

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

ROYAL BANK OF CANADA

Applicant

- and -

ZSD ELECTRIC INC.

Respondent

APPLICATION UNDER s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C-43 and
s. 243 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, ss. 67(1)(a) and (e) of the
Personal Property Security Act, R.S.O. 1990, c. P.10 and
Rules 3 and 14.05(2), (3) (g) and (h) of the *Rules of Civil Procedure*

FACTUM OF THE APPLICANT

(Receivership Application)

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PART I – OVERVIEW

1. This application by Royal Bank of Canada (the “**Bank**”) is for the appointment of msi Spergel inc. (“**Spergel**”) as Court-appointed receiver (the “**Receiver**”) of the assets, undertakings, and properties of the respondent, ZSD Electric Inc. (the “**Debtor**”). The Bank is the Debtor’s primary secured creditor pursuant to the Credit Facilities and the Security (as these terms are defined below). For the following reasons, the Bank submits that its Security is in jeopardy and the appointment of a receiver is necessary to protect the interests of the Bank and other stakeholders:

- a. **The Debtor is insolvent, has significant arrears in respect of Priority Payables (as defined below) and the Bank’s position is deteriorating.** The Debtor is indebted to the Bank in the amount of \$908,412.79 as of May 6, 2025 (exclusive of further accrued interest and costs), and the Credit Facilities have been in arrears since April 2025. The Bank issued demands for repayment of the full indebtedness owing, which expired on September 16, 2024. As of April 1, 2025, the Debtor reported having HST arrears of \$132,453.49 and payroll arrears of \$4,538.80 (the “**Priority Payables**”). The Debtor’s failure to keep Priority Payables current is imperiling the Bank’s Security given that they may be payable in priority to the Security held by the Bank. The Debtor has also ceased carrying out its day-to-day banking with the Bank, which constitutes a breach of the terms of the Credit Facilities and the Security, and puts the Debtor’s deposits, which are subject to the Bank’s Security, beyond the reach of the Bank;
- b. **The Debtor refused to enter into a forbearance agreement, and has no repayment, refinancing or restructuring plan such that there is no other exit scenario available to the Bank.** Over the course of September 2024 through January 2025, counsel for the parties canvassed the possibility of the parties entering into a forbearance agreement to accommodate the Debtor while it sought alternate financing in order to repay its indebtedness to the Bank. On January 8, 2025, despite having previously confirmed that the Debtor had agreed to the Bank’s proposed forbearance terms, counsel for the Debtor confirmed that the Debtor would not be entering into a forbearance agreement. The Debtor has failed to provide any plan for refinancing or otherwise exiting the relationship with the Bank, despite being advised throughout from September 2024 to

date that the Bank wished to exit the banking relationship. The Bank has lost confidence in the Debtor and has no confidence that the Debtor is willing or able to secure alternate financing or establish any plan that will result in the Bank being promptly repaid, and that the Bank's position will not further deteriorate in the interim;

c. **The Debtor refuses to provide full financial information and reporting to the Bank.**

Pursuant to the Credit Facilities and the GSA (as defined below), the Debtor is required to provide the Bank with certain financial information and reporting. Despite repeated requests throughout late-2024 and early-2025, the Debtor failed to provide all of the information and documentation requested by the Bank in a timely manner. When the Debtor did provide some of the financial reporting, it confirmed the following which confirms that the Debtor is insolvent:

- Accounts payable of \$1,311,562.02, with \$1,041,073.56 of this amount over 90 days past due;
- Accounts receivable of only \$515,615.91, with \$158,056.94 over 90 days;
- Profit of only \$100,526.67 for the period of Nov. 2024 to Mar. 2025;
- HST arrears of \$132,453.49 and payroll arrears of \$4,538.80;
- Balance sheet as of July 31/24 show liabilities exceeding assets by \$2,483,887.91; and
- A net loss of \$849,588.97 for the 2024 fiscal year.

- d. As a result of the Debtor's various defaults, on September 6, 2024, the Bank issued formal demands for repayment of the indebtedness and a notice of intention to enforce security ("**NITES**") pursuant to s. 244 of the *Bankruptcy and Insolvency Act* ("**BIA**"). The Bank's demands and the NITES expired on September 16, 2024 and the indebtedness remains outstanding to date. The Bank's security entitles it to the appointment of a receiver in the event of default. Thus, the Bank is contractually and statutorily entitled to the appointment of a Receiver pursuant to the Credit Facilities, the Security, section 101 of the *Courts of Justice Act* ("**CJA**"), section 243 of the *BIA*, and section 67 of the *Personal Property and Security Act* R.S.O. 1990 c.P10 ("**PPSA**").

Affidavit of Yatri Vagadia sworn June 18, 2025 ("*Vagadia Affidavit*"), Application Record, Tab 2, paras. 22-42 and Exhibits P-S and Compendium of the Applicant at Tab 1.

PART II – FACTS

The Parties

2. The Bank is the primary secured creditor of the Debtor, and at all material times, the Debtor was indebted to the Bank pursuant to the Credit Facilities and the Security.

*Vagadia Affidavit, Application Record, Tab 2, paras. 3 and 5,
Compendium of the Applicant at Tab 2.*

3. The Debtor is incorporated pursuant to the laws of Ontario and operates as an electrical contractor from a premises located in Mississauga, Ontario. Dennis Zammit (“**Mr. Zammit**”) is the sole registered director and officer of the Debtor, and has also guaranteed the Debtor’s indebtedness to the Bank.

*Vagadia Affidavit, Application Record, Tab 2, para. 4, and Exhibit A,
Compendium of the Applicant at Tab 3.*

4. The Debtor is indebted to the Bank pursuant to the Credit Facilities and the Security in the amount of \$908,412.79 as of May 6, 2025 (exclusive of further accrued interests and costs incurred by the Bank).

Vagadia Affidavit, Application Record, Tab 2, para. 5, Compendium of the Applicant at Tab 4.

The Bank’s Loans and Security

5. In accordance with the terms of a credit agreement dated March 31, 2020 and June 28, 2021, the Bank granted to the Debtor an operating line of credit in the amount of \$700,000.00, a HASCAP loan in the amount of \$250,000.00 (the “**Term Loan**”), and a credit card facility in the maximum amount of \$150,000.00 (collectively, the “**Credit Facilities**”).

*Vagadia Affidavit, Application Record, Tab 2, para. 7 and Exhibit B,
Compendium of the Applicant at Tab 5.*

6. The Credit Facilities provide, among other things, that:

- a. The Debtor is required to make all payments that are required to be made pursuant to the Credit Facilities as and when due;

- b. The Debtor is required to comply with certain financial covenants and reporting requirements to the Bank, including delivering to the Bank such financial and other information and documentation that the Bank may reasonably require;
- c. All Priority Payables, including source deduction and HST remittances, are to be kept current;
- d. The Debtor is required to cooperate with the Bank to obtain copies of the Debtor's records or other information and/or to collect information from any person regarding any potential Priority Payables; and
- e. It is an event of default, entitling the Bank to cancel the Credit Facilities, demand repayment in full, and to realize on its Security if, among other things:
 - i. The Debtor fails to pay to the Bank any principal, interest or other amount as and when due;
 - ii. The Debtor, or any guarantor, fails to observe any covenant, provision, term or condition contained in the Credit Facilities or the Security;
 - iii. There is a material deterioration in the financial condition of the Debtor or any guarantor; or,
 - iv. The Debtor fails to immediately advise the Bank of any event of default.

Vagadia Affidavit, Application Record, Tab 2, para. 8 and Exhibit B, Compendium of the Applicant at Tab 6.

7. It was a condition of granting the Credit Facilities by the Bank to the Debtor that the Debtor grant the following security to the Bank (hereinafter collectively referred to as the "**Security**"):
- a. A general security agreement executed by the Debtor in favour of the Bank, dated June 23, 2015 (the "**GSA**");
 - b. The guarantee and postponement of claim of 2262525 Ontario Inc. (the "**Corporate Guarantor**") limited to the principal amount of \$455,000.00, dated June 23, 2015, and supported by a general security agreement executed by the Corporate Guarantor in favour of the Bank, dated June 23, 2015;

- c. The guarantee and postponement of claim of Mr. Zammit limited to the principal amount of \$1,200,000.00, dated May 18, 2023; and
- d. The postponements and assignments of claim of Mr. Zammit and the Corporate Guarantor dated June 23, 2015.

Vagadia Affidavit, Application Record, Tab 2, para. 9, and Exhibits C-G, Compendium of the Applicant at Tab 7.

- 8. The GSA expressly provides that the Bank is entitled to appoint a receiver in the event of default.

Vagadia Affidavit, Application Record, Tab 2, para. 10 and Exhibit C, Compendium of the Applicant at Tab 8.

- 9. The Bank's security interest granted by the GSA was perfected by registration pursuant to the PPSA on December 18, 2014. The results of the April 29, 2025 search of the PPSA registry confirm that, in addition to the Bank, there is one other secured creditor, TD Auto Finance (Canada) Inc.

Vagadia Affidavit, Application Record, Tab 2, para. 11 and Exhibit H, Compendium of the Applicant at Tab 9.

