortgage Investment Corp v 1776411 Ontario Ltd and 1333 Weber Street Kitchener LP* \(October 12, 2023\), Toronto, CV-23-00706813-00CL \(Order Appointing Receiver\) \(ONSC\)](#)
19. [*Genesis Mortgage Investment Corp v 1776411 Ontario Ltd and 1333 Weber Street Kitchener LP* \(October 12, 2023\), Toronto, CV-23-00706813-00CL \(Endorsement\) \(ONSC\)](#)
20. [*KingSett Mortgage Corporation and Dorr Capital Corporation v Stateview Homes \(Minu Towns\) Inc et al* \(May 2, 2023\), Toronto, CV-23-00698576-00CL \(Order Appointing Receiver\) \(ONSC\)](#)
21. [*KingSett Mortgage Corporation and Dorr Capital Corporation v. Vandyk – Uptowns Limited, Vandyk – Heart Lake Limited, 2402871 Ontario Inc., Vandyk – The Ravine Limited And Vandyk – Lakeviewdx-West Limited* \(November 14, 2023\), Toronto, CV-23-00709180-00CL \(Order Appointing Receiver\) \(ONSC\);](#)
22. [*KingSett Mortgage Corporation v 30 Roe Investments Corp* \(May 9, 2022\), Toronto, CV-22-00674810-00CL \(Order Appointing Receiver\) \(ONSC\)](#)
23. [*Macquarie Equipment Finance Limited v Validus Power Corp et al*, 2023 ONSC 4772](#)
24. [*Meridian v Okje Cho & Family Enterprise Ltd*, 2021 ONSC 3755](#)
25. [*Mizrahi Commercial \(The One\) LP, Mizrahi Development Group \(The One\) Inc., And Mizrahi Commercial \(The One\) GP Inc*, \(October 18, 2023\), Toronto, CV-23-00707839-00CL \(Order Appointing Receiver\) \(ONSC\)](#)
26. [*Octagon Properties Group Ltd. \(Re\)*, 2009 ABQB 50](#)
27. [*Port Capital Development \(EV\) Inc. \(Re\)*, 2021 BCSC 1272.](#)

28. [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 \(Order Appointing Receiver\) \(ONSC\)](#)
29. [Royal Bank of Canada v 1731861 Ontario Inc, 2023 ONSC 3292](#)
30. [Romspen Investment Corporation v. 6711162 Canada Inc., 2014 ONSC 2781](#)

Commentary Cited

1. Jeremy Opolsky, Jacob Babad & Mike Noel, “[Receivership versus CCAA in Real Property Development: Constructing a Framework for Analysis](#)” (2020) 18 Annual Review of Insolvency Law 199.

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

759 WINSTON CHURCHILL GP INC., 759 WINSTON CHURCHILL L.P., 688 SOUTHDOWN GP INC., 688 SOUTHDOWN LP, 2226 ROYAL WINDSOR GP INC. and 2226 ROYAL WINDSOR LP

Applicant

Respondents

Court File No.: CV-24-00714543-00CL

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

Proceedings commenced in Toronto

FACTUM OF THE APPLICANT

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

Milan Singh-Cheema (LSO# 88258Q)

Tel: (416) 777-5527

Email: singhcheemam@bennettjones.com

Lawyers for the Applicant