

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**BETWEEN:**

DUCA FINANCIAL SERVICES CREDIT UNION LTD.

Applicant

-and-

1725859 ONTARIO INC., 1941275 ONTARIO LTD.,  
and 1941276 ONTARIO INC.

Respondents

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**FACTUM OF THE APPLICANT, DUCA FINANCIAL SERVICES CREDIT UNION LTD.  
(Application Returnable October 6, 2021)**

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September 24, 2021

**HARRISON PENZA LLP**  
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TO: Service List

Court File No. CV-21-00668237-00CL

**ONTARIO  
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**PART I – THE MOTION**

The Applicant, DUCA Financial Services Credit Union Ltd. (“**DUCA**” or the “**Applicant**”) seeks the following Order, substantially in the form attached as Schedule “A” (the “**Appointment Order**”) to the Notice of Application:

- a) Appointing msi Spergel inc. as Receiver (“**Spergel**” or the “**Receiver**”), without security, of all of the assets, undertakings and properties of the Respondents, 1725859 Ontario Inc. (“**859**”), 1941275 Ontario Ltd. (“**275**”), and 1941276 Ontario Inc. (“**276**”) (collectively, the “**Debtors**”) acquired for, or used in relation to a business or businesses carried on by the Debtors, and of the real property described at Schedule “A” to the Appointment Order (the “**Property**”);
- b) That the time for service, filing and confirming of the Notice of Application and the Application Record be abridged and validated so that this application is properly returnable today and dispensing with further service thereof; and,

c) Such further and other relief as to this Honourable Court may seem just.

### The Position of DUCA

1. It is DUCA's position that the present circumstances are an appropriate case for the appointment of the Receiver, including the following (all capitalized terms as defined herein):
  - a) DUCA is a secured creditor of the Debtors pursuant to the Mortgages and the GSA;
  - b) The Debtors are in Default of the terms of the Financing, as a result of, *inter alia*, the subsequent encumbrances registered on title to the Real Properties, and enforcement actions in relation to same and the Property Tax Arrears;
  - c) The Debtors have failed to cure the Defaults, and the Demands issued by DUCA have expired;
  - d) The Mortgage Loan matured on August 30, 2021;
  - e) In the face of the expired Demands, the Debtors are insolvent. No further terms of credit nor forbearance are available to the Debtors from DUCA. It is necessary for the protection of the Debtors' estate that a Receiver be appointed;
  - f) DUCA's Security provides DUCA with the right to appoint a Receiver over all property of the Debtors, as a result of the Defaults;
  - g) The Appointment of a Receiver is necessary to manage the Debtors' property, ensure that the Property Tax Arrears are cured, and that utilities and future property taxes are kept current; and,
  - h) A Receiver will also be required to complete the orderly sale of the Real Properties, and to ensure that the proceeds of any such sale are applied to the Obligations. In

relation to any such sale, the Appointment of Receiver is also necessary to deal with the subsequent encumbrances, with any former employee(s) and with the business assets of the Debtors.

## **PART II – FACTS/OVERVIEW**

2. The Debtors, 859, 275 and 276, are companies incorporated pursuant to the laws of the Province of Ontario.

**Reference: Affidavit of Ivan Bogdanovich, sworn August 24, 2021, at para 2 and Exhibits “A” to “C” thereto (the “Bogdanovich Affidavit”).**

3. Aneel Jackson Shaukat is the sole officer and director of each of the Debtors, and is a guarantor of the Obligations of the Debtors to DUCA.

**Reference: Bogdanovich Affidavit at para 3.**

4. The Debtors are insolvent, and are currently in Default (a “**Default**”, or the “**Defaults**”) of their obligations to DUCA as a result of, *inter alia*, the following (all capitalized terms as defined below):

- a) The Debtors have granted the Subsequent Charges over the Real Properties without the knowledge or consent of DUCA, to each of 122 Ontario, Nano, and Lekhi;
- b) Lekhi, *via* the Lekhi Estate, has commenced enforcement proceedings in relation to the 275 Property, including issuance of the Lekhi Notice of Sale;
- c) The Mortgage Loan matured on August 30, 2021; and,
- d) As at July 7, 2021, there are Property Tax Arrears owing in relation to the Real Properties as follows:

- i. The sum of \$1,342.71 in relation to the 859 Property;
- ii. The sum of \$8,211.60 in relation to the 275 Property; and,
- iii. The sum of \$56,135.31 in relation to the 276 Property.