Defaults under the Credit Facilities and the Security, and Demands for Payment

- 10. The Debtor has a lengthy history of default under the terms and conditions of the Credit Facilities and the Security. As a result, on April 5, 2024, the Debtor's accounts were initially referred to the Bank's Special Loans and Advisory Services ("**SLAS**") unit because of, among other things:

- a. The Debtor's apparent cash flow difficulties, having exhausted the Credit Facilities and the non-revolvement of the line of credit;
- b. Delinquencies and excess over the prior year;
- c. The Debtor's failure or refusal to provide financial reporting to the Bank when due or requested; and
- d. The evident deterioration in the Debtor's financial condition and affairs.

Vagadia Affidavit, Application Record, Tab 2, para. 12, Compendium of the Applicant at Tab 10.

11. On April 5, 2024, the Bank confirmed with the Debtor that its accounts had been transferred to SLAS. The Bank spoke with Mr. Zammit on April 9, 2025 to confirm the foregoing and request that he provide the Bank with specific financial reporting, including among others:

- a. The Debtor's internally prepared financial statements for the period of November 1, 2023 to March 31, 2024;
- b. The Debtor's most recent aged accounts payable and receivable report;
- c. The Debtor's most recent CRA statements showing the amount owing with respect to HST, payroll source deductions and corporate HST remittances; and
- d. A 13 week forecast cash flow statement and income statement.

Vagadia Affidavit, Application Record, Tab 2, para. 13 and Exhibit I, Compendium of the Applicant at Tab 11.

12. The Debtor failed to provide the requested financial reporting as set out in the Bank's letter of June 11, 2024. The Bank was concerned about delayed financial reporting for the 2023 financial year, and the continued evidence of the deterioration in the Debtor's financial condition and affairs. As a result, the Bank was, and has been, unable to assess the Debtor's financial affairs and its risk.

Vagadia Affidavit, Application Record, Tab 2, paras. 14-18 and Exhibits J-M, Compendium of the Applicant at Tab 12.

13. One year later, on April 1, 2025, Debtor's counsel provided some of reporting requested by the Bank. By correspondence to the Debtor dated April 8, 2025, the Bank confirmed to the Debtor that the reporting provided by the Debtor confirmed the information set out in paragraph 1(c) above, which confirmed that the Debtor was insolvent.

Vagadia Affidavit, Application Record, Tab 2, para. 34 and Exhibit R, Compendium of the Applicant at Tab 13.

Defaults under the Credit Facilities and Security, and Demands for Payment

14. As a result of the foregoing and the ongoing defaults by the Debtor, the Bank issued formal demands for payment to the Debtor and guarantors. By letter dated September 6, 2024, the Bank demanded payment of the indebtedness owing by the Debtor to the Bank by September 16, 2024. The Bank further delivered to the Debtor the NITES in accordance with section 244 of the BIA.

***Vagadia Affidavit, Application Record, Tab 2, para. 19 and Exhibit N,
Compendium of the Applicant at Tab 14.***

15. As of September 4, 2024, the Debtor's aggregate indebtedness to the Bank pursuant to the Credit Facilities totaled \$851,150.64 (exclusive of further accrued interest, fees, disbursements, costs and HST).

Vagadia Affidavit, Application Record, Tab 2, para. 20, Compendium of the Applicant at Tab 15.

16. As of May 6, 2025, the Debtor's aggregate indebtedness to the Bank pursuant to the Credit Facilities totaled \$908,412.79, confirming the continued deterioration in the Bank's position, (exclusive of further accrued interest, fees, disbursements and costs) as follows:

Facility	Loan No.	Amount Outstanding	Interest
Credit Card	**** * 7643	\$1,019.67	19.99%
Converted Credit Card Term Loan	07512 69477347 009	\$149,985.47	19.99%
Auto Loan	04128 58781387 001	\$12,356.20	
HASCAP Loan	07512 69477347 002	\$27,872.29	4.00%
Royal Credit Line	07512 69477347 001	\$706,187.31	7.00%
Fees, disbursements and costs		\$10,991.85	
			Total: \$908,412.79

Vagadia Affidavit, Application Record, Tab 2, para. 26, Compendium of the Applicant at Tab 16.

17. Further, as of May 6, 2025, the above noted indebtedness is inclusive of: a motor vehicle loan, which was 54 days in arrears; the Royal Credit Line, which was overdrawn in the amount of \$6,187.31 and was 26 days in arrears; and the Term Loan, which was 31 days in arrears.

Vagadia Affidavit, Application Record, Tab 2, para. 27, Compendium of the Applicant at Tab 17.

18. The Bank has further learned that the Debtor has ceased carrying out its day-to-day banking with the Bank, given that there have been essentially no deposits to the Debtor's accounts with the Bank since, on or about March 28, 2025. This would constitute a breach of the terms of the Credit Facilities and the Security requiring that the Debtor bank with the Bank, and would put the Debtor's deposits, which are subject to the Bank's security, beyond the reach of the Bank.

Vagadia Affidavit, Application Record, Tab 2, para. 28, Compendium of the Applicant at Tab 18.

The Need to Appoint a Receiver

19. For the reasons detailed in paragraph 1 above, the Bank submits that it is just and convenient that a receiver be appointed for the protection of the Debtor's estate and for the protection of the interests of the Bank and other stakeholders.

Vagadia Affidavit, Application Record, Tab 2, paras. 36-42 and Exhibit S, Compendium of the Applicant at Tab 19.

PART III – ISSUE

20. The Bank submits that this application raises the following issue which should be answered in the affirmative:

- (i) Whether an Order in the form of the draft Order annexed as Schedule "A" to the notice of application herein, should be issued appointing Spergel as Receiver, without security, over the Debtor's assets, undertakings, and properties.

PART IV – LAW

The Jurisdiction of the Court to Appoint a Receiver

21. A receiver may be appointed by this Court where it is "just and convenient" to do so. Further, the Court may make any Order required to ensure the protection of the interests of any secured creditor, including binding declarations of right and injunctive relief.

22. Section 101 of the *CJA* provides:

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.

[*Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101\(1\)*](#), Compendium of the Applicant at Tab 20.

23. Subsection 243(1) of the *BIA* similarly provides that:

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.

[Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 243\(1\)](#),
Compendium of the Applicant at Tab 21.

24. Paragraphs 67(1)(a) and (e) of the *PPSA* provide:

Upon application to the Superior Court of Justice by a debtor, a creditor of a debtor, a secured party, an obligor who may owe payment or performance of the obligation secured or any person who has an interest in collateral which may be affected by an order under this section, the court may,

- (a) make an order, including binding declarations of right and injunctive relief, that is necessary to ensure compliance with Part V, section 17 or subsection 34(3) or 35(4); [...]
- (e) make any order necessary to ensure protection of the interests of any person in the collateral, but only on terms that are just for all parties concerned;

[Personal Property Security Act, R.S.O. 1990, c. P.10, s. 67](#), Compendium of the Applicant at Tab 22.

25. The technical requirements for the appointment of a receiver under the BIA have been satisfied in the present case:

- a. The Bank is a secured creditor of the Debtor and is therefore entitled to bring an application under s. 243(1) of the BIA;
- b. The Bank delivered the NITES in accordance with section s. 244 of the BIA. The 10-day notice period under the NITES has expired, as required by s. 243(1.1) of the BIA; and
- c. Spergel is a licenced insolvency trustee, has provided its consent to act as the Receiver if so appointed and is qualified to act in that capacity as required by s. 243(4) of the BIA.

[Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 243](#), Compendium of the Applicant at Tab 23.

It is Just and Convenient to Appoint a Receiver in the Circumstances

26. In order to determine whether it is just or convenient to appoint a receiver, a Court will have regard to all of the circumstances of a particular case. In particular, the following considerations have been held to be relevant:

- a. The moving party has a right under its security to appoint a receiver;
- b. The security is in jeopardy; and,

- c. Whether it is in the interests of all concerned to have a receiver appointed by the Court. This analysis includes an examination 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 working duties of the Receiver and manager.

Bank of Nova Scotia v Freure Village on Clair Creek, 1996 CanLII 8258 at paras. 10-13 (ONSC), Compendium of the Applicant at Tab 24.

27. Further, the Court must consider “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”. When evaluating whether, in all the circumstances, the appointment of a receiver is just or convenient, Courts have considered numerous factors, including:

- a. The nature of the property;
- b. The likelihood of preserving and maximizing the return on the subject property;
- c. the loss of confidence in the debtor’s management;
- d. Whether the lenders have a contractual right to the receiver’s appointment;
- e. The potential costs of the receiver; and
- f. The best way of facilitating the work and duties of the receiver.

Metropolitan Partners Group Administration, LLC v International Credit Experts Inc, 2024 ONSC 4601 at paras 23 and 36, Compendium of the Applicant at Tab 25.

BCIMC Construction Fund Corporation et al. v The Clover on Yonge Inc., 2020 ONSC 1953 (Ont. Gen. Div) at para 45, Compendium of the Applicant at Tab 26.

28. Where a debtor is in default of its secured obligations to a lender and there is evidence that the lender’s security is in jeopardy, it is just and convenient that a receiver be appointed.

Canadian Commercial Bank v Gemcraft Ltd., 3 C.P.C. (2d) 13 at para. 6 (Ont. Sup. Ct.), Compendium of the Applicant at Tab 27.

