Court File No.: CV-23-00705869-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and -

TEN 4 SYSTEM LTD., 1000043321 ONTARIO INC. AND 1000122550 ONTARIO INC.

Respondents

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

BOOK OF AUTHORITIES

October 2, 2023

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Index

INDEX

Tab 1

Courts of Justice Act, R.S.O. 1990

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Tab 2

Bankruptcy and Insolvency Act R.S.C., 1985

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.

Tab 3

CITATION: Royal Bank of Canada v. CFNDRS Inc., 2017 ONSC 7661
COURT FILE NO.: CV-17-587341-00CL
DATE: 20171220

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

ROYAL BANK OF CANADA
Applicant

-and-

CFNDRS INC.,
formerly known as DESIGN COFOUNDERS INC.,
formerly known as TAILORED UX INC.
Respondent

BEFORE: F.L. Myers J.

COUNSEL: *James Satin,* counsel for Royal Bank of Canada
Mustafa Redha in person

HEARD: December 20, 2017

ENDORSEMENT

[1] On November 28, 2017, the bank commenced a summary application seeking the appointment of a receiver over the property, assets, and undertaking of the respondent. The relief claimed in the notice of application does not include the appointment of a manager of the business. Neither does it include a claim for judgment on the respondent's indebtedness. The appointment of a receiver alone is the sole substantive relief sought in this application.

[2] The grounds relied upon in the application and the bank's evidence are that: the bank holds security under a general security agreement and a lease; the terms of the security documents provide for the appointment of a receiver on default; the respondent is indebted to the bank; it defaulted; and the bank has made demand.

[3] The bank relies upon s. 101 of the *Courts of Justice Act*, RSO 1990, c. C-43 and s. 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B.3.

[4] Section 101 of the *Courts of Justice Act* does not apply in this application. The section involves only interlocutory orders. Here, the appointment is sought on a final basis. This is allowed under s. 243 of the *BIA* and therefore under Rule 14.05 (2) of the *Rules of Civil*

Procedure, RRO 1990, Reg. 194. However, nothing in that statute describes what happens after the receiver is appointed by way of application. An application is made and the court issues a final order appointing the receiver – presumably defining the goals of the process in that final order.

[5] By contrast, when an action is commenced to enforce a debt and the plaintiff seeks the interim appointment of a receiver and manager under s. 101 of the CJA and Rule 41, the appointment is interlocutory. The receiver preserves and protects the assets pending proof of the debt. If the plaintiff obtains judgment on its debt, the receiver and manager then will enforce the plaintiff's judgment by way of equitable execution akin to an appointment under Rule 60.02 (1)(d). The receiver and manager will liquidate assets or engage in other processes to realize cash to pay to the plaintiff who is then a judgment creditor. Before the receiver and manager can pay a judgment creditor however, the receiver and manager, of necessity, will have to consider whether there are other claims that must, by law, be paid in priority to the claim of the judgment creditor. In that process an orderly liquidation and payment scheme is mandated and carried out.

[6] While there is much similarity between the provincial and federal regimes, it should be borne in mind that s. 243 (7) of the BIA prohibits the court from providing a super-priority charge to the receiver to indemnify it for disbursements it incurs in the operation of a business of the insolvent person. I am unaware of any case law that provides for the appointment of a receiver under s. 243 of the BIA by way of originating application in which the receiver has been ruled to be entitled to a super-priority charge to protect its right to indemnity for business disbursements.

[7] Although the notice of application in this case sought only the appointment of a receiver, the draft order submitted by the bank followed the Commercial List model form of order. It provided for the appointment of a receiver and manager under both s. 101 of the *CJA* and s. 243 of the *BIA*. It provided a super-priority charge for all fees and disbursement of the receiver and manager and its counsel on all disbursements although that is available only under the former statute and not under the latter. Where both statutes apply, that is permissible. But here, since s. 101 is not engaged in an interlocutory appointment process, the receiver would not be entitled to indemnity for business disbursements in a s. 243 receivership.