(collectively, the “**Property Tax Arrears**”)

(collectively, the “**Defaults**”)

**Reference: Bogdanovich Affidavit at para 4.**

859 Property

5. The Debtor, 859, is the owner of real property municipally known as 629 King Street W, Ste 217, Toronto, Ontario, comprising a residential condominium unit, and legally described as:

- a) UNIT 17, LEVEL 2, TORONTO STANDARD CONDOMINIUM PLAN NO. 2534 AND ITS APPURTENANT INTEREST; SUBJECT TO AND TOGETHER WITH EASEMENTS AS SET OUT IN SCHEDULE A AS IN AT4291912; CITY OF TORONTO (PIN 76534-0030 LT) (the “**859 Property**”)

**Reference: Bogdanovich Affidavit, at paras 6 and 7 and Exhibit “D” thereto.**

6. DUCA holds a first-priority charge over the 859 Property, as evidenced by the 859 Mortgage (as defined below).

**Reference: Bogdanovich Affidavit at para 8.**

7. There are two subsequent mortgagees of the 859 Property, being 1226460 Ontario Inc. (“**122 Ontario**”) and Domenic Nano (“**Nano**”), which charges were granted without the knowledge or consent of DUCA.

**Reference: Bogdanovich Affidavit at para 9.**

8. There are Property Tax Arrears owing in relation to the 859 Property as follows, as at July 7, 2021:

- a) For tax year 2021, the sum of \$27.25; and,
- b) For tax year 2020, the sum of \$1,315.46.

**Reference: Bogdanovich Affidavit, at para 10 and Exhibit "E" thereto.**

275 Property

9. The Debtor, 275 is the owner of real property municipally known as 3 Glenmanor Drive, Brampton, Ontario, a residential property, and legally described as:

- a) PCL 4-1, SEC 43M753 ; LT 4, PL 43M753 ; BRAMPTON (PIN 14244-0287 LT) (the "**275 Property**").

**Reference: Bogdanovich Affidavit, at paras 11 and 12 and Exhibit "F" thereto.**

10. DUCA holds a first-priority charge over the 275 Property, as evidenced by the 275 Mortgage (as defined below).

**Reference: Bogdanovich Affidavit at para 13.**

11. There are three subsequent mortgagees of the 275 Property, being 122 Ontario, Nano, and Vijay Lekhi ("**Lekhi**"), which charges were granted without the knowledge or consent of DUCA.

**Reference: Bogdanovich Affidavit at para 14.**

12. Lekhi is deceased, and is represented by Amit Lekhi, as Estate Trustee for the Estate of Vijay Lekhi (the “**Lekhi Estate**”). The Lekhi Estate has commenced enforcement procedures as against the 275 Property, and did issue statutory notices to 275, including a Notice of Sale Under Mortgage/Charge to 275 (the “**Lekhi Notice of Sale**”).

**Reference: Bogdanovich Affidavit, at para 15 and Exhibit “G” thereto.**

13. DUCA’s counsel is advised by counsel to the Lekhi Estate, and DUCA has confirmed through a litigation search that the Lekhi Estate has commenced an action naming 275 as a Defendant in the Ontario Superior Court at Brampton bearing Court File CV21000020620000.

**Reference: Bogdanovich Affidavit at para 16.**

14. There are Property Tax Arrears owing in relation to the 275 Property as follows, as at July 7, 2021:

- a) For tax year 2021, the sum of \$5,379.37; and,
- b) For tax year 2020, the sum of \$2,832.23.

