

COURT OF APPEAL FOR ONTARIO

ROYAL BANK OF CANADA

Respondent

- and -

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

Moving Party

AND 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

FACTUM OF THE RESPONDENT

(Motion for Leave to Appeal)

PART I - OVERVIEW

1. Ten 4 Systems Ltd. (“**Ten 4**”), 1000043321 Ontario Inc. (“**321 Ontario**”) and 1000122550 Ontario Inc. (“**550 Ontario**”) and together with Ten 4 and 321 Ontario, the “**Debtors**”) move pursuant to Section 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3 (“**BIA**”) for leave to appeal the Order of Justice Osborne (the “**Application Judge**”) of Ontario Superior Court of Justice (Commercial List) dated October 18, 2023 (the “**Receivership Order**”) made pursuant to Section 101 of the *Courts of Justice Act* (the “**CJA**”) and Section 243(1) of the BIA appointing msi Spergel Inc. as receiver (in such capacity, the “**Receiver**”), without security, of all of the assets, properties and undertakings (collectively, the “**Property**”) of the Debtors.
2. The Receivership Order was made in accordance with the endorsement released by the Application Judge dated October 18, 2023 (the “**Reasons**”). In the Reasons, the Application Judge found that it was just *and* convenient in all of the circumstances to

appoint the Receiver and noted that the Debtors had contractually agreed to the appointment of a receiver in the event of default.

3. The Debtors were found to be in breach of their credit agreements, which provided for the appointment of a receiver, and the Application Judge specifically found that a receivership will provide for stability, transparency and orderly administration of the affairs of the Debtors under the supervision of a court-appointed officer.
4. The Application Judge is an experienced Justice of the Commercial List and it is clear from the detailed Reasons that he carefully evaluated the evidence (including evidence submitted by the Debtors after the hearing of the Application), properly instructed himself as to the applicable law and then applied that law to the facts as found by him. In doing so, the Application Judge committed no reviewable error.
5. Accordingly, the Respondent, Royal Bank of Canada (“**RBC**” or the “**Bank**”) submits that leave to appeal the Receivership Order ought not to be granted.

PART II - BACKGROUND

A. The Debtors

6. Ten 4 is incorporated pursuant to the laws of the Province of Alberta and is extra-provincially registered in the Province of Ontario. Ten 4 is primarily engaged in the business of shipping services.
7. 321 Ontario and 550 Ontario are each incorporated pursuant to the laws of the Province of Ontario. 321 Ontario and 550 Ontario are each primarily engaged in the business of holding real estate.

B. Loans and Security

8. Pursuant to the Ten 4 Evidence of Indebtedness dated July 21, 2023 (the “**Ten 4 EOI**”) and the RBC Royal Bank Visa Business Card Agreement dated January 5, 2023 (the “**Visa**

Agreement”), RBC provided certain credit facilities to Ten 4, on the terms and conditions as outlined in the Ten 4 EOI and the Visa Agreement¹.

9. As security for the repayment of all amounts owing by Ten 4 to RBC, including under and in connection with the Ten 4 EOI, the Visa Agreement, the Ten 4-321 Ontario Guarantee (as defined below) and the Ten 4-550 Ontario Guarantee (as defined below), Ten 4 provided in favour of RBC a general security agreement dated December 22, 2022 (the “**Ten 4 GSA**”).
10. The debts and liabilities owing by Ten 4 to the Bank, including under and in connection with the Ten 4 EOI and the Visa Agreement, were guaranteed by each of the following guarantors:
 - (a) 321 Ontario, pursuant to a guarantee and postponement of claim dated July 21, 2023, for an unlimited amount (the “**321 Ontario-Ten 4 Guarantee**”);
 - (b) 550 Ontario, pursuant to a guarantee and postponement of claim dated July 21, 2023, for an unlimited amount (the “**550 Ontario-Ten 4 Guarantee**”); and
 - (c) Nasir Mahmood, pursuant to a guarantee and postponement of claim dated July 21, 2023, for a maximum amount of CA\$2,500,000, plus interest (the “**Mahmood-Ten 4 Guarantee**” and, collectively with the 321 Ontario-Ten 4 Guarantee and the 550 Ontario-Ten 4 Guarantee, the “**Ten 4 Guarantees**”).
11. As of August 31, 2023, Ten 4 was indebted to the Bank in the amounts of:
 - (a) CA\$5,194,862.79 and US\$452,915.45 under the Ten 4 EOI and the Visa Agreement;
 - (b) CA\$4,203,815.71 under the Ten 4-321 Ontario Guarantee; and
 - (c) CA\$5,304,009.79 under the Ten 4-550 Ontario Guarantee,

¹ Reasons at para 15 and 16.

in each case, inclusive of interest to such date, plus further interest, fees and costs that continue to accrue from and after August 31, 2023.