[8] The test for the appointment of an interlocutory receiver is well understood. In para. 10 of *Bank of Nova Scotia v. Freure Village of Clair Creek*, 1996 CanLII 8258 (ON SC) Blair J. (as he then was) set out several propositions that remain applicable today:

a. The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so;

b. In deciding whether or not to do so, the court must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto;

c. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the

question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently;

d. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed.

[9] Justice Blair also noted that while the appointment of a receiver may be seen to be extraordinary, it is much less extraordinary when the plaintiff has a contractual right to appoint a receiver on its own. The question of whether a court appointment then is just and convenient when there is a contractual power of appointment will turn on an assessment of, "the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager." *Freure Village* at para. [12].

[10] In my view, the issue that usually tips the balance is whether there is a reason to incur the expense and procedural formality of appointing a third party to exercise neutral, transparent, accountable stewardship of the assets of the debtor while interested parties jostle on the merits of whatever their dispute may be. If the parties' dispute puts the business assets at risk or where realization options may be impaired by leaving the business in the debtor's hands or requiring the secured creditor to bear the risk of indemnifying a privately appointed receiver, the court will usually intervene. Often, simple default on secured debt will be sufficient to attract a receivership where the risk to the business is implicit in the nature of the business or the dispute between the creditor(s) and the debtor(s). However, as with all equitable remedies, context is everything and each case turns on its own facts.

[11] In this case, there is absolutely no evidence before the court as to why a court appointed receiver is just or convenient. All that follows was told to me on an unsworn basis by counsel and Mr. Redha personally.

[12] As best as I can tell, the respondent runs a high tech startup that is in an early development stage. It is creating software that will help lead a business through the steps of a problem solving exercise. Like many startups, the business operates through its principal, Mr. Redha, and a number of independent contractor/consultants. There are no other employees. There is no bricks and mortar. There is Mr. Redha, his computer, and perhaps some IP. I did not ask if the business has an office or if the bank proposed to take possession of Mr. Redha's residence under the order as drafted.

[13] The bank says that it is interested in collecting the respondent's accounts receivable and its entitlement to Scientific Research and Experimental Development Tax Incentive payments. Mr. Redha estimates conservatively that the business has approximately $75,000 in outstanding receivables. It may have entitlement to SR&ED payments for 2016 and 2017 that may be significant. The applications for these payments are complex and require Mr. Redha's involvement with a professional consultant who charges a 7% fee. Mr. Redha is bullish on his prospects to obtain new receivables, i.e. new revenue, in the New Year. I doubt he would have been so bullish had he understood that a receivership would have seen him working for a salary

to be negotiated with the receiver while the receiver obtains the receivables generated by his efforts.

[14] Mr. Redha submits that the IP of the business has value that exceeds the amount of his debt. I have no way to assess the correctness of this statement. Moreover, the bank is not required to keep funding the respondent through a sales process of its own making. However, this much is clear to me (based on experience and common sense absent any evidence one way or the other) – if a receiver is appointed, it has no wherewithal to run the business without Mr. Redha's voluntary and ongoing commitment. Trying to sell partially developed software disembodied from an operating business and without Mr. Redha's ongoing support seems unlikely to be value-maximizing and probably is impossible. In fact, there really is no business for a third party to manage. There is just Mr. Redha and his computer and incomplete software.

[15] Mr. Satin submits that the bank is entitled to a receiver under its loan and security documents. The proposed receiver, he says, is not willing to undertake the appointment without the protection of the court. There is no indication of why that may be so.

[16] The total debt of about $450,000 is very small for a court ordered receivership process. There is no indication as to how a court-based process can be expected to be value-maximizing or why it is more desirable than a private appointment in this case. There is nothing inherent in the relationship between these parties that makes the mere existence of a default on a debt require a neutral third party to assume stewardship of the business such as it may be. The bank has delivered a notice under s. 63 (4) of the PPSA that it intends to realize on collateral of the respondent. Collecting $75,000 in outstanding receivables is not made more convenient by a court appointed receiver. Putting in place a trust or lockbox process for receipt of SR&ED payments may require some negotiation or, perhaps, appointment of a very limited true receiver empowered simply to receive this specific property of the debtor and perhaps to oversee completion of SR&ED applications. With some negotiation, a sale process for the respondent's IP might be agreed upon. It will take evidence however to establish that a professional accountant/trustee can come in and sell the IP in a value-maximizing process without Mr. Redha's voluntary, active engagement.