**Reference: Bogdanovich Affidavit, at para 17 and Exhibit “H” thereto.**

#### 276 Property

15. The Debtor, 276, is the owner of real property municipally described as 50 Queen Street East, Brampton, Ontario, a commercial property, and legally described as:

- a) PT LTS 4 & 5, E OF HURONTARIO ST & N OF QUEEN ST, PL BR2, PT 1, 43R6799 ; BRAMPTON (PIN 14124-0046 LT) (the “**276 Property**”, collectively with the 859 Property and the 275 Property, the “**Real Properties**”)

**Reference: Bogdanovich Affidavit, at paras 18 and 19 and Exhibit “I” thereto.**

16. DUCA holds a first-priority charge over the 276 Property, as evidenced by the 276 Mortgage (as defined below).

**Reference: Bogdanovich Affidavit at para 20.**

17. The 276 Property comprises a commercial building located in the City of Brampton, Ontario.

**Reference: Bogdanovich Affidavit at para 19.**

18. There are two subsequent mortgagees of the 276 Property, being 122 Ontario and Nano, which charges were granted without the knowledge or consent of DUCA.

**Reference: Bogdanovich Affidavit at para 21.**

19. There are Property Tax Arrears owing in relation to the 276 Property as follows, as at July 7, 2021:

a) For tax year 2021, the sum of \$27,009.75; and,

b) For tax year 2020, the sum of \$29,125.56.

**Reference: Bogdanovich Affidavit, at para 22 and Exhibit “J” thereto.**

### **The Obligations to DUCA and Security Held**

20. As of August 23, 2021, the Debtors were indebted to DUCA in the amount of \$2,826,327.15<sup>1</sup>, plus accruing interest and the DUCA’s continuing costs of enforcement (the “**Obligations**”), in respect of certain financing advanced to the Debtors pursuant to the terms of the

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<sup>1</sup> \$2,818,782.71 (principal), \$5,933.14 (interest), \$1,611.30 (paid legal costs).



Commitment Letter dated June 6, 2018, as amended by way of Amendment to Commitment dated June 22, 2018 (collectively, the “**Letter Agreement**”).

**Reference: Bogdanovich Affidavit, at para 23 and Exhibit “K” thereto.**

21. The credit facility established by the Letter Agreement, upon which funds were advanced by DUCA to the Debtors, is:

a) Mortgage Loan: in the sum of \$2,900,000 (the “**Financing**”).

**Reference: Bogdanovich Affidavit, at para 24.**

22. The Mortgage Loan matured on August 30, 2021.

**Reference: Bogdanovich Affidavit, at para 25.**

23. The Obligations are secured by, *inter alia*, the following:

- a. General Security Agreement from the Debtors dated June 22, 2018 (the “**GSA**”);
- b. Collateral Charge/Mortgage from 859 in the principal sum of \$2,900,000 and receipted as instrument number AT4946902 on August 30, 2018 over the 859 Property (the “**859 Mortgage**”), as governed by a Schedule – Additional Provisions (Commercial Mortgage Loans) attached thereto (the “**Charge Provisions**”);
- c. Assignment of Rents from 859 dated June 22, 2018, and receipted as instrument number AT4946928 on August 30, 2018 over the 859 Property (the “**859 Rent Assignment**”);
- d. Assignment of Condominium Voting Rights dated June 22, 2018 from 859 to DUCA with regard to the 859 Property;

- e. Collateral Charge/Mortgage from 275 and 276 in the principal sum of \$2,900,000 and received as instrument number PR3372600 on August 30, 2018 over the 275 and 276 Properties (the “**275 Mortgage**” and the “**276 Mortgage**”, and collectively, with the 859 Mortgage, the “**Mortgages**”), as governed by the Charge Provisions;
  - f. Assignment of Rents from 275 and 276 dated June 22, 2018, and received as instrument number PR3372611 on August 30, 2018 over the 275 and 276 Properties (collectively with the 859 Rent Assignment, the “**Rent Assignments**”);
- (collectively, the “**Security**”)