12. Pursuant to the 321 EOI, the Bank provided certain credit facilities to 321 Ontario, on the terms and conditions as outlined in the 321 EOI.
13. As security for the repayment of all amounts owing by 321 Ontario to the Bank, including under and in connection with the 321 EOI, the 321 Ontario-Ten 4 Guarantee and the 321 Ontario-550 Ontario Guarantee (as defined below), 321 Ontario provided certain security to the Bank, including the following:
 - (a) a general security agreement dated December 22, 2022 (the “**321 Ontario GSA**”);
 - (b) a charge in respect of the property municipally known as 2396 Cedar Creek Road, Ayr, Ontario, registered at the land registry office on January 24, 2023 (the “**321 Ontario Charge**”);
 - (c) an assignment of rents dated December 22, 2022, in respect of the property located at 2396 Cedar Creek Road, Ayr, Ontario (the “**321 Ontario Assignment of Rents**”); and
 - (d) an assignment of insurance policies dated December 22, 2022 (the “**321 Ontario Assignment of Insurance**”).
14. The debts and liabilities owing by 321 Ontario to the Bank, including under and in connection with the 321 EOI, were guaranteed by each of the following guarantors:
 - (a) Ten 4, pursuant to a guarantee and postponement of claim dated December 22, 2022, for a maximum amount of CA\$4,244,570 plus interest (the “**Ten 4-321 Ontario Guarantee**”);
 - (b) 50 Ontario, pursuant to a guarantee and postponement of claim dated December 22, 2022, for a maximum amount of CA\$4,244,570 plus interest (the “**550 Ontario-321 Ontario Guarantee**”);

- (c) Nasir Mahmood, pursuant to a guarantee and postponement of claim dated December 22, 2022, for a maximum amount of CA\$1,500,000 plus interest (the “**Mahmood-321 Ontario Guarantee**”); and
 - (d) Rupinder Taggar, pursuant to a guarantee and postponement of claim dated December 22, 2022, for a maximum amount of CA\$1,500,000 plus interest (the “**Taggar-321 Ontario Guarantee**” and collectively with the Ten 4-321 Ontario Guarantee, the 550 Ontario-321 Ontario Guarantee and the Mahmood-321 Ontario Guarantee, the “**321 Ontario Guarantees**”).
15. As of August 31, 2023, 321 Ontario was indebted to the Bank in the amounts of:
- (a) CA\$4,203,815.71 under the 321 EOI;
 - (b) CA\$5,194,862.79 and US\$452,915.45 under the 321 Ontario-Ten 4 Guarantee; and
 - (c) CA\$5,304,009.79 under the 321 Ontario-550 Ontario Guarantee,
- in each case, inclusive of interest to such date, plus further interest, fees and costs that continue to accrue from and after August 31, 2023.
16. Pursuant to the 550 EOI, the Bank provided certain credit facilities to 550 Ontario, on the terms and conditions as outlined in the 550 EOI.
17. As security for the repayment of all amounts owing by 550 Ontario to the Bank, including under and in connection with the 550 EOI, the 550 Ontario-Ten 4 Guarantee and the 550 Ontario-321 Ontario Guarantee, 550 Ontario provided certain security to the Bank, including the following:
- (a) a general security agreement dated December 22, 2022 (the “**550 Ontario GSA**”);
 - (b) a charge in respect of the property municipally known as 2396 Cedar Creek Road, Ayr, Ontario, registered at the land registry office on January 24, 2023 (the “**550 Ontario Charge**”);