Ontario Development Corporation v Ralph Nicholas Enterprises Ltd., 57 C.B.R. (N.S.) 186 at para. 20 (Ont. S.C.J. in bankruptcy), Compendium of the Applicant at Tab 28.

29. The secured creditor does not need to demonstrate that it will suffer irreparable harm if a receiver is not appointed where that creditor has a contractual right to the appointment of a receiver. As held by the Court in *Metropolitan Partners Group Administration, LLC v International Credit Experts Inc.*:

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.

Metropolitan Partners Group Administration, LLC v International Credit Experts Inc., 2024 ONSC 4601 at para 22, Compendium of the Applicant at Tab 29.

Callidus Capital Corp. v. CarCap Inc., 2012 ONSC 163, at para. 42 (Gen. Div.) [Comm. List], Compendium of the Applicant at Tab 30.

Swiss Bank Corp. (Canada) v Odyssey Industries Inc., 30 C.B.R. (3d) 49 at paras. 28 and 38 (Ont. Gen. Div.) [Comm. List], Compendium of the Applicant at Tab 31.

Royal Bank of Canada v 605298 Ontario Inc., [1998] O.J. No. 4859 at para. 8 (Gen. Div.), Compendium of the Applicant at Tab 32.

30. There must be good reason to deprive a secured creditor of a bargained-for contractual right to appoint a receiver.

Romspen Investment Corporation v Atlas healthcare (Richmond Hill) Ltd et al, 2018 ONSC 7382 at para 100, Compendium of the Applicant at Tab 33.

31. In situations where the security documentation itself provides for the appointment of a receiver, Courts have held that the extraordinary nature of the remedies sought is less essential to the inquiry. In essence, it is submitted that where a secured creditor is contractually entitled to the appointment of a receiver, the loan is in default, and the 10-day NITES period has expired, it is just and convenient for the Court to assist in the orderly liquidation of a debtor's estate through the appointment of a Court-appointed receiver.

Bank of Nova Scotia v Freure Village on Clair Creek, supra at para. 12, Compendium of the Applicant at Tab 34.

Bank of Montreal v Sherco Properties Inc., 2013 ONSC 7023 at para. 42, Compendium of the Applicant at Tab 35.

32. Moreover, a debtor defaulting under its loan is sufficient justification for the appointment of a receiver. It is just and convenient to appoint a receiver where the debtor has breached the terms of agreement with the secured creditor, and in particular, credit agreement terms and forbearance agreement terms.

Royal Bank v Brodak Construction Services Inc., 2002 CanLII 49590 (ONSC) at para. 11, Compendium of the Applicant at Tab 36.

Royal Bank of Canada v 605298 Ontario Inc., *supra*, at paras. 8, 9 (Gen. Div.), Compendium of the Applicant at Tab 37.

Royal Bank of Canada v. 1731861 Ontario Inc., 2023 ONSC 3292, at para. 33 (Gen. Div.) [Comm. List], Compendium of the Applicant at Tab 38.

33. It is also just and convenient to appoint a receiver where the debtor fails to provide any evidence that there is “reasonable certainty” of the ability to repay the indebtedness in the near future, or at all.

Royal Bank of Canada v. 1731861 Ontario Inc., *ibid*, at para. 33 (Gen. Div.) [Comm. List], Compendium of the Applicant at Tab 39.

34. The above circumstances are present in this case, where:

- a. As set out above, the Debtor has breached numerous terms and conditions of its agreements with the Bank, in particular, the Credit Facilities and the Security;
- b. the Bank has a contractual right to appoint a receiver pursuant to the Bank’s GSA (para. 13(a));
- c. The Bank’s original demand for payment and NITES expired on September 16, 2024 such that the Bank is entitled to enforce the Security; and
- d. the Debtor has failed to provide any evidence that there is any “reasonable certainty” of its ability to repay the indebtedness in the near future, or at all.

35. It is therefore submitted that the present case is an appropriate case for the appointment of a Court-appointed receiver. In this regard, the Debtor has breached numerous provisions of the loan and security agreements, the Bank has issued demands, the ten-day notice period provided for in the NITES has expired and, for the reasons detailed above, the Bank’s security is in jeopardy.

PART V – ORDER REQUESTED

36. The Bank respectfully requests the following relief:
- a. an order, if necessary, dispensing with service and filing of the within application, declaring that service of this application has been validly effected on all necessary parties and declaring that this application is properly returnable on October 9, 2025 at 10:00 a.m. in Brampton, Ontario, or as soon thereafter as this application can be heard;
 - b. an Order pursuant to s. 101 of the CJA and/or s. 243(1) of the BIA and/or ss. 67(1) (a) and (e) of the PPSA appointing Spergel as Court-appointed Receiver, without security, over all of the assets, undertakings and property of the Debtor;
 - c. an Order ancillary to the Receivership requested above in the form of the draft Order annexed as Schedule “A” to the notice of application herein, as a result of the circumstances described in the Affidavit filed in support of this application;
 - d. costs of the application on a substantial indemnity basis; and
 - e. such further and other relief as to this Honourable Court may seem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 29th day of August, 2025.

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SCHEDULE “A”

LIST OF AUTHORITIES

1. *Bank of Nova Scotia v Freure Village on Clair Creek*, 1996 CanLII 8258 (ONSC)
2. *Metropolitan Partners Group Administration, LLC v International Credit Experts Inc*, 2024 ONSC 4601 (ONSC).
3. *BCIMC Construction Fund Corporation et al. v The Clover on Yonge Inc.*, 2020 ONSC 1953 (Ont. Gen. Div) [Comm. List]
4. *Canadian Commercial Bank v Gemcraft Ltd.*, 3 C.P.C. (2d) 13 (Ont. Sup. Ct.)
5. *Ontario Development Corporation v Ralph Nicholas Enterprises Ltd.*, 57 C.B.R. (N.S.) 186 (Ont. S.C.J. in bankruptcy)
6. *Callidus Capital Corp. v. CarCap Inc.*, 2012 ONSC 163 (ONSC) [Comm. List]
7. *Swiss Bank Corp. (Canada) v Odyssey Industries Inc.*, 30 C.B.R. (3d) 49 (Ont. Gen. Div.) [Comm. List]
8. *Royal Bank of Canada v 605298 Ontario Inc.*, [1998] O.J. No. 4859 (Gen. Div.)
9. *Romspen Investment Corporation v Atlas Healthcare (Richmond Hill) Ltd et al*, 2018 ONSC 7382 (ONSC).
10. *Bank of Montreal v Sherco Properties Inc.*, 2013 ONSC 7023 (ONSC) [Comm. List]
11. *Royal Bank v Brodak Construction Services Inc.*, 2002 CanLII 49590 (ONSC)
12. *Royal Bank of Canada v. 1731861 Ontario Inc.*, 2023 ONSC 3292 (Gen. Div.) [Comm. List]

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

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

Personal Property Security Act, R.S.O. 1990, c. P-10

Court orders and directions

67. (1) Upon application to the Superior Court of Justice by a debtor, a creditor of a debtor, a secured party, an obligor who may owe payment or performance of the obligation secured or any person who has an interest in collateral which may be affected by an order under this section, the court may,

- (a) make any order, including binding declarations of right and injunctive relief, that is necessary to ensure compliance with Part V, section 17 or subsection 34 (3) or 35 (4);
- (b) give directions to any party regarding the exercise of the party's rights or the discharge of the party's obligations under Part V, section 17 or subsection 34 (3) or 35 (4);

- (c) make any order necessary to determine questions of priority or entitlement in or to the collateral or its proceeds;
- (d) relieve any party from compliance with the requirements of Part V, section 17 or subsection 34 (3) or 35 (4), but only on terms that are just for all parties concerned;
- (e) make any order necessary to ensure protection of the interests of any person in the collateral, but only on terms that are just for all parties concerned;
- (f) make an order requiring a secured party to make good any default in connection with the secured party's custody, management or disposition of the collateral of the debtor or to relieve the secured party from any default on such terms as the court considers just, and to confirm any act of the secured party; and
- (g) despite subsection 59 (6), if the secured party has taken security in both real and personal property to secure payment or performance of the debtor's obligation, make any order necessary to enable the secured party to accept both the real and personal property in satisfaction of the obligation secured or to enable the secured party to enforce any of its other remedies against both the real and personal property, including an order requiring notice to be given to certain persons and governing the notice, an order permitting and governing redemption of the real and personal property, and an order requiring the secured party to account to persons with an interest in the real property or personal property for any surplus.

1985 CarswellOnt 404
Ontario Supreme Court High Court of Justice

Canadian Commercial Bank v. Gemcraft Ltd.

1985 CarswellOnt 404, [1985] O.J. No. 477, 2 W.D.C.P. 233, 32 A.C.W.S. (2d) 49, 3 C.P.C. (2d) 13

Canadian Commercial Bank (Plaintiff) and Gemcraft Limited (Defendant)

Montgomery J.

Heard: July 11, 1985
Judgment: July 11, 1985
Docket: No. 4066/85

Counsel: *B. Tait, Q.C.*, for plaintiff.
W.D.R. Beamish, for defendant.