**Reference: Bogdanovich Affidavit, at para 26 and Exhibits “L” to “Q” thereto.**

24. The Financing is governed by, *inter alia*, the terms and conditions contained within the Letter Agreement, which include the following:

- i. That the Debtors would pay, when due, all taxes levied against the Real Properties;
- ii. That the Debtors would pay, when due, all amounts owing to any government authority which, if unpaid, would give such authority recourse for such amounts ranking in priority to the Security;
- iii. That the Debtors would not register any encumbrances on the Real Properties aside from the Mortgages;
- iv. That DUCA would have the right to terminate the Letter Agreement and seek full repayment of the Obligations on occurrence of any of the following:
  - (i) In the sole opinion of DUCA, a material adverse change in the condition

of any of the Real Properties, the Borrowers the actual or anticipated revenues from any of the Real Properties;

(ii) The Debtors become subject to any insolvency proceedings.

v. That the non-compliance with any terms of the Letter Agreement constituted a Default by the Debtors thereunder, and that on such Default, DUCA was entitled, *inter alia*, to:

(i) Appoint a Receiver over the Real Properties.

**Reference: Bogdanovich Affidavit, at para 27.**

#### **DUCA's Security Interest in the Real Properties**

25. DUCA's interest in the Real Properties is secured by the respective Mortgages, which are governed by identical Charge Provisions. Each of the Mortgages constitute first charges on the respective Real Properties.

**Reference: Bogdanovich Affidavit, at para 28.**

26. The subsequent charges registered on title to each of the Real Properties, are subordinate to the Mortgages held by DUCA (collectively, the "**Subsequent Charges**").

**Reference: Bogdanovich Affidavit, at para 29.**

#### **DUCA's Security Interest in the Personal Property of the Debtors**

27. The GSA secures all personal property of the Debtors. DUCA has registered Financing Statements as against the Debtors pursuant to the provisions of the *Personal Property*

*Security Act* (Ontario) to perfect its security interest in the personal property of the Debtors secured under the GSA.

**Reference: Bogdanovich Affidavit, at paras 32 to 33.**

28. The Personal Property Security Registration System Search Results for the Debtors confirm that DUCA has a perfected security interest in the personal property of each of the Debtors secured by the GSA, and there are no other registrations by secured creditors under the PPSA.

**Reference: Bogdanovich Affidavit, at paras 34 to 35 and Exhibits “R” to “T” thereto.**

### **Defaults, Default Letters and Demands**

29. The Debtors are in Default of the Financing as set out above.

**Reference: Bogdanovich Affidavit, at para 36.**

30. By way of letter dated May 31, 2021 (the “**Default Letter**”), DUCA did advise the Debtors of certain of the Defaults and stated that absent payment in full of the Obligations within thirty (30) days, DUCA would commence enforcement proceedings as against the Debtors.

**Reference: Bogdanovich Affidavit, at para 37 and Exhibit “U” thereto.**

31. The Debtors failed to repay the Obligations within thirty days of the Default Letter, which constitutes a further Default under the Financing.

**Reference: Bogdanovich Affidavit, at para 38.**

32. As a result of the continuing Defaults, DUCA did deliver to each of the Debtors a demand for payment and a Notice of Intention to Enforce Security pursuant to section 244(1) of the

*Bankruptcy and Insolvency Act* (“**BIA**”), each dated July 16, 2021 (collectively, the “**Demands**”).

**Reference: Bogdanovich Affidavit, at para 39 and Exhibit “V” thereto.**

33. All statutory notice periods under the Demands have expired, and the Debtors have failed to cure the Defaults.

**Reference: Bogdanovich Affidavit, at para 40.**

### **The Appointment of a Receiver**

34. The Obligations due pursuant to the Demands have not been paid. The Debtors have failed to cure the Defaults. The ten (10) day period under section 244 of the BIA has expired. DUCA is in a position to appoint a receiver over the assets and property of the Debtors as secured by DUCA’s Security, pursuant to section 243 of the BIA.