- (c) an assignment of rents dated December 22, 2022, in respect of the property municipally known as 2396 Cedar Creek Road, Ayr, Ontario (the “**550 Ontario Assignment of Rents**”);
 - (d) an assignment of insurance policies dated December 22, 2022 (the “**550 Ontario Assignment of Insurance**”).
18. The debts and liabilities owing by 550 Ontario to the Bank, including under and in connection with the 550 EOI, were guaranteed by each of the following guarantors:
- (a) Ten 4, pursuant to a guarantee and postponement of claim dated July 21, 2023, for an unlimited amount (the “**Ten 4-550 Ontario Guarantee**”);
 - (b) 321 Ontario, pursuant to a guarantee and postponement of claim dated July 21, 2023, for an unlimited amount (the “**321 Ontario-550 Ontario Guarantee**”);
 - (c) Nasir Mahmood, pursuant to a guarantee and postponement of claim dated July 21, 2023, for a maximum amount of CA\$2,050,000 plus interest (the “**Mahmood-550 Ontario Guarantee**”); and
 - (d) Rupinder Taggar, pursuant to a guarantee and postponement of claim dated July 21, 2023, for a maximum amount of CA\$2,050,000 plus interest (the “**Taggar-550 Ontario Guarantee**” and, collectively with the Ten 4-550 Ontario Guarantee, the 321 Ontario-550 Ontario Guarantee and the Mahmood-550 Ontario Guarantee, the “**550 Ontario Guarantees**”).
19. As of August 31, 2023, 550 Ontario was indebted to the Bank in the amounts of:
- (a) CA\$5,304,009.79 under the 550 EOI;
 - (b) CA\$5,194,862.79 and US\$452,915.45 under the 550 Ontario-Ten 4 Guarantee; and
 - (c) CA\$4,203,815.71 under the 550 Ontario-321 Ontario Guarantee,
- in each case, inclusive of interest to such date, plus further interest, fees and costs that continue to accrue from and after August 31, 2023.

20. The Ten 4 GSA, the 321 Ontario GSA and the 550 Ontario GSA each provide RBC with the right to appoint a receiver in the event of default.
21. RBC registered its security interest in respect of all of the Property under the Alberta *Personal Property Security Act* (the “**Alberta PPSA**”), in respect of Ten 4, and the Ontario *Personal Property Security Act* (the “**Ontario PPSA**”), in respect of the Debtors.

C. Defaults

22. The Debtors are in default of their obligations to the Bank. The defaults are material and have not been waived².
23. The accounts of the Debtors were transferred to RBC’s Special Loans and Advisory Services on or about August 17, 2023, due to unusual account activity resulting in the full utilization of the operating line and an account excess of CA\$2,489,450.90 and US\$452,915.45³.
24. The account activity related to numerous suspicious deposits being made into the accounts of Ten 4 with the Bank followed immediately by electronic fund transfers from Ten 4’s accounts with the Bank to companies related to the Debtors.
25. In late July and early August 2023, there was a significant increase in the number of cheques deposited from entities of concern which were subsequently returned, the large majority due to having insufficient funds to clear the originating account.
26. The return of these cheque deposits left the RBC accounts of Ten 4 in an overdraft position of C\$2,466,785 and US\$452,385 as at August 14, 2023.
27. RBC took the decision to demand payment of the obligations under the Ten 4 EOI and each Ten 4 Guarantee, and to terminate the Visa Agreement. The credit facilities extended to Ten 4 are repayable on demand.

² Reasons at para 18.

³ Reasons at para 22.

28. RBC took the decision to demand payment of the obligations under the (a) 321 EOI and the 550 EOI, and the (b) 321 Ontario Guarantees and the 550 Ontario Guarantees, in light of the fact that 321 Ontario and 550 Ontario had committed certain events of default, including, without limitation, the failure of 321 Ontario and 550 Ontario to pay principal, interest or other amounts on mortgage payments when due pursuant to the 321 EOI and the 550 EOI, respectively.
29. Further, the Debtors had failed to pay the property taxes on two properties in Ayr, Ontario (the “**Ayr Properties**”) that are subject to the Bank’s collateral.
30. There were, as well, other covenant defaults in respect of reporting to the Bank on such matters as aged accounts receivable, quarterly financial statements and monthly borrowing base certificates⁴.
31. RBC issued formal demands for payment and Notices of Intention to Enforce Security on each of the Debtors and guarantors in accordance with Section 244 of the BIA⁵.
32. As well, certain charges against the Ayr Properties and a writ of execution against Ten 4 were disclosed by the Debtors after the above demands for payment had been issued of which the Debtors had not previously advised the Bank⁶.
33. The Debtors have failed to pay the amounts owed to RBC.