[17] The respondent should not take from this that it is at all freed from its legal obligations to pay its debt. The bank has many paths open to it to seize and sell the respondent's assets, take its loss, and bring a swift end to the business. That strikes me as a lose-lose proposition, but that is not my decision to make. As usual, if there is to be a win-win, there will need to be a discussion in which each party tries to accommodate the other's interests to some degree at least.

[18] In view of the procedural issues, the complete lack of evidence, and the inapt order sought, I am not prepared to appoint a receiver as sought in this case at this time. If the bank wishes, it may arrange a case conference before me, on notice to the respondent, at which I can assist the parties work towards a consensual outcome or restructured court proceedings. Alternatively, the applicant may file a draft order dismissing this application for signing. Mr. Redha's approval of the form and content of the draft order is not required. Nothing in this

outcome precludes the applicant from commencing an action against the respondent to sue on its debt.

F.L. Myers J.

Date: December 20, 2017

Tab 4

CITATION: *Macquarie Equipment Finance Limited v. Validus Power Corp. et al.*, 2023 ONSC 4772
COURT FILE NO.: CV-23-00703754-00CL
DATE: 20230818

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

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

RE: Macquarie Equipment Finance Limited, Applicant

AND:

Validus Power Corp. et al., Iroquois Falls Power Corp., Bay Power Corp., KAP Power Corp., Validus Hosting Inc., Kingston Cogen Limited Limited Partnership and Kingston Cogen GP Inc., Respondents

BEFORE: Peter J. Osborne J.

COUNSEL: *Michael Noel, Scott Bomhoff, Jeremy Opolsky and Alina Butt*, for the Applicant

Catherine Louis Francis, for the Respondent, Validus Power Corp.

Brett Harrison, for CIBC

Evan Cobb, Counsel for KSV Restructuring Inc. (Proposed Receiver)

David Sieradzki and Bobby Kofman, KSV Restructuring Inc. (Proposed Receiver)

HEARD: August 10, 2023

ENDORSEMENT

1. The Applicant, Macquarie Equipment Finance Limited, seeks the appointment of a receiver over the properties and assets of the Respondents/Debtors pursuant to both section 243 of the *Bankruptcy and Insolvency Act* (BIA) and section 101 of the *Courts of Justice Act* (CJA). The Respondents oppose the appointment of a full Receiver today, but consent to the continuation of the previously ordered interim receivership.

2. This Application originally came on before Kimmel, J. on August 2, 2023 at which time an interim receivership order (limited in scope) was made, and the matter was adjourned until the hearing of this Application on August 10, 2023, to give the Respondents a full opportunity to file materials and respond.

3. Defined terms in this Endorsement have the meaning given to them in the motion materials, the August 2 Endorsement, and/or the First Report of the Interim Receiver dated August 9, 2023, unless otherwise stated.

4. At the conclusion of the two hour hearing, I granted the relief sought by the Applicant in the form of a full receivership, following which I signed and released an order that had been approved by the parties as to form and content. It was important to the parties that the Application be disposed of promptly, since the interim receivership expired on the day of the hearing. I indicated that reasons would follow. These are those reasons.The test for the appointment of a receiver pursuant to section 243 of the *BIA* or section 101 of the *CJA* is not in dispute. Is it just or convenient to do so?

5. In making a determination about whether it is, in the circumstances of a particular case, just or convenient to appoint a receiver, the Court must have regard to all of the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto. These include the rights of the secured creditor pursuant to its security: *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 O.J. No. 5088, 1996 CanLII 8258.

6. Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties: *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 at para. 27. However, the presence or lack of such a contractual entitlement is not determinative of the issue.

7. The appointment of a receiver becomes even less extraordinary when dealing with a default under a mortgage: *BCIMI Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 at paras. 43-44.