Subject: Civil Practice and Procedure; Corporate and Commercial

Montgomery J. (orally):

1 This application by Canadian Commercial Bank (the “bank”) is for the appointment of a receiver and manager of the property, undertaking, and assets of Gemcraft Limited (“Gemcraft”).

2 The bank contends default under some of its loan agreements. Because of deterioration in the financial condition of Gemcraft; the bank says its security is in jeopardy. The bank holds fixed and floating charges contained in a debenture dated the 30th day of September 1980, a general assignment of book debts dated August 29, 1978 and security given pursuant to s. 178 of the Bank Act, S.C. 1980, c. 40.

3 In January and February 1984 the bank agreed to issue an income debenture to Gemcraft as part of the restructuring of credit arrangements. The effect of the \$1.5 million dollar income debenture gave Gemcraft a lower interest rate with no interest payable unless a profit was made. Principle is not due under the instrument until December, 1988. The bank would receive the interest by way of dividends from a Canadian corporation pursuant to a provision of the Income Tax Act, S.C. 1970-71-72, c. 63. Gemcraft was authorized to draw on the income debenture so long as it maintained sufficient current receivables as defined in the margin requirements of the instrument. Gemcraft has received all but \$221,000 under the income debenture but it is \$784,000 short of its required receivables under the instrument. This in my view constitutes a continuing default under the financing agreements. All of the security held by the bank stands as security for the repayment of all present and future indebtedness.

4 Gemcraft’s position is that the bank holds \$81,000, erroneously received as interest under the income debenture. It is common ground that an error in the customer’s financial statements in 1983 of some \$1.3 million dollar overstatement of inventory made it appear that a profit existed when it did not. The bank concedes that \$81,000 held by it is to be credited against loan accounts rather than being construed as interest under the income debenture. This, however, does not cure the default. Gemcraft says it is entitled to apply the remaining \$221,000 under the income debenture against the loan accounts. The bank quite properly in my view says that is our money, it is not yours. The margin requirement is \$784,000 short. Until that short fault is remedied no further draw will be allowed by the bank.

5 I am satisfied that this default triggers the acceleration clause in the 1980 agreement. It is not necessary that the income debenture contain an independent acceleration clause. The 1984 letter agreement provides that the security for the income debenture is the 1980 agreement and the \$10 million dollar debenture.

6 A further default exists. The mis-statement of inventory in 1983 perpetuated in ensuing financial statements constitutes a continuing default under the 1980 agreement. For these reasons the bank is entitled to the appointment of a receiver and manager under the terms of the 1980 agreement. I am also persuaded that the appointment is just and convenient under s. 114 of the Courts of Justice Act, S.O. 1984, c. 11. I conclude that the bank's security is in jeopardy.

7 An order will issue appointing Price Waterhouse Ltd. as receiver and manager of the property, assets and undertaking of Gemcraft. Costs to the applicant.

Application granted.

1985 CarswellOnt 206
Ontario Supreme Court, In Bankruptcy

Ontario Development Corp. v. Ralph Nicholas Enterprises Ltd.

1985 CarswellOnt 206, 33 A.C.W.S. (2d) 243, 57 C.B.R. (N.S.) 186

ONTARIO DEVELOPMENT CORPORATION and ROYNAT INC. v. RALPH NICHOLAS ENTERPRISES LTD.

Gray J.

Heard: October 15-16, 1985
Judgment: October 28, 1985
Docket: No. 5473/85

Counsel: *S. Block* and *M. Rotsztain*, for plaintiffs.
M.L. Solmon, for defendant.

Gray J.:

1 Two motions are involved in this matter. The first is a motion by the plaintiffs for an order appointing a receiver and manager of the Alpine Hotel in Thunder Bay. The second is a motion by the defendant to set aside the interim possession order granted by Saunders J. on 6th September 1985. At the close of argument on 16th October, judgment was reserved by me on both motions and I further ordered that the orders of the court then outstanding were to continue until the disposition of these motions.

2 The Alpine Hotel is owned by the defendant and the plaintiffs loaned the defendant \$1,150,000 which enabled the defendant to purchase the hotel in July 1982, at which time the defendant gave the plaintiffs a debenture for \$1,150,000. The defendant defaulted in its obligations under the debenture and by an agreement, the defendant agreed to pay \$700,000 by 16th April 1985. It failed to do so. Demand was subsequently made for the payment of \$1,363,963. By an agreement dated 28th June 1985, the defendant agreed to make payment of \$700,000 by 31st July 1985. Again, there was default and the time for payment was extended to 15th August and then again to 30th August and the defendant continued to default.

3 The closing portion of para. 9 of the 28th June 1985 agreement dealing with the rights of lenders to enforce security reads thus:

then the Lenders shall be entitled, notwithstanding any of the provisions of this Agreement to immediately enforce their security or exercise such other remedies available to them without any further notice to the Company, and the acknowledgement and consent referred to in paragraph 5 hereof shall be effective. The Company agrees that in any such event, it shall not in any manner challenge the rights of Lenders to so proceed, defend the proceedings or cross-claim, or commence any proceedings to prevent the Lenders from so proceeding.

4 Schedule A to the agreement is an acknowledgement and consent executed by the defendant.

5 The financial condition of the defendant was, and still is, desperate. Even without making the payments owing under the debenture at 26th September 1985, arrears of approximately \$150,000 were owing to government bodies and numerous trade creditors remained unpaid.

6 The plaintiffs appointed one Stetsko, a chartered accountant and licensed trustee in bankruptcy in Thunder Bay, as receiver and manager and instructed him to enter and take possession of the defendant's premises. I quote now from para. 10 of the plaintiffs' factum:

Because of attempts by the Defendant's representatives to regain possession of the hotel after the Plaintiffs' initial entry, the Plaintiffs applied to Mr. Justice Saunders on September 6, 1985 and obtained an order for interim possession and custody under Rules 44 and 45. The application was brought, *ex parte*, under Rule 44.01(2) and based on the consent of the Defendant in the June 28 agreement waiving further notice of steps by the Plaintiffs to enforce their security. Mr. Justice Saunders was advised that the Plaintiffs were proceeding to cease operations of the hotel.

7 I will deal with this later. On 11th September 1985 the defendant brought a motion to set aside the order of Saunders J. and an adjournment was granted by Callaghan J. (as he then was) on terms which permitted the defendant to re-enter the hotel and operate it. A further adjournment to 15th October 1985, to permit completion of the cross-examinations was granted by Steele J., hence this hearing before me on 15th October 1985.

8 The plaintiffs' position is that an order should go in the form of the order appearing at p. 3 of the motion record, vol. 1, by reason of the provision of s. 114 of the Courts of Justice Act.

9 The defendant's position is that the plaintiffs, who are seeking equitable relief, should be denied that relief because they do not come to the court with "clean hands". The receiver and manager should not be appointed but rather John Hobbs & Co. should be appointed as a court monitor with the defendant being permitted to operate the business in the interim and with the court-appointed monitor to have the power to obtain an appraisal and report to the court as to what should be done in the interim with the assets and the property pending final disposition of the issues between the parties.

10 The complaints that the defendant makes concern the happenings from 30th August onwards, and I am urged to find that an appraisal should be made to decide whether the hotel should be sold empty or as a going business.

11 The conclusion I have reached is that the order should go for the appointment of the receiver and manager, substantially in the form of the draft order appearing at p. 3 of the motion record, vol. 1. There is, in my view, no need to give the defendant more time because it is obvious that this hotel enterprise cannot succeed at this time. Its 1985 revenues have been grossly overstated and the hotel has survived thus far by non-payment of many of its current trade debts. I will deal briefly in a moment with certain other financial aspects but I do not propose to exercise my discretion in favour of the defendant because of inaccurate statements made on its behalf. The so-called confederated management proposal and commitment is not a viable proposal and I find difficulty with the evidence of the deponents Nicholas and Friesner.

12 The plaintiffs financed the Alpine Hotel on two previous occasions and on both occasions the hotel failed.

13 Counsel for the defendant, at some considerable length, reviewed the conduct of the plaintiffs' representatives after 30th August, particularly with respect to the closure of the hotel and the allegation that Saunders J. was not told by the plaintiffs that they had shut down the business.

14 With respect to this latter allegation, I was advised that Saunders J. was advised that the plaintiffs were ceasing operations and all of this in the context of the manner in which the plaintiffs were taken out of possession. Counsel for the plaintiffs clearly stated to me that Saunders J., on the *ex parte* application, was advised that the plaintiffs were going to empty the hotel. I am not accepting the evidence of the affidavits in the supplementary record upon which I reserved judgment.

15 The important matter to decide on this motion is whether, at common law, or under the provisions of ss. 19, 56, 57 or 59 of the Personal Property Security Act, there is an obligation on a secured party to preserve intangible property such as goodwill by not going into possession and by continuing to operate the business.

16 There may well be an obligation under the Personal Property Security Act requiring a secured party to use reasonable care in the custody and preservation of collateral property in his possession even when the debtor is in default, but I fail to see that there is any obligation at common law or under the Personal Property Security Act requiring a secured party's representative to continue with the real property in such a way as to require continuation of a financially unsound business, the result of which continuation would simply add to the debt already owed to the secured creditor. It is not required. The authority for this proposition is *Re B. Johnson & Co. (Bldrs.) Ltd.*, [1955] Ch. 634, [1955] 3 W.L.R. 269, [1955] 2 All E.R. 775 (C.A.).