D. Appointment of Receiver

34. RBC lost all confidence in the principals of the Debtors and formed the view that a Receiver should be appointed to secure the Property. Accordingly, on September 13, 2023, RBC brought an application for the Receivership Order, pursuant to subsection 243(1) of the BIA and Section 101 of the *Courts of Justice Act* (the “**CJA**”).

⁴ Reasons at para 20.

⁵ Reasons at para 18.

⁶ Reasons at para 19 and 29.

35. The application was heard on October 11, 2023. While the matter was under reserve, counsel for the Debtors wrote to the Application Judge unilaterally to advise of what he described as a funding commitment. A case conference was scheduled for October 18, 2023⁷.
36. Just prior to the case conference, the Debtors filed supplementary materials including a commitment letter. Further submissions on this material were heard by the Application Judge at the case conference on October 18, 2023⁸.
37. The Bank had a number of issues with the commitment letter including:
- (a) the commitment, from Toronto Wire Solutions Corp., contemplated only the numbered company Debtors as borrowers and a number of other parties, including Nasir Mahmood, to be joint and several guarantors;
 - (b) it contemplated a loan amount of \$23,600,000 “in favour of [existing properties]”, interest at 9% per annum payable monthly on account of interest-only in the amount of \$177,000 per month or a one-year term;
 - (c) it contemplated an advance date of January 16, 2024; and
 - (d) it included a number of express conditions precedent to which the obligation to advance funds were expressly subject, including appraisals, inspections, surveys, “up-to-date Environmental Reports, satisfactory to the lender in its sole discretion” and other conditions⁹.
38. On October 18, 2023, the Application Judge granted the Receivership Order and released the Reasons.

⁷ Reasons at para 32.

⁸ Reasons at para 32.

⁹ Reasons at para 34.

PART III – ISSUES

39. This Reply Factum addresses the following issues:
- (a) What is the standard of review applicable to this motion for leave to appeal?
 - (b) Should leave to appeal under Section 193(e) of the BIA be granted?

PART IV – LAW AND ARGUMENT

A. Standard of Review is one of Deference

40. This court has consistently held that substantial deference is owed to the discretion of commercial court judges who are supervising insolvency proceedings, and that it will not intervene absent demonstrable error.¹⁰ Appellate intervention in decisions made by judges of the Commercial List has been exercised sparingly.¹¹ This restraint is born from the understanding that Commercial List judges are alive to legal and business realities and should thus be accorded a “high level of deference.”^{12 13} As emphasized by Justice Blair in the *Stelco* (2005) CCAA proceedings,¹⁴ decisions by Commercial List judges are not lightly disturbed on appeal.¹⁵ Rather, an experienced Commercial List judge is entitled to considerable deference.
41. This principle has been inferred from the statutory imposition of a leave requirement in the first place rather than an express right of appeal. The sparing grant of leave to appeal further underscores the principle that appellate scrutiny should be exceptional and predicated upon clear errors in judgement or principle.
42. In *Ravelston Corp.* (2007), this court acknowledged its role to defer substantially to the Commercial List judge’s discretion absent a clear error. At paragraph 3, it was specifically

¹⁰ *Marchant Realty Partners Inv. v. 2407553 Ontario Inc.*, 2021 ONCA 375 at para 18.

¹¹ *Nortel Networks Corp., Re*, 2016 ONCA 332 (Ont. C.A.) at para 34; and *Essar Steel Algoma Inc. (Re)*, 2017 ONCA 478, 2017 CarswellOnt 8668 (Ont. C.A.) at para 19.

¹² *Stomp Pork Farm Ltd., Re*, 2008 SKCA 73, 2008 CarswellSask 358 (Sask. C.A.) at para. 26.

¹³ *Mundo Media Ltd. (Re)*, 2022 ONCA 607 at para 30.

¹⁴ See also *Potentia Renewables Inc. v Deltro Electric Ltd.* 2019 ONCA 779.

¹⁵ *Stelco Inc., Re*, 2005 CarswellOnt 1188, [2005] O.J. No. 1171 (Ont. C.A.) at para. 63 [*Stelco ONCA*].

held that “it is well established that an appellate court owes substantial deference to the discretion of a commercial court judge charged with the responsibility of supervising insolvency and restructuring proceedings and that absent demonstrable error, it will not interfere.”¹⁶

43. The case law collectively establishes that appellate courts have approached decisions of Commercial List judges with a presumption of correctness, intervening only in exceptional circumstances.