8. As I observed in *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186, the Supreme Court of British Columbia, citing *Bennett on Receivership*, 2nd ed. (Toronto, Carswell, 1999), listed numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver and with which I agree: *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd*., 2009 BCSC 1527 at para. 25):

    a. whether irreparable harm might be caused if no order is made, although as stated above, it is not essential for a creditor to establish irreparable harm if a receiver is not appointed where the appointment is authorized by the security documentation;

    b. the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of assets while litigation takes place;

    c. the nature of the property;

d. the apprehended or actual waste of the debtor's assets;

e. the preservation and protection of the property pending judicial resolution;

f. the balance of convenience to the parties;

g. the fact that the creditor has a right to appointment under the loan documentation;

h. the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;

i. the principle that the appointment of a receiver should be granted cautiously;

j. the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;

k. the effect of the order upon the parties;

l. the conduct of the parties;

m. the length of time that a receiver may be in place;

n. the cost to the parties;

o. the likelihood of maximizing return to the parties; and

p. the goal of facilitating the duties of the receiver.

9. How are these factors to be applied? The British Columbia Supreme Court put it, I think, correctly: "these factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient: *Pandion Mine Finance Fund LP v. Otso Gold Corp*., 2022 BCSC 136 at para. 54).

10. It is not essential that the moving party establish, prior to the appointment of a receiver, that it will suffer irreparable harm or that the situation is urgent. However, where the evidence respecting the conduct of the debtor suggests that a creditor's attempts to privately enforce its security will be delayed or otherwise fail, a court-appointed receiver may be warranted: *Bank of Montreal v. Carnival National Leasing Ltd*., 2011 ONSC 1007 at paras. 24, 28-29.

11. Accordingly, is it just or convenient to appoint a receiver in the particular circumstances of this case?

12. As stated, in my view it is not only just *or* convenient, but indeed it is just *and* convenient to appoint a receiver here.

13. Much of the context of, and background to, this Application are set out in the Endorsement of Justice Kimmel dated August 2 and need not be repeated here. Moreover, much of the underlying chronology of events is not in dispute. Most of the key events in the chronology are set out in the Chronological Summary found at Tab 1 of the Applicant's Compendium.

14. In the main, The Validus Group is a power generation company that generates and then sells power to the Independent Energy System Operator (IESO) as a participant in IESO's capacity auction market. The principal operations of The Validus Group consist of four power plants located in Ontario: North Bay, Kapuskasing and Kingston. There is a data centre in North Bay.

15. Validus Power Corp. is a holding company, the primary or sole assets of which consist of the shares or units held in each of the other Debtors, each of which are direct or indirect wholly-owned subsidiaries. Four of those Debtors, in turn, own the operating assets corresponding to the four power plants.[1]

16. Pursuant to what, for today's purposes, can generally be described as the loan agreements between the Applicants on the one hand and the Debtors/Respondents on the other hand, the Debtors are indebted to the Applicant in a significant amount.

17. The parties entered into a sale and leaseback transaction originally in respect of the Iroquois Falls power plant, pursuant to which the Applicants purchased substantially all of the turbines, plant and equipment used in that plant operation from Iroquois Falls Power Corp. (IFPC). The Applicant paid a purchase price of $45 million plus HST.

18. The Applicants then leased the purchased assets back to IFPC under a lease agreement which required IFPC to make regular monthly rent payments and pay all other amounts when due. The Applicant was (and is) entitled to accelerate all payments due as liquidated damages and demand payment of same if there is a default by IFPC or any of the other Debtors. Each of the other Debtors guaranteed both the obligations of IFPC and the guarantee obligations of the other guarantors.[2]

19. All of the Debtors provided the Applicant with first ranking security over substantially all of their property and assets, subject to certain limited exceptions set out in the materials and about which there is no issue today.

20. While there was, as at the hearing of the Application, some dispute as to the precise amount and whether or not there had been double counting as to certain input factors, the Applicants submit that the total outstanding amount was, as of July 31, 2023, $55,598,575. The Respondents expressly conceded in argument that the amount was at least in excess of $40 million.

21. Pursuant to the loan agreements, the Applicant has a contractual right to appoint a receiver if an event of default has occurred. The Applicant has first-in-time registrations against each of the debtors under the *PPSA* and against all of the real property of the Debtors registered on title, as well as physical possession of the shares and units that Validus Parent pledged pursuant to the loan agreements.