17 I was asked to conclude that the collateral property in this case consisted of certain goodwill. My reading of the material convinces me that at this point in time, this hotel business has virtually no existing goodwill. It would not be prudent or commercially reasonable to require the continued operation of this hotel business. The concept of the monitor merely is a request for further delay to permit possible payment of a portion of the indebtedness and the receiver and manager, if appointed, can decide in all the circumstances whether to operate or close the hotel.

18 I read the decision of Anderson J. in *Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97, 37 C.B.R. (N.S.) 281, 123 D.L.R. (3d) 394 (S.C.), with care and I have concluded that it does not stand for the proposition on its facts that a receiver cannot sell. The receiver, in that case, did not get the power to sell because of the unusual facts of the case.

19 As I said previously, the order shall go for the appointment of the receiver and manager, substantially in the form of the draft order appearing at p. 3 of the motion record, vol. 1. I make this order under s. 114 of the Courts of Justice Act.

20 It is just and convenient to make the appointment where the principal owing under the debenture is in arrears and where the security is in jeopardy: Kerr on Receivers, 16th ed. (1983), p. 52; *McMahon v. North Kent Ironworks Co.*, [1891] 2 Ch. 148.

21 In the result, therefore: (1) the application to set aside the order of Saunders J. dated 6th September 1985 is dismissed; (2) the conditions set forth in paras. 2, 3, 4 and 5 of the order of Callaghan J. (as he then was) are at an end; and (3) an order will go substantially in the form set forth in para. 3 of the draft order appearing at p. 3 of motion record, vol. 1.

22 The costs of the plaintiffs' motions for the appointment shall be costs to the plaintiffs on a solicitor and his own client basis in accordance with the provisions of Sched. A at p. 38 of motion record, vol. 1.

Order accordingly.

1995 CarswellOnt 39
Ontario Court of Justice (General Division — Commercial List)

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.

1995 CarswellOnt 39, [1995] O.J. No. 144, 30 C.B.R. (3d) 49, 53 A.C.W.S. (3d) 307

**SWISS BANK CORPORATION (CANADA) v. ODYSSEY INDUSTRIES INCORPORATED and
WESTON ROAD COLD STORAGE COMPANY**

Ground J.

Heard: December 7 and 15, 1994
Judgment: January 31, 1995
Docket: Docs. 94-CU-80416, B 280/94

Counsel: *Frank Newbould, Q.C.*, for plaintiff.
Alan J. Lenczner, Q.C. and *Linda L. Fuerst*, for defendants.

Ground J.:

1 This is a motion brought by the plaintiff, Swiss Bank Corporation (Canada) ("Swiss Bank") for the appointment of a receiver and manager of the property, undertaking and assets of the defendants, Odyssey Industries Incorporated ("Odyssey") and Weston Road Cold Storage Company ("Weston").

Factual Background

2 Odyssey and Weston are part of a group of entities controlled by Joseph Robichaud ("Robichaud") which carry on business in Ontario, Quebec and the Maritime Provinces. The business is based upon the storage of frozen foods in large cold-storage warehouse facilities. Other entities controlled by Robichaud either carry on, or carried on, similar business in Western Canada and in the United States.

3 Odyssey, a corporation controlled by Robichaud, was a holding company. It held 100% of the equity of Associated Freezers of Canada Inc. ("AFC"). AFC operated the freezer business under leases from limited partnerships controlled by Robichaud which held the beneficial ownership of the various cold-storage warehouse facilities. As a result of various transactions recently undertaken by one or more of the Robichaud entities, it is in issue as to which corporation or entity manages the business, or has beneficial ownership of the various warehouse properties at this time.

4 Seven cold-storage warehouse plants are registered in the name of 606327 Ontario Limited ("606327"). They are situated in Ontario, Quebec, New Brunswick, Nova Scotia and Newfoundland. Until recently, 606327 held the properties in trust for a limited partnership registered in Ontario as The Polar-Freez Limited Partnership ("Polar-Freez"). Ninety percent of the limited partnership units of Polar-Freez were owned by AFC.

5 Two cold-storage warehouse facilities are owned by the defendant Weston which is a limited partnership registered in Ontario.

6 On December 13, 1988, Swiss Bank advanced approximately \$47.5 million (the "Odyssey Loan") to Associated Investors Partnership ("Associated Investors"), one of the partners of which was Odyssey. The loan was repayable on demand. Associated Investors advanced the funds to Odyssey.

7 The security Swiss Bank received for the Odyssey Loan included:

(a) assignments by Odyssey of \$30 million and \$39 million mortgages (the "Polar-Freez Mortgages") from 606327 to Odyssey, each mortgage being registered over the seven cold-storage warehouse plants beneficially owned by Polar-Freez. The mortgage terms included an obligation to pay all taxes when due; and

(b) a fixed and floating charge debenture (the "Odyssey Debenture") in the amount of \$47.5 million given by Odyssey over all of its assets as a general and continuing collateral security. The Odyssey Debenture contained standard provisions dealing with events of default and remedies, including the right to apply to a court for the appointment of a receiver and manager.

8 The Odyssey Loan was payable on demand. By letters dated July 22, 1994, Swiss Bank demanded payment of outstanding arrears and principal to be made no later than September 6, 1994. Payment was not made. Principal outstanding as of November 20, 1994 was \$48,959,148.48. As of November 20, 1994, there was \$1,178,241.19 of arrears of interest owing.

9 Municipal property taxes on the seven Polar-Freez properties are in arrears of approximately \$2.5 million. These arrears have existed over various periods of time within the past two years.

10 On December 4, 1989, Swiss Bank agreed to renew an existing facility in favour of Weston in an amount not to exceed \$10,179,750 (the "Weston Loan"). The loan was repayable on December 31, 1994, or in the event of default, on demand.

11 The security Swiss Bank received for the Weston Loan included:

(a) a collateral mortgage in the amount of \$13 million over the two warehouses owned by Weston. The mortgage provided that Weston was to pay all municipal taxes when due;

(b) a general security agreement over the assets and undertaking of Weston containing standard terms describing the events of the default and remedies available, including the right of Swiss Bank to apply to court for the appointment of a receiver and manager; and

(c) guarantees by Odyssey and Robichaud of the indebtedness of Weston to the amounts of \$13 million and \$3.5 million respectively.

12 Principal payments on the Weston Loan of \$150,000 were due on December 31 each year commencing in 1990. No payments of principal were made and therefore as of December 31, 1993, and thereafter, \$600,000 in principal payments were in arrears. The Weston Loan agreement provided for a hedge account to be funded by Weston. The purpose of this account was to provide protection to Swiss Bank as a hedge against any adverse movements in foreign exchange rates in the event that Weston transferred its obligations into Swiss francs. An initial deposit of \$1 million was made by Weston to the hedge account at the end of December 1989 as required. Further payments of \$350,000 per annum commencing on December 31, 1990 were required; however, the only payment made was a further \$15,000 payment on July 31, 1992. The hedge account is in arrears of \$1,040,000. Municipal tax arrears against the Weston properties of approximately \$1 million have been outstanding for approximately two years.

13 By letter dated July 22, 1994, Swiss Bank demanded payment in full of outstanding principal plus interest by September 6, 1994. Payment was not made. Principal outstanding as of November 29, 1994 was \$11,334,907.93. Loan interest payments have been in default since March 31, 1994. The amount of interest outstanding to November 29, 1994 is \$203,686.70.

14 In the Spring of 1994, the Robichaud Group presented a restructuring plan that included a reverse take-over of a new Robichaud corporation named Polar Corp. International ("Polar Corp.") by a V.S.E.-traded corporation.

15 The restructuring plan contemplated: (i) Polar Corp acquiring the seven warehouses from Polar-Freez; (ii) a transfer of AFC's ownership interest in Polar-Freez to a corporation named Pacific Eastern Equities Inc. ("Pacific Eastern"), a corporation controlled by Robichaud with no substantial assets; (iii) a winding-up of AFC under s. 88 of the *Income Tax Act*, and conveyance of its assets to Odyssey; (iv) a sale of the leasehold interest of Odyssey (now the tenant) in the seven warehouses to Polar Corp.

16 It appears from the documents before the court that certain conveyances and transfer documents and agreements were entered into pursuant to the restructuring plan and there are letters and memoranda before the court referring to certain assets having been transferred in accordance with the restructuring plan. There is also before the court a master agreement made as of October 31, 1994 (the "Master Agreement") among Odyssey, Weston, their affiliated companies, Robichaud and Swiss Bank, which appears to provide that the restructuring plan will not be effective, or to the extent that it has already been effected, it will be reversed, unless certain aspects of the restructuring plan have been settled to the satisfaction of Swiss Bank. Section 2.21 of the Master Agreement provides as follows:

If:

(a) by 5 p.m. on November 4, 1994, the matters referred to in Sections 2.17(c) and (d) and 2.18(b) shall not have been agreed to;

(b) any payment required under Section 2.20 shall not be made when due;

(c) by 5 p.m. on November 4, 1994 (i) the Robichaud Group shall not have provided SBCC with complete particulars of the debts, obligations and liabilities (whether absolute or contingent, matured or not) of each of AFC and Odyssey (including, without limitation, obligations in respect of taxes), describing the creditor, the amount of the debt, obligation or liability and the nature thereof, or (ii) SBCC shall not be satisfied with the amount of such liabilities and that AFC shall have sufficient assets to and shall be able to satisfy all such debts, obligations and liabilities; or

(d) by 5 p.m. on November 4, 1994 SBCC shall not be satisfied as to the tax consequences of the transactions contemplated by this Agreement,

this Agreement shall terminate on notice by SBCC and shall be of no further force and effect.