B. Leave to Appeal under Section 193(e) of the BIA should not be granted

Test for Granting Leave

44. Without an appeal as of right pursuant to any of subsections 193(a)-(d) of the BIA, an appellant must seek leave to appeal under Section 193(e) of the BIA from a single judge of the Court of Appeal prior to commencing their appeal.
45. Leave to appeal is a discretionary decision and the test for leave has been articulated in a number of ways, particularly in Ontario. Justice Blair in [Business Development Bank of Canada v Pine Tree Resorts Inc.](#)¹⁷ fused two competing lines of authority into one three-part test. One of the benefits of this test is that it generally echoes the test for leave under the [CCAA](#).
46. Beginning with the overriding proposition that the exercise of granting leave to appeal under Section 193(e) is discretionary and must be exercised in a flexible and contextual way, the three factors for a court to consider are if the proposed appeal:
- (a) Is *prima facie* meritorious. This factor is the threshold for all leave to appeal motions.¹⁸ There must, at a minimum, be arguable points in favour of the appeal that create a reasonable possibility of success.¹⁹ A persuasive line of authority,

¹⁶ *Ravelston Corp., Re.* 2007 ONCA 135 at para 3.

¹⁷ *Business Development Bank of Canada v Pine Tree Resorts Inc.*, 2013 ONCA 282, at para 29.

¹⁸ *Kaiser, Re, 2011 CarswellOnt 12822 (Ont. C.A. [In Chambers])*, at para 18 and *Echino v Munro, 2014 CarswellAlta 2223 (Alta. C.A.) (Echino)*, at para 11.

¹⁹ *Lechcier-Kimel, Re, 2011 CarswellOnt 10144 (Ont. C.A. [In Chambers])*, at para 9.

however, requires that the proposed appellant demonstrate a real chance of success considering the entire context of the appeal, including the standard of review.²⁰

- (b) Raises an issue of general importance to insolvency practice or the administration of justice generally. This factor incorporates two different concepts and is where the two older tests for leave fused. The two alternate factors are: (i) whether the case will be of significant precedential value in insolvency proceedings generally; or (ii) whether there is something in the judgement that is contrary to law, is an abuse of power or other obvious error causing prejudice that, for the sake of the administration of justice requires that the appeal be heard. This is a much more case-specific factor. However, unless the appeal grounds reach to the level of a violation of the administration of justice, purely factual and case-specific issues should not be relitigated on appeal.²¹
- (c) Will unduly hinder the progress of the specific insolvency proceeding in which it is raised.²²

- 47. Other than the requirement that the proposed appeal is *prima facie* meritorious, the test is flexible and does not operate as a strict checklist. Instead, the factors are weighed and balanced, keeping in mind the legislative intent to ensure insolvency appeals proceed sparingly.
- 48. The Appellant does not meet the well-established test for granting leave to appeal, such that leave ought to be denied.

The proposed notice of appeal does not disclose a *prima facie* meritorious appeal

- 49. In looking at the first prong of the test, it has been held that proposed appeals that are *prima facie* meritorious include those in which the judgement or order under attack: (i) appears to be contrary to law; (ii) amounts to an abuse of judicial power; or (iii) involves an obvious

²⁰ *Can*Sport Incorporated v. HarbourEdge Mortgage Investment Corporation*, 2022 CarswellNS 43 (N.S.C.A.), at paras 17 – 21.

²¹ *Farm Credit Canada v. Gidda*, 2015 CarswellBC 1414 (BCCA), at para 18.

²² *KingSett Mortgage Corporation v. 30 Roe Investments Corp.*, 2022 ONCA 479 [“*KingSett*”] at para 26.

error causing prejudice for which there is no remedy. The proposed appeal must raise arguments that provide good reason to doubt the Application Judge's decision²³. Here, the notice of appeal does not disclose any such *prima facie* meritorious appeal.