22. Events of default have clearly occurred. In addition to the fundamental monetary defaults in the form of the failure to repay amounts when due, there are additional covenant and

[1] The one exception to that is the turbines, plant and equipment for the Iroquois Falls plant, which is all owned by the Applicant.
[2] The guarantees are unlimited with the exception of Validus Holdings which provided a limited recourse guarantee.

operating defaults, including the failure to pay rent, the failure to remit HST and other taxes, the breach of an agreement with a key customer, and the failure to properly maintain books and records, and to maintain insurance.

23. I observe, as did Justice Kimmel, that during 2023, the Applicant has made various payments on behalf of the Debtors in respect of critical items, in order to protect further erosion from its collateral and, as Justice Kimmel noted, to minimize the risk of potential destabilization of the Debtors and their operations.

24. The parties entered into a forbearance agreement in February, 2023. The Debtors have breached the terms of that forbearance agreement. The Applicant issued demands and section 244 *BIA* Notices on June 9, 2023 and again on July 24, 2023. The proposed Receiver has made arrangements with a licensed operator who can assume control of the Property of the Debtors in the event the Application is granted.

25. The Application was adjourned on August 2 at the request of the Debtors to permit them an opportunity to file responding materials and attempt to find an alternative source of debt or equity financing to permit the repayment of the Applicant. Justice Kimmel observed that this was something on which the Debtors had been working since the beginning of 2023, although they submitted to the Court on August 2 that there may be a recent development offering greater hope for success.

26. The Applicant submits that it has lost confidence in management of the Respondents, that (as further described below) a recent sales process completely failed, that there is no apparent liquidity in the Property of the Debtors, the books and records are in disarray with the result that an accurate valuation is difficult if not impossible, and that it is contractually entitled to the appointment of a Receiver which is now appropriate.

27. The principals of the Debtors are alleged to have misappropriated and failed to return funds from a bank account to which they were erroneously granted access (CIBC) and are alleged to have failed to provide benefits and RRSP contributions to their unionized employees pursuant to a collective bargaining agreement.

28. The Applicant submits that its significant efforts to accommodate the Debtors have included the provision of a four month rent holiday in February of this year, and the facilitating, at their expense, of an unsuccessful out of court sales and marketing process in respect of one of the Debtors, in addition to the payments on behalf of the debtors referred to above, in the aggregate amount of at least $1,421,370.38. Unfortunately, none of these efforts has led to a viable path forward.

29. The sale and marketing process took place. in March and April of this year. For parties submitted nonbinding expressions of interest. One bid or made a binding offer on which it defaulted. The process concluded unsuccessfully.

30. The Applicant observes that one of its intended objectives in the receivership, if granted, is a sales process which will likely include a stalking horse bid for substantially all of the assets of the Debtors, in turn likely in conjunction with a filing pursuant to the CCAA. The Debtors submit that they will object to this and indeed this entire Application is a ruse to allow the Applicants to acquire their assets at less than full value.

31. As stated, I was satisfied at the conclusion of oral argument that a full receivership was appropriate and I so ordered. The parties agreed on the form and content of the order given that disposition, and I was satisfied that the draft order was both consistent with the terms of the Model Order of the Commercial List and appropriate in the circumstances of this case, with the one exception that I declined to grant an order authorizing the Applicant to commence a CCAA process. In my view, that was premature, although I was clear that my decision in declining to grant that relief was without prejudice to the ability of the Applicant to seek that relief in the future.

32. I accept the position of the Applicant that it has not acted in a rushed or rash fashion. Indeed, the chronology of the events since the original defaults as summarized above demonstrate that the contrary is true. The Respondents submitted that the Application on August 2 before Justice Kimmel came out of the blue and took them by surprise.

33. I appreciate that the preference of the Respondents would have been to avoid such an Application, but in my view they can hardly be surprised given the defaults, the terms of the forbearance agreement, the contractual consent to the appointment of a receiver in the event of default, the failed sales process, the continued HST arrears (and corresponding Canada Revenue Agency lien for approximately $6 million) the continued arrears of municipal taxes, and most fundamentally, the continued default and demands under the loan agreements notwithstanding the demands made on June 9, 2023 together with corresponding section 244 *BIA* Notices, demanding payment of the Base Rent and HST arrears.