17 It appears to be agreed that the conditions set out in s. 2.21 of the Master Agreement were not fulfilled.

Submissions

18 It is the position of counsel for Swiss Bank that the transfers of assets contemplated by the Master Agreement did in fact take place and that the cancellation of the leases to AFC which were assigned to Odyssey on the wind-up of AFC constituted a breach of the covenant of Odyssey contained in the Odyssey Debenture not to dispose of any part of the charged premises except in the ordinary course of business. It is his further submission that, if I should find that the transactions contemplated by the restructuring plan did not in fact take place, there is still ample evidence before the court that the Odyssey Loan and the Weston Loan were in default and that Swiss Bank is entitled to the appointment of a receiver.

19 With respect to the restructuring plan, counsel for Swiss Bank points out that a number of the letters and memoranda and several statements contained in the affidavits of Robichaud, all submitted to the court, refer to the transactions as having taken place and the assets having been transferred in accordance with the restructuring plan. There is no reference anywhere to the transfer documents being held in escrow pending the approval by Swiss Bank to the restructuring plan. He submits that the Master Agreement is of no legal effect in that Swiss Bank gave notice that it was not satisfied as to the tax aspects of the restructuring plan and, accordingly, the situation remains as it was before the Master Agreement was entered into.

20 With respect to other defaults, counsel for Swiss Bank refers to the following: the fact that interest is in arrears on the Odyssey Loan in an amount in excess of \$1,100,000; that demand has been made for payment of the principal of the Odyssey Loan and such payment has not been made; that there are tax arrears on the Polar-Freez properties in an amount in excess of \$2,500,000; that there are principal payments of \$600,000 in arrears on the Weston Loan, and that the annual payments of \$350,000 required to have been made to the hedge account under the Weston Loan have not been made; that there is interest in default on the Weston Loan in the amount of \$203,000; that there are municipal tax arrears on the Weston properties in amounts in excess of \$1,000,000; that a demand for payment of the principal amount of the Weston Loan has been made and that the principal has not been paid. It is his submission that, whether or not a transfer of assets in breach of the provisions of the Odyssey

Debt has occurred pursuant to the restructuring plan, the existence of all of the other defaults under the Odyssey Loan and the Weston Loan entitle Swiss Bank to the appointment of a court appointed receiver. It also appears to be his position that the transfer by Odyssey of certain term deposits to affiliates in the United States constitutes a diversion of funds from Odyssey such that the court ought to find that the security for the Odyssey Loan and the ability of Odyssey to repay the Odyssey Loan are in jeopardy.

21 Counsel for Odyssey and Weston submit that Swiss Bank is not entitled to the appointment of a receiver for a number of reasons. First, they submit that the Odyssey Loan is illegal and, accordingly, the security for such loan is void and unenforceable. It is their position that the Odyssey Loan when originally made was in breach of regulations under the *Bank Act*, S.C. 1980-81-82-83, c. 40 (the "*Bank Act*") in that the loan could not be made by Swiss Bank as it would have been in breach of the large loan to capital ratios specified in regulations under the *Bank Act* and, accordingly, the loan was referred to Swiss Bank's parent corporation in Switzerland and was arranged through the parent corporation and one of its other affiliates.

22 Second, counsel alleges that Swiss Bank is in breach of certain provisions of the commitment letters for both the Odyssey Loan and the Weston Loan by refusing to agree to certain conversions of the loans from Swiss francs to Canadian dollars on several occasions at the request of the borrowers made pursuant to the terms of the commitment letters. In refusing to allow such conversions, counsel submit that Swiss Bank was not only in breach of the terms of the commitment letters, but was also in breach of its fiduciary duty to the borrowers in that Swiss Bank had undertaken to give advice to the borrowers as to the structure of the loans and as to currency conversions.

23 Third, counsel for Odyssey and Weston point out that Swiss Bank is not seeking the appointment of an interim receiver pending trial of this action, but is seeking the appointment of a court appointed receiver and manager to take over the business, undertaking and assets of Odyssey and Weston to enforce the security held by Swiss Bank and effect repayment of the Odyssey Loan and the Weston Loan. Counsel submit that under the provisions of s. 101 of the C.J.A., a receiver and manager may be appointed where it appears to a judge of the court to be just or convenient to do so, and that, in seeking the appointment of a receiver and manager, Swiss Bank is seeking an equitable remedy. It is the position of counsel for Odyssey and Weston that to appoint a receiver in this case would be unjust and inequitable. They submit that there is no risk of irreparable harm to Swiss Bank if a receiver is not appointed pending the trial of the oppression action commenced by Swiss Bank. There are certificates of pending litigation registered against the properties and there is an outstanding order restricting the disposition of any assets of Odyssey and Weston. In addition, Robichaud and the Robichaud group are prepared to give an undertaking to the court that there will be no expenditures of cash outside the ordinary course of business pending the trial of the action. It is further submitted that, if it is determined at trial that the assets have been transferred in accordance with the restructuring plan, there is very little in Odyssey for a receiver to administer and that, if it is determined that the assets remain in Odyssey and Polar-Freez, a sale of such assets by the receiver would result in a substantial tax liability and Swiss Bank would not recover an amount which would substantially decrease the principal amount of the Odyssey Loan. In addition, counsel submits that to appoint a receiver would be inequitable in view of Swiss Bank's acquiescence in the asset transfer since the Spring of 1994. Further, it is submitted, the appointment would result in extreme hardship to the borrowers, that Swiss Bank does not come to court with clean hands in view of its refusal to permit conversions of the loans and that any receiver and manager appointed to run the business of Odyssey and Weston would not have the background and experience of Robichaud in the operation of the business.

24 With respect to the diversion of funds to affiliates in the United States, counsel for Odyssey and Weston submit that there is no evidence that the transfer of the deposit receipts was for any improper purpose or was not in the ordinary course of business in view of the history of relationships among the Robichaud group of companies and, in any event, does not constitute evidence that the security for the Swiss Bank loans was in jeopardy or materially affect the ability of the borrowers to repay such loans.

Reasons

25 I shall deal first with the status of the restructuring plan and the effect of the Master Agreement. I accept the submission of counsel for Swiss Bank that there are many references in correspondence, memoranda and affidavits to the transactions contemplated by the restructuring plan having taken place and assets having been transferred and that there is no reference in any of such documents to the agreements or transfers having been made in escrow pending the approval of the restructuring plan by Swiss Bank. It seems to me, however, that the effect of the Master Agreement is either that such transactions are reversed, or that they shall be deemed never to

have taken place. Section 5.4 of the Master Agreement provides:

In case any of the conditions set out in Section 5.3 shall not have been fulfilled and/or performed within the time specified for such fulfilment and/or performance, or if SBCC determines that any condition might not be fulfilled or performed as required, SBCC may terminate this Agreement by notice in writing to the Robichaud Group. Each member of the Robichaud Group expressly acknowledges that its obligations to SBCC shall be deemed not to be assigned, transferred, amended or restated as contemplated hereby until all of the foregoing conditions precedent have been satisfied or waived in writing by SBCC. If such conditions be terminated under Section 2.21, this Agreement and all transactions contemplated hereby including, without limitation, the transactions contemplated by Article II shall be of no force or effect and the obligations of the Robichaud Group to SBCC and defaults under such obligations then existing shall continue and SBC shall be entitled immediately and without further notice or delay, to exercise any and all remedies available to it in respect of such defaults.

26 One could become embroiled in a metaphysical debate as to whether the effect of such section is that the transactions having taken place have been reversed or that the transactions are deemed never to have taken place. Whichever is the case, there has either been a default under the Odyssey Debenture which has been rectified, or no default under the Odyssey Debenture has taken place. Accordingly, it is not, in my view, grounds for the appointment of a receiver and manager by Swiss Bank. I am also not satisfied that the rather confused transactions involving the term deposits in the United States constitute grounds for the appointment of a receiver. It appears that the transfers of the term deposits to the United States were for valid business reasons, i.e. to provide security for the performance of a lease or for the approval of a proposal under c. 11. There is no evidence to support the contention of counsel for Swiss Bank that the failure to reflect one of the transfers of such term deposits on the books of AFC was part of some nefarious plot to divert assets of the Robichaud Group companies. Accordingly, I am not persuaded that these transactions constitute a basis for determining that the security for the loans was in jeopardy, or that the ability of Odyssey and Weston to pay the loans was materially effected by these transactions so as to satisfy the court that it would be just and convenient on this ground to appoint a receiver and manager.