50. The Debtors allege that the Application Judge relied on a confidential brief that had been compiled by the Bank. It is clear, however, from the Reasons that the Application judge did not review the confidential brief, nor did he place any reliance on its existence.²⁴ Instead, the Application Judge merely relied on the statement in the Bank's affidavit material that there had been unusual and suspicious account activity.²⁵
51. The Debtors allege that the Application Judge made an overriding and palpable error of mixed fact and law by concluding that it was just and convenient to appoint a receiver. The Reasons, however, disclose that the Application Judge properly instructed himself as to the applicable law regarding the appointment of a receiver²⁶ and then fully and fairly considered all relevant factors in granting the receivership order, including all the objections raised by the Appellant. The Application Judge specifically noted that the Debtors had contractually agreed to the appointment of a receiver²⁷. The Reasons are clear, concise, and responsive to the issues presented.
52. In respect of the "reasonable alternatives" advocated for by the Debtors, the Application Judge correctly found as follows:

35. In short and having considered the commitment letter notwithstanding the manner and timing of its filing, it does not get the Respondents where they need to be. The commitment is highly conditional, and even if the conditions were met, it does not provide for funding until January next year. It simply does not answer the problem, let alone do so in any timely way.

36. I am satisfied that, considering all of the relevant factors in the circumstances of this case, that the appointment of a receiver is

²³ *DEL Equipment Inc. (Re)*, 2020 ONCA 555 at para 15.

²⁴ Indeed, the Debtor's notice of motion concedes at ground number 1 that the confidential brief was not put before the Application Judge, so it is difficult to conceive of how he could have relied on it.

²⁵ Reasons at para 22.

²⁶ Reasons at paras 7 – 11.

²⁷ Reasons at para 36.

appropriate. Not only have the parties contractually agreed the appointment of a receiver in an event of default, which has clearly occurred here, but I am satisfied that it would otherwise be appropriate in any event.²⁸

53. Further, the Application Judge made no reviewable error in concluding as follows:

39. There is considerable uncertainty about the status and amount of possibly competing claims. There is uncertainty about whether the value of the Property, even if accurate as reflected in the appraisal report, would be sufficient to pay out all claims. The fact that the mortgage is currently registered in the amount of \$6 million (in addition to the security of RBC) suggests that there may not be a material surplus, if indeed there is any at all.

40. A receivership will allow for the orderly exploration, investigation and analysis of those claims, and the available assets, all in circumstances where potential chaos of competing claims, and the ensuing expensive litigation, can be avoided or minimized. It will also allow for the avoidance of further chaos and an analysis of the receivables and payables of the Debtors.²⁹

54. As in this court's decision in *KingSett*, while the Debtors do not agree with how the Application Judge considered the relevant factors relevant to the decision of whether or not to appoint the Receiver, his decision was not unreasonable given the defaults of the debtors and their inability to cure the defaults.³⁰

55. The Debtors have not raised any arguments that provide good reason to doubt the Application Judge's decision.

No general importance to the insolvency practice

56. The proposed appeal does not raise an issue of general importance to the insolvency practice or to the administration of justice as a whole. There are no legal principles in dispute. Rather, the proposed appeal is driven by the relationship between the Appellants,

²⁸ Reasons at paras 35 – 36.

²⁹ Reasons at paras 39 – 40.

³⁰ *KingSett*, supra note 15, at para 34.

as debtors, and the Respondent, as lender and, as such, the proposed appeal is highly fact specific.

57. The Application Judge did not incorrectly apply Section 101 of the CJA, as alleged by the Debtors. Time and time again our courts have found that Section 101 of the CJA may be relied on as authority to make a final order appointing a receiver. For example, Morawetz J. (as he then was), relying on authority from this court, held in *Business Development Bank of Canada v 2197333 Ontario Inc.* that both Section 101 of the CJA and Section 243 of the BIA provide that the court may appoint a receiver if it considers it to be just or convenient to do so.³¹

The Appeal would unduly hinder the progress of the administration of the receivership

58. Finally, the proposed appeal would unduly hinder the progress of the administration of the receivership. By granting leave and triggering the automatic stay contained in Section 195 of the BIA, this would forcibly halt the Receiver from exercising its powers and authority, as previously granted through the Receivership Order, to market and sell the Property. This delay would not only obstruct the Receiver's ability to fulfil its obligations but could lead to potential erosion of value of the collateral, negatively impacting stakeholders. In effect, this would be counterproductive, hampering the process and impeding the equitable distribution of assets.

PART V – ORDER SOUGHT

59. The Respondent requests the following relief:
- (a) An order dismissing the Debtors' request for leave to appeal the Receivership Order; and
 - (b) Costs of this motion on a full recovery basis.