34. In any event, the Respondents filed full responding materials and made submissions at the hearing of the Application.

35. I am satisfied that, as submitted by the Applicant, there is disarray in management of the Applicant, and there is a real risk both to the existing employees of the Respondents in terms of the payment of salaries and wages and the remittance of statutory source deductions, and also to the stability of the operations of the Debtors in the sense of a real risk that the existing employees may leave. That would without question destabilize if not impair irrevocably the operation of the Debtors.

36. In this regard, I observe the position of the Interim Receiver as set out in its First Report to the Court dated August 9, 2023, in which the Interim Receiver observes among other things that the employees have expressed a lack of confidence in management; concern if management remains in control of the business of the Debtors; and frustration with respect to benefit and RRSP amounts withdrawn from their payroll but not remitted as required. All of these factors contributed to the expressed view of the Interim Receiver that mass resignation is a risk.

37. Moreover, the First Report reflects that the cash flow prepared for the receivership period reflects that substantially all cash receipts will be required to maintain the operations of the business. The result, as reflected in the cash flow, is that the projected cash receipts are not sufficient to service the lease arrangements of the Debtors by way of payment of the monthly base rent of $1.4125 million. In addition, there is no funding to service the past-

due amounts which total approximately $9.6 million inclusive of HST, representing six monthly payments, before interest and costs.

38. Further as noted above, there has been a default in the payment of insurance premiums, some of which have already been paid by the Applicant to protect its position. Additional funding to maintain coverage will be required. No prudent operator would continue to own let alone operate power plant assets without appropriate insurance coverage in place.

39. Within the next 10 days alone, $306,000 will be required for insurance premiums together with $108,000 for payroll. There is no funding available for immediate payroll needs.

40. In short, there is just no funding available either to finance the immediate operational and/or debt servicing needs and obligations of the Respondents, nor to begin to repay the amounts already overdue. I conclude that the collateral of the Applicant is at risk.

41. The Respondents rely upon the Affidavit of Mr. Todd Shortt sworn August 7, 2023 and the Supplementary Affidavit of Mr. Shortt sworn August 10, 2023 together with the exhibits thereto. Mr. Shortt concedes that the Debtors have struggled with their operations and that a dispute with Hut 8 Mining Corp. in respect of a lease in North Bay, Ontario has resulted in the Debtors losing an important source of revenue which in turn had a snowball effect on the rest of the operations (para. 22).

42. Mr. Shortt also states that the Debtors have been working to obtain alternative financing to fully repay the Applicant and that indeed financing has been arranged although it needs to be formally documented. He states that he believes that the appointment of a full receiver would destroy the business.

43. The financing commitment the Debtors say they have received is attached as Exhibit "A" to Mr. Shortt's Supplementary Affidavit. He states that the conditions are marked as fulfilled. Indeed, the document reflects that certain documentation has been "provided".

44. I agree with the concerns expressed by counsel to the Applicant that this commitment letter does not provide the certainty urged upon me that the Applicant will be repaid in full, let alone by a date certain. I say this for a number of reasons.

45. First, the commitment is from a broker, not from the lender or syndicate of lenders itself or themselves (which are not identified). The commitment is "based on the information provided to us" which is not defined in the commitment letter nor elsewhere in the record, such as by an affidavit from or own behalf of the proposed lender(s).

46. The concern of the Applicant, with which I agree and accept, is exacerbated by the inadequate record keeping of the Debtors (see, for example, the Affidavit of Joshua Stevens sworn July 31, 2023, para 54(a), and the April 16, 2023 Notice of Default and Reservation of Rights from the Applicant to the Debtors setting out Specified Events of Default, including among other things, a breach of the obligation to provide annual financial statements, semi-annual financial statements, bank statements and other reports required (d); and a breach of the obligation to maintain proper books, accounts and records in accordance with Section 4.23 of the Participation Agreement (p)).