**Reference: Bogdanovich Affidavit, at paras 41 and 42.**

### **The Real Properties**

35. The Charge Provisions and the Letter Agreement grant DUCA the power to appoint a Receiver over the Real Properties, as a result of the Defaults.

**Reference: Bogdanovich Affidavit, at paras 43 and 44.**

### **The Personal Property**

36. The GSA grants DUCA the right to appoint a Receiver over all personal property of the Debtors secured by the GSA, as a result of the Defaults of the Debtors under the Financing.

**Reference: Bogdanovich Affidavit, at para 46.**

37. Spergel has consented to act as Receiver, should this Honourable Court so appoint it.

**Reference: Bogdanovich Affidavit, at para 56.**

### **PART III – ISSUES, LAW AND ARGUMENT**

#### **Issues**

38. The issues before this Court, and addressed below, are:

- a) Does this Court have jurisdiction to appoint the Receiver?
- b) Should this Court appoint the Receiver?
- c) If this Court decides to appoint the Receiver, then are the terms of the Receivership Order appropriate in the circumstances of this receivership?

#### **(a) This Court has jurisdiction to appoint the Receiver**

39. Subsection 243(5) of the BIA provides that an application under subsection 243(1) of the BIA is to be filed in a court having jurisdiction in the judicial district of the “locality of the debtor”, which is defined in section 2 of the BIA.

[BIA, s. 2, Schedule “B”;](#)

[BIA s. 243\(5\), Schedule “B”.](#)

40. The Debtors are Ontario corporations with their registered head offices in Ontario. The businesses carried on by the Debtors that are subject to the proposed receivership are located in Ontario. The locality of the Debtors is, therefore, Ontario, and this application is properly brought before the Ontario Superior Court of Justice (Commercial List).

41. Subsection 243(4) of the BIA provides that only a trustee, as defined in section 2 of the BIA, may be appointed under subsection 234(1) of the BIA.

[BIA, s. 2, Schedule “B”;](#) [BIA, s. 243\(4\), Schedule “B”.](#)

42. Spergel is a trustee as defined in the BIA, and therefore, satisfies the requirements for appointment pursuant to the BIA.

**(b) This Court should appoint the Receiver**

43. Section 244(1) requires that a secured creditor provide an insolvent person with the requisite advance notice of its intention to enforce security.

[BIA, s. 244\(1\), Schedule “B”.](#)

44. The Applicant sent the Demands together with its Notice of Intention to Enforce Security pursuant to such section of the BIA, to the Debtors on July 16, 2021, and this application is being heard on a date that is after the date on which any applicable notice periods expired.

45. Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended (the “CJA”) provides for the appointment of a receiver by this Court where it is “just and convenient”. Section 243(1) of the BIA also provides that, on an application by a secured creditor, this Court may appoint a receiver if it considers it to be just and convenient to do so to: (a) take possession over the assets of an insolvent person; (b) exercise any control that the Court considers advisable over the property and business; or (c) take any other action that the Court considers advisable.

[CJA, s. 101, Schedule “B”;](#)

[BIA, s. 243\(1\), Schedule “B”.](#)

46. Where the loan agreement and related transaction documents contemplate the appointment of a receiver, this Court may have regard to the principles summarized by Justice Newbould in *RMB Australia Holdings Limited v. Seafield Resources Ltd.*:

28 In determining whether it is “just or convenient” to appoint a receiver under either the BIA or CJA, Blair J., as he then was, in *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) stated that in deciding whether the appointment of a receiver was just or convenient, 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, which includes the rights of the secured creditor under its security. He also referred to the relief being less extraordinary if a security instrument provided for the appointment of a receiver:

While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver — and even contemplates, as this one does, the secured creditor seeking a court appointed receiver — and where the circumstances of default justify the appointment of a private receiver, the “extraordinary” nature of the remedy sought is less essential to the inquiry. Rather, the “just or convenient” question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not.