³¹ *Business Development Bank of Canada v 2197333 Ontario Inc.* 2012 ONSC 965 at para 14. See also *Potentia Renewables Inc. v Deltro Electric Ltd.*, 2018 ONSC 3437 at para 44; affirmed 2019 ONCA 779 at paras 14-15 and 18.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of December, 2023

Roger Jaipargas and Doug Smith
Counsel for Royal Bank of Canada

SCHEDULE “A”

LIST OF AUTHORITIES

1. [Marchant Realty Partners Inc. v 2407553 Ontario Inc.](#), 2021 ONCA 375.
2. [Nortel Networks Corp.](#), (Re), 2016 ONCA 332.
3. [Essar Steel Algoma Inc.](#), (Re), 2017 ONCA 478.
4. [Stomp Pork Farm Ltd.](#), (Re), 2008 SKCA 73.
5. [Mundo Media Ltd.](#), (Re), 2022 ONCA 607.
6. [Stelco Inc.](#), Re, 2005 CarswellOnt 1188, [2005] O.J. No. 1171 (Ont. C.A.).
7. [Potential Renewables Inc. v Deltro Electric Ltd.](#), 2019 ONCA 779.
8. [Ravelston Corp.](#), (Re), 2007 ONCA 135.
9. [Business Development Bank of Canada v Pine Tree Resorts Inc.](#), 2013 ONCA 282.
10. [Kaiser](#), (Re), 2011 ONCA 713.
11. [Echino v Munro](#), 2014 ABCA 422.
12. [Lechcier-Kimel](#) (Re), 2011 ONCA 590.
13. [Can*Sport Incorporated v HarbourEdge Mortgage Investment Corporation](#), 2022 NSCA 8.
14. [Farm Credit Canada v Gidda](#), 2015 BCCA 236.
15. [KingSett Mortgage Corporation v 30 Roe Investments Corp.](#), 2022 ONCA 479.
16. [DEL Equipment Inc. \(Re\)](#), 2020 ONCA 555.
17. [Business Development Bank of Canada v 2197333 Ontario Inc.](#), 2012 ONSC 965.

LEGISLATION

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

Court of Appeal

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

- (a) if the point at issue involves future rights;
- (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- (c) if the property involved in the appeal exceeds in value ten thousand dollars;
- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- (e) in any other case by leave of a judge of the Court of Appeal.

Rule 31

31(1) Borrowing powers with permission of court

With the permission of the court, an interim receiver, a receiver within the meaning of subsection 243(2) or a trustee may make necessary or advisable advances, incur obligations, borrow money and give security on the debtor's property in any amount, on any terms and on any property that may be authorized by the court and those advances, obligations and money borrowed must be repaid out of the debtor's property in priority to the creditors' claims.

31(2) Security under *Bank Act*

For the purpose of giving security under Section 427 of the *Bank Act*, the interim receiver, receiver or trustee, when carrying on the business of the bankrupt, is deemed to be a person engaged in the class of business previously carried on by the bankrupt.

31(3) Limit of obligations and carrying on of business

The creditors or inspectors may by resolution limit the amount of the obligations that may be incurred, the advances that may be made or moneys that may be borrowed by the trustee and may limit the period of time during which the business of the bankrupt may be carried on by the trustee.

31(4) Debts deemed to be debts of estate

All debts incurred and credit received in carrying on the business of a bankrupt are deemed to be debts incurred and credit received by the estate of the bankrupt.

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

Motion for Leave to Appeal

Notice of Motion for Leave

61.03 (1) Where an appeal to the Divisional Court requires the leave of that court, the notice of motion for leave shall,

- (a) state that the motion will be heard on a date to be fixed by the Registrar;
- (b) be served within 15 days after the making of the order or decision from which leave to appeal is sought, unless a statute provides otherwise; and
- (c) be filed with proof of service in the office of the Registrar, within five days after service.

R.R.O. 1990, Reg. 194, r. 61.03 (1); O. Reg. 61/96, s. 5 (2); O. Reg. 14/04, s. 29 (1).

CERTIFICATE OF ESTIMATED TIME FOR ARGUMENT

Counsel for RBC estimates that 1 hour will be required for its argument, including reply.

ROYAL BANK OF CANADA

- and -

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

Respondent

Moving Party

COURT APPEAL FOR ONTARIO

FACTUM OF THE RESPONDENT

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