47. How, the Applicant asks rhetorically, can the Debtors purport to have satisfied the proposed lenders represented by the letter of commitment, in the absence of books and records, and financial statements?

48. I accept that concern, which I share. I further observe that even if the proposed lender or lenders were in fact satisfied, there is no evidence in the record to demonstrate this. There is nothing beyond the commitment letter. There is no affidavit, as noted above, from or on behalf of the proposed lenders addressing this issue or even stating more generally that the financing commitment was unconditional and unequivocal and that the lenders were prepared to advance funds immediately or by any date certain.

49. Second, the proposed financing commitment is expressly conditional on factors, in addition to those that are indicated on the document as having been provided, in respect of which there is no evidence that they have been satisfied.

50. For example, Mr. Shortt is required to be a guarantor. It may be reasonable to assume that he would agree to such an obligation, but there is no evidence of this, and there is certainly no guarantee to which the terms have already been agreed. Presumably, that remains to be done.

51. Moreover, the "Lender Fee" is stated as being: "1.50% plus 20% equity in the four power plants". There is no evidence of any agreements in place pursuant to which the transfer of 20% of the equity in the four power plants is to be transferred. Such agreements would require the consent of the Applicant as a first order of business. Even if that were forthcoming, as it may well be, the complexity of the existing loan agreements between the Applicants and the Debtors suggests that there would be significant time required to negotiate and finalize the terms of this 20% equity purchase.

52. At a minimum, I am comfortable concluding that the result, for the purposes of the disposition of the Application today, is that there remains significant uncertainty in the conditionality of the financing required. Even if the proposed transactions proceeded expeditiously and smoothly, a certain amount of time would be required to negotiate and conclude the equity purchase agreements, with the additional result that there is no certainty as to the date upon which the funding would be available even if the agreements all closed seamlessly.

53. Required "standard loan documentation" has not yet been reflected as having been provided.

54. Most fundamentally, however, if the proposed commitment letter represents a financing commitment that can be closed, and funds advanced, in relatively short order, so much the better. Nothing in my conclusion to appoint a full receiver prevents or prohibits the Receiver from continuing discussions with the proposed lender or lenders to pursue this proposed commitment and determine whether it is in the best interests of stakeholders. Indeed, I was clear at the hearing of the motion and am clear now that I would expect the Receiver to do nothing less.

55. If that funding commitment closed relatively quickly, it follows that the cost of the Receivership would be minimized. However, in the interim, stability will be maximized

and the Receiver could pursue this possible commitment together with, and in addition to, any possible alternative commitments such as might be revealed through a court supervised sales process.

56. In any event, the complete absence of any interim funding from any source further reinforces my conclusion that a full Receiver should be appointed now since, in the absence of funding available to continue operations even in the immediate term (and to pay, among other things, payroll to maintain the employees), the circumstances all but guarantee the further destabilization of the business of the Debtors, the further erosion of the security of the Applicant, and the further risk to all stakeholders of an outcome that is less than optimal.

57. Considering all of the factors relevant to the appointment of a receiver, and in particular the relative prejudice to the Applicant on the one hand and the Debtors and other stakeholders on the other hand, the balance of convenience clearly favours the appointment of a full Receiver at this time in my view.

58. The Receiver can and I expect will sort out issues such as the potential for double counting in respect of certain stipulated loss amounts. I expect that it goes without saying that nothing in my decision to appoint a full Receiver would entitle the Applicant to recover amounts in excess of those which it is owed. But again, the Receiver will sort all of that out. It can also address matters such as the inadvertent payment, and refusal to repay, the amounts in respect of CIBC.

59. For all of these reasons, I am satisfied that the Receiver should be appointed on the terms set out in the order agreed as to form and content (without, for the time being, the authority to commence a CCAA proceeding).

60. I am grateful to all counsel for their submissions.

Osborne J.

Court File No.: CV-23-00705869-00CL

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

ROYAL BANK OF CANADA	**- and -**	**TEN 4 SYSTEM LTD., 1000043321 ONTARIO INC. AND 1000122550 ONTARIO INC.**
Applicant		**Respondents**

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

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