29 See also *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 (Ont. S.C.J. [Commercial List]), in which Morawetz J., as he then was, stated:

...while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635 at paras. 50 and 75 (B.C. S.C. [In Chambers]); *Freure Village*, supra, at para. 12; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498 at para. 18 (S.C.J. [Commercial List]); *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007, [2011] O.J. No. 671 at para. 27 (S.C.J. [Commercial List]).

[\*RMB Australia Holdings Limited v. Seafield Resources Ltd.\*, 2014 ONSC 5205 \(Commercial List\), paras. 28-29.](#)

47. The existence of a contractual right to appoint a receiver in the loan agreement and related transaction documents is key and transforms the appointment of a receiver from an



extraordinary remedy to relief that is granted more as a matter of course, especially in cases in which the circumstances further support such an appointment. That is the case here.

48. This relief becomes even less extraordinary when dealing with a default under a mortgage.

[\*BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.\*, 2020 ONSC 1953 at paragraph 44.](#)

49. This even further lowered burden in cases in which there has been a default by a mortgagor is described by Justice Farley in *Confederation Life Insurance Co. v. Double Y Holdings Inc.*:

20 I must also note that there appears to be a major distinction between those case where the borrower is in default and those where it is not (or a receiver is being asked for in say a shareholder dispute - e.g. *Goldtex Mines Ltd. v. Nevill* (1974), 7 O.R. (2d) 216 (Ont. C.A.)). See *Receiverships, Bennet* (1985), at p.91 referring to: "In many cases, a security holder whose instrument charges all or substantially all of the debtor's property will request a court - appointed receivership if the debtor is in default". (In this case the plaintiffs have a very strong case - not only are the loans in default, they have matured). See also *Kerr on Receiverships* (1983), 16th ed. at p.5:

There are two main classes of cases in which appointment is made: (1) to enable persons who possess rights over property to obtain the benefit of those rights and to preserve the property, pending realization, where ordinary legal remedies are defective and (2) to preserve property from some danger which threatens it.

#### Appointment to Enforce Rights

In the first class of cases are included those in which the court appoints a receiver at the instance of a mortgagee whose principal is immediately payable or whose interest is in arrear. ... In such cases the appointment is made as a matter of course as soon as the applicant's right is established and it is unnecessary to allege any danger to the property.

[\*Confederation Life Insurance Co. v. Double Y Holdings Inc.\*, 1991 CarswellOnt 1511 \(Ont. S.C.J. \(Commercial List\)\) \["Confederation Life"\], para. 20.](#)

50. In the present case, the Debtors are in default under the loan agreement and related transaction documents and the mortgage is immediately payable, meaning that this is the first class of cases referred in *Confederation Life*. In this sort of case, allegations of danger

to the property are not necessary, though such allegations do exist in this case, as described in the Bogdanovich Affidavit.

[Confederation Life, para. 20.](#)

51. Thus, with the Applicant's contractual entitlement to appoint a receiver and the existence of a mortgage default, the appointment of a receiver is not extraordinary relief, and the burden has been lowered further. With this lower burden, the following additional "just or convenient" factors identified by Justice Farley in *Confederation Life* may be considered:

- a) The lenders' security is at risk of deteriorating;
- b) There is need to stabilize and preserve the Debtors' business;
- c) Loss of confidence in the Debtors' management; and,
- d) Positions and interests of other creditors.

[Confederation Life, paras. 19-24.](#)

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

[Swiss Bank Corporation \(Canada\) v. Odyssey Industries Incorporated \(1995\), 30 C.B.R. \(3d\) 49 at paragraph 28.](#)

53. When the above *Confederation Life* factors are applied to this case, the Applicant submits that the burden to appoint a receiver has been met and that such appointment is just and convenient in the circumstances:

- a) ***The Debtors contractually agreed to the appointment of a receiver.*** The loan agreement and the related transaction documents among the Applicant and the

Debtors expressly entitle the Applicant to appoint a receiver under certain circumstances, including the present circumstances. The Applicant now exercises this entitlement, subject to this Court's authority.