27 It appears, however, that the other defaults under both the Odyssey Loan and the Weston Loan referred to by counsel for Swiss Bank, would of themselves provide ample justification for the appointment of a receiver and manager. One must then consider the submissions made by counsel for Odyssey and Weston that, in this case, it would be unjust and inequitable to order such appointment.

28 The first submission of counsel for Odyssey and Weston is that there is no risk of irreparable harm to Swiss Bank if a receiver is not appointed as certificates of pending litigation have been filed against the real estate properties involved, and there is an existing order restraining the disposition of other assets. I know of no authority for the proposition that a creditor must establish irreparable harm if the appointment of a receiver is not granted by the court. In fact, the authorities seem to support the proposition that irreparable harm need not be demonstrated (see *Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97 (S.C.)).

29 The second submission of counsel for Odyssey and Weston is that there would be no substantial benefit to Swiss Bank resulting from the appointment in that, if it is determined that the assets have been transferred to Polar Corp., there is very little in Odyssey for a receiver to administer. Having found that the effect of the termination of the Master Agreement is that either the transfer of assets has been reversed or is deemed not to have taken place, substantial assets remain in Odyssey and its subsidiaries and a receiver would be in a position to administer such assets and business or to realize upon them to satisfy the indebtedness owing to Swiss Bank. Accordingly, I do not accept the submission that there is no substantial benefit to Swiss Bank from the appointment of a receiver.

30 Counsel for Odyssey and Weston submit that Swiss Bank acquiesced in the transfer of assets since the Spring of 1994, and that accordingly, it would be inequitable to appoint a receiver at this time. My reading of the material before this court is that, although Swiss Bank was aware of the intended restructuring plan and the motivation for such plan, it was concerned throughout about the effect that such plan would have on its security position and the tax ramifications of such plan, and at no time indicated its acquiescence in, or approval of, the plan.

31 With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business

sold. The situation in this case is no different. If the borrowers are able to arrange new financing to pay off the loan, the receiver will be discharged and there appear to be no unusual circumstances prohibiting Odyssey and Weston from seeking new financing to pay off the outstanding loans to Swiss Bank and regaining control of their assets and business. Similarly, the fact that any receiver and manager appointed would not have the background and expertise in running the business that Robichaud has is no reason not to grant the appointment. In most situations, the receiver and manager will not have the same expertise as the principals of the debtor and may retain the principals to manage the day-to-day operation of the business during the receivership period. This circumstance does not in my view establish that it would be unjust or inequitable to appoint a receiver.

32 The first submission of counsel for Odyssey and Weston is that the Odyssey Loan was illegal and accordingly the security for such loan is void and unenforceable. The illegality is alleged to have arisen from the fact that Swiss Bank would not have been able to make the original loan to Odyssey itself without being in breach of certain regulations under the *Bank Act*. I am unable to accept this submission for two reasons. The initial loan made in 1985 has been repaid and it is security for the new loan made in 1989 which is now sought to be enforced. There is so far as I am aware no allegations that Swiss Bank was unable to make the new loan in 1989. In any event, Swiss Bank did not make the original 1985 loan; rather, it arranged for the loan to be made by its parent company in Switzerland and an European affiliate of its parent company, neither of whom would have been subject to the regulations under the *Bank Act*. Accordingly, I fail to see how the original loan could be said to be illegal when the loan was not made by an institution subject to the regulations under the *Bank Act*. Moreover, the decision of the Ontario Court of Appeal in *Sidmay Ltd. v. Wehttam Investments*, [1967] 1 O.R. 508, affirmed [1968] S.C.R. 828 would seem to stand for the proposition that, even if a loan is made in contravention of a statute or regulation governing the lending institution, such loan is still enforceable by the lending institution.

33 Counsel for Odyssey and Weston further submit that Swiss Bank did not come to court with clean hands in view of the fact that it was in breach of the provisions of the commitment letters governing the Odyssey Loan and the Weston Loan by virtue of its failure to allow certain currency conversions, and was also in breach of its fiduciary duty to the borrowers in that it had undertaken to give advice with respect to the structure of the loans and the provision for currency conversion. I can see that the language of the two commitment letters dealing with currency conversions is not abundantly clear and there is little evidence before this court as to whether the requests for currency conversions were properly made on the appropriate dates and with the appropriate notice.

34 There is also very little evidence before this court to establish that this is a situation of special relationship or exceptional circumstances where a lender would be found to have a fiduciary duty to its borrower in that the relationship between them goes beyond the normal relationship of borrower and lender. The Supreme Court of Canada recently dealt with the law of fiduciaries in *Hodgkinson v. Simms*, September 30, 1994, (unreported) [now reported at [1994] 9 W.W.R. 609]. At pp. 20-22 [pp. 629-630] of his reasons, LaForest J. stated:

In *LAC Minerals* I elaborated further on the approach proposed by Wilson J. in *Frame v. Smith*. I there identified three uses of the term fiduciary, only two of which I thought were truly fiduciary. The first is in describing certain relationships that have as their essence discretion, influence over interests, and an *inherent* vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. In seeking to determine whether new classes of relationships are per se fiduciary, Wilson J.'s three-step analysis is a useful guide.

As I noted in *LAC Minerals*, however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relationships described by a slightly different use of the term "fiduciary", viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship ... In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.

Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. ...

In relation to the advisory context, then, there must be something more than a simple undertaking by one

party to provide information and execute orders for the other for a relationship to be enforced as fiduciary. For example, most everyday transactions between a bank customer and banker are conducted on a creditor-debtor basis; see *Canadian Pioneer Management Ltd. v. Saskatchewan (Labour Relations Board)*, [1980] 1 S.C.R. 433 ; *Thermo King Corp. v. Provincial Bank of Canada* (1981), 34 O.R. (2d) 369 (C.A.) , leave to appeal refused, [1982] 1 S.C.R. xi (note)

35 La Forest J. then makes the following comments about commercial transactions at pp. 26-27 [pp. 632-633]:

Commercial interactions between parties at arm's length normally derive their social utility from the pursuit of self-interest, and the courts are rightly circumspect when asked to enforce a duty (i.e., the fiduciary duty) that vindicates the very antithesis of self-interest ... No doubt it will be a rare occasion where parties, in all other respects independent, are justified in surrendering their self-interest such as to invoke the fiduciary principle.

36 The commercial transactions among the parties to this action do not appear to me to be those rare occasions where the fiduciary principle would be invoked.

37 In any event, in my view, such allegations of breach of contract and breach of fiduciary duty would have to be established by the borrowers in an action in damages against Swiss Bank and such damages may well be offset against the amounts owing under the Odyssey Loan and the Weston Loan. The fact that such allegations are being made at this time does not, however, constitute a reason for refusing to grant the appointment of a receiver at this time or convince me that it would be unjust or inequitable to do so. It has not been suggested that the damages which might be awarded to Odyssey and Weston, should they be successful in any such action, would be sufficient to pay off the Odyssey Loan and the Weston Loan. In fact, the limited evidence before the court as to the damages to which Odyssey and Weston would be entitled would seem to indicate that such damages would fall far short of the amount necessary to pay off the two loans.

38 In summary, although I am not satisfied that at this time there exists any default resulting from a transfer of assets pursuant to the restructuring plan or that the transfer of the deposit receipts to affiliates in the United States constitutes grounds for the appointment of a receiver, the existence of the other defaults with respect to interest payments, principal payments, arrears of taxes and failure to pay principal on demand, in my view, justifies the appointment of a receiver and none of the submissions put forward by counsel for Odyssey and Weston convinces me that it would be unjust or inequitable to grant such appointment.

39 Accordingly, an order will issue, substantially in the form of the order annexed as Sched. "A" to the notice of motion, appointing Coopers & Lybrand Limited as receiver and manager of the property, undertakings and assets of Odyssey and Weston. If counsel are unable to settle the terms of such order, they may attend upon me. Counsel may also make oral or written submissions to me as to the costs of this motion.

Motion allowed.

1998 CarswellOnt 4436
Ontario Court of Justice (General Division) [Commercial List]

Royal Bank v. 605298 Ontario Inc.

1998 CarswellOnt 4436, [1998] O.J. No. 4859, 84 A.C.W.S. (3d) 92

Royal Bank of Canada, Plaintiff and 605298 Ontario Inc.

Greer J.

Heard: November 10, 1998
Heard: November 12, 1998
Judgment: November 20, 1998
Docket: 98-CL-3070

Counsel: *A. Irvin Schein*, for the Plaintiff.
Avrum D. Slodovnick, for the Defendant and the Moks.
M.J. Neirinck, for the Penta Group and the Ugovsek Group.

Greer J.:

1 The Plaintiff, Royal Bank of Canada, ("the Plaintiff" or "the Bank") moves for an Order appointing Pricewaterhouse Coopers Inc. ("PwC") as Receiver and Manager of the property, assets and undertaking of the Defendant, 605298 Ontario Inc. ("the Defendant"). The Bank is a creditor of the Defendant, being the holder of two debentures in the amounts of \$4,200,000 dated November 11, 1987 and \$4,900,000 dated December 19, 1990, and the holder of a General Security Agreement dated November 11, 1987, granting a security interest to it over all of the Defendant's assets, property and undertaking, including the real property owned by the Defendant in the Town of Markham ("the property") which houses a small shopping plaza, the largest tenant of which is a bowling alley.