- b) ***The loan agreement is in default.*** As set out above, events of default have occurred and are continuing under the loan agreement and the related transaction documents. The Applicant has demanded on the indebtedness. The Applicant provided the Debtors with statutory notice of their intention to enforce security, and the applicable notice periods have elapsed.
- c) ***The lenders' security is at risk of deteriorating.*** DUCA is concerned the Debtors do not have the working capital needed to repair or maintain the Real Properties, evident by the incurring of further indebtedness. As a result, the realizable value of the Property would continue to diminish.
- d) ***The Debtors' business needs to be stabilized and preserved.*** The Debtors' liquidity crisis will continue to worsen in the absence of action. A receiver will be able to take the necessary steps to preserve the Property, including conducting an orderly sale process that will generate recoveries for creditors. If the Debtors' business experiences further disarray, there will be further negative consequences.
- e) ***The Applicant has lost confidence in the Debtors' management.*** The Applicant has made efforts to explore alternatives to a receivership, without success. The Applicant has justifiably lost confidence in the management of the Debtors due to the events described in the Bogdanovich Affidavit, including the issuing of the Lekhi Notice of Sale, the Property Tax Arrears and the Subsequent Charges.

- f) ***Position and interests of other Creditors.*** The Applicant is not the only creditor of the Debtors. As at the date of this Factum, no creditor has opposed the receivership application. The Receiver will be able to properly and equitably deal with the interests of creditors other than the Applicant. A receivership provides parties with an effective forum in which to deal with any issues, including any competing claims, that may arise in respect of the Debtors and the Property.

54. As at the date of this Factum, the Applicant is not aware of any restructuring efforts by the Debtors that stand any reasonable chance of success.

**(c) The Terms of the Receivership Order are Appropriate**

55. The terms of the proposed Receivership Order are substantially the same as the terms of the Commercial List's model receivership order, and the modifications to same are indicated in the blacklined copy provided.

**Blackline of the draft Order against the Model Receivership Order; Application Record, Tab 1, Schedule "A-2".**

**PART IV – ORDER REQUESTED**

56. For the reasons set forth herein and in the Application Record, it is respectfully submitted that the appointment of a receiver is just and convenient and is necessary for the protection of the estate of the Debtors and the interests of DUCA and other stakeholders.

57. The Applicant respectfully requests that this Honourable Court grant the Appointment Order substantially in the form attached as Schedule "A" to the Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of September, 2021

A handwritten signature in black ink, appearing to be 'TH' or similar initials, written in a cursive style.

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Solicitors for the Applicant,  
DUCA Financial Services Credit Union Ltd.

**SCHEDULE "A"****LIST OF AUTHORITIES**

1. *RMB Australia Holdings Limited v. Seafield Resources Ltd.*, 2014 ONSC 5205 (Commercial List);
2. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953;
3. *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 (Ont. S.C.J. (Commercial List));
4. *Swiss Bank Corporation (Canada) v. Odyssey Industries Incorporated* (1995), 30 C.B.R. (3d) 49.

## SCHEDULE “B”

### TEXT OF STATUTES, REGULATIONS & BY-LAWS

#### Bankruptcy and Insolvency Act, RSC 1985, c B-3

##### **Court may appoint receiver**

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
- (c) take any other action that the court considers advisable.

##### **Restriction on appointment of receiver**

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

##### **Definition of receiver**

(2) Subject to subsections (3) and (4), in this Part, receiver means a person who

- (f) is appointed under subsection (1); or
- (g) 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) 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.

#### *Advance notice*

244 (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, RSO 1990, c. C-43.****Injunctions and receivers**

101. (1) In the Superior Court of Justice, an interlocutory 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.

DUCA FINANCIAL SERVICES CREDIT UNION LTD.

v.

1725859 ONTARIO INC., et al.

Applicant

Respondents

**Court File No. CV-21-00668237-00CL**

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

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