2 Further, in 1995, the Bank provided various credit facilities to the Defendant consisting of a \$75,000 demand operating loan, a \$118,000 letter of credit, a \$2,983,714 match funded base rate loan and a \$1,537,137 term loan. As security for all of this money, the Defendant issued the two debentures which are registered against the property owned by the Defendant. Finally, the Bank holds a joint and several personal guarantee dated June 19, 1991 in the amount of \$1,245,000 signed by Dr. Simon Mok and his wife, Grace Mok; a joint and several guarantee dated July 4, 1991 in the amount of \$725,000 executed by Penta Drugs Limited, S.T.K. & W. Chemists Limited, Sydney Yiu, Keith Mak, Tak Man Lam and George Kam; a guarantee dated June 26, 1991 in the amount of \$300,000 executed by Peter Mok; and a joint and several guarantee dated July 8, 1991 in the amount of \$580,000 executed by Ugovsek Investments Limited and Stanislav Ugovsek.

3 Under the provisions of its debentures, the Bank, upon default, may appoint any person or persons to be a Receiver of the property. The Defendant has failed to make any payments on the first due debenture for over a year, and interest on the demand operating loan in the amount of \$75,000 has been in arrears since March 23, 1997, interest on the \$1,537,137 term loan has been unpaid since May 21, 1997 and interest on the \$2,983,714 match funded base rate loan which came due on November 1, 1997, has been in arrears since June 4, 1997. Demand letters have been sent by the Bank to the Defendant for all of its security and demand letters have also been sent to all the guarantors by the Bank.

4 The parties agree that the Defendant has been attempting to restructure its loans and that the Defendant has been having on-going negotiations between the Moks, on the one hand, and the Penta Group and the Ugovsek Group on the other hand. There is documentation to this effect in the Motion Record. There is also evidence that the Moks have attempted to list the property and the bowling alley business for sale without consultation with others who have an interest in the Defendant.

5 Prior to the Motion being heard, the Bank filed a further short 7 paragraph supporting affidavit sworn to by Kenneth L. Kallish, a solicitor. The Defendant moved to adjourn the Motion to allow it to cross-examine Mr. Kallish on the affidavit. This Motion was refused by me and the main Motion was heard.

6 The Moks wish to have further time during which to negotiate a possible restructuring, and take the position that the Bank is owed less than the value of the property so that it has adequate security for its loans. Further, the Defendant maintains that it would be prejudiced if the Receiver is appointed as the value of the property would be diminished if sold by a Receiver as opposed to if it was sold by the Defendant itself. The Defendant believes that the appointment of the Receiver is the remedy of last resort.

7 The Penta Group and the Ugovsek Group are co-owners of the land with the company. They do not oppose the appointment of a Receiver. They wish finality brought to the proceedings which has have been long and protracted, and if no forbearance agreement is reached, they would not contest the Receivership.

8 The Bank says it has delayed long enough in exercising its rights under its security. It relies on the principles set down in *Confederation Life Insurance Co. v. Double Y Holdings Inc.* (September 3, 1991), Doc. 91-CQ-72 (Ont. Gen. Div.) where the secured creditor had not received payments on account of interest since its security matured nor had the principal being repaid when it fell due. In that case, at p.5, Farley J. notes:

I must also note that there appears to be a major distinction between those cases where the borrower is in default and those where it is not (or a receiver is being asked for in say a shareholder dispute).

At p.6, he notes that the plaintiffs have extended great latitude to the defendants, which is the case before me. I note, as Farley J. did, that the Defendant before me has not shown any irreparable harm that is not compensable in damages, although as Ground J. noted in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]), at p.58, the authorities seem to support the proposition that irreparable harm need not be demonstrated.

9 I am satisfied that there is no other acceptable means to protect the interests of the parties other than the appointment of PwC as the Receiver. The appointment of a Receiver is an equitable remedy, and given that the Court must determine if such an appointment is both just and convenient. While such an appointment may be intrusive and should not be granted simply as a matter of course (see: *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565 (Ont. Gen. Div.)), in the case at bar, the Bank has not caused the default, which the lending institution did in *Royal Bank*, supra. Here there has been default on the debenture, a loan has matured, there is more than a significant amount owing with huge arrears of interest outstanding, and the Bank has exercised great patience to the present date. It does not have to rely on the appraisal which has been presented by the Defendant, which does not reflect the true financial picture of what the bowling alley revenue and expenses are. The three groups which have an interest in the Defendant company are at odds with one another.

10 The Bank has agreed to postpone the effective date of the Order to November 24, 1998, if the order is made, to allow the interest groups to try to work out their differences and put forward a proposal for restructuring. I have concluded that the appointment of a Receiver must be made. Order to go appointing PwC as Receiver and Manager of the property, assets and undertaking of the Defendant company as set out in paragraph 1 of its Notice of Motion, to take effect on November 24, 1998, and in the terms of the Draft Order which is attached as Schedule A to the Notice of Motion.

11 If the parties cannot otherwise agree on Costs, I may be spoken to.

Motion granted

CITATION: Romspen Investment Corporation v. Atlas Healthcare (Richmond Hill) Ltd. et al,
2018 ONSC 7382

COURT FILE NO.: CV-18-607303-00CL

COURT FILE NO: CV-18-00609634-00CL

DATE: December 10, 2018

**SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST**

IN THE MATTER OF 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, AND SECTION 68 OF THE *CONSTRUCTION ACT*, R.S.O. 1990, C. 30, AS AMENDED

RE: ROMSPEN INVESTMENT CORPORATION, Applicant

AND:

ATLAS HEALTHCARE (RICHMOND HILL) LTD., ATLAS (RICHMOND HILL) LIMITED PARTNERSHIP, ATLAS SHOULDICE HEALTHCARE LTD., ATLAS SHOULDICE HEALTHCARE LIMITED PARTNERSHIP, ATLAS HEALTHCARE (BRAMPTON) LTD. and ATLAS BRAMPTON LIMITED PARTNERSHIP, Respondents

AND RE:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ATLAS SHOULDICE HEALTHCARE LTD., ATLAS HEALTHCARE (BRAMPTON) LTD., ATLAS HEALTHCARE (RICHMOND HILL) LTD., ATLAS HEALTHCARE ASSET MANAGEMENT LTD., ATLAS GLOBAL HEALTHCARE LTD., GRIGORAS DEVELOPMENTS LTD. AND ATLAS INVESTMENTS AND SECURITIES CORPORATION

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *David Preger and Linda Corne*, for Romspen Investment Corporation

Clifton Prophet, for Meridian Credit Union Limited

Marc Wasserman and Mary Paterson, for the Atlas Respondents and the Applicants under the *Companies' Creditors Arrangement Act* application

Robert Chadwick and Andrea Harmes, for PointNorth Capital Inc., the Proposed DIP Lender

Eric Golden, for Ernst & Young Inc., Proposed Receiver

Mario Forte, for KSV Kofman Inc., the Proposed Monitor

HEARD: November 27, 2018

ENDORSEMENT

[1] There are two applications before the Court.

[2] In the first application (the "Receivership Application"), Romspen Investment Corporation ("Romspen") applies for the appointment of Ernst & Young Inc. as receiver, manager and construction lien trustee of the undertaking, assets and properties of the Respondent, Atlas Healthcare (Richmond Hill) Ltd., and as receiver and manager of the undertakings, assets and properties of the remaining Respondents including Atlas Healthcare (Richmond Hill) Limited Partnership ("Richmond Hill"), Altas Shouldice Healthcare Limited Partnership ("Shouldice") and Altas Brampton Limited Partnership ("Brampton") (collectively, Richmond Hill, Shouldice and Brampton are referred to as the "Debtors").

[3] In the second application (the "CCAA Application"), certain corporations related to the Debtors including the general partners of the Debtors (collectively, the "CCAA Applicants") request certain relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") including an initial stay of proceedings in respect of the Debtors and approval of a proposed debtor-in possession facility in respect of Richmond Hill (the "DIP Facility").

[4] On December 3, 2018, the Court advised the parties that the CCAA Application was denied and that the Receivership Application was granted for written reasons to follow. This Endorsement sets out the Court's reasons for these determinations.

Factual Background

The Debtors

[5] Richmond Hill is the owner of a 5.59 acre parcel of land that fronts on the west side of Brodie Drive and the east side of Leslie Street in Richmond Hill, Ontario and has a municipal address of 25 Brodie Street (the "Richmond Hill Property").

[6] Richmond Hill is currently building a six-story medical office building on the Richmond Hill Property (the "Project"), which is addressed in greater detail below.

[7] Shouldice owns a 22.467 acre parcel of land at 7750 Bayview Avenue (the "Shouldice Property") in Markham, Ontario. The Shouldice Property is currently improved with a three-storey hospital and is occupied by Shouldice Hospital Limited under a lease (the "Hospital Lease").

[8] Atlas owns a 4.59 acre parcel of land at 241 Queen Street East in Brampton, Ontario (the "Brampton Property"). The Brampton Property is currently improved with a single-storey commercial building. The building is currently vacant.

[9] In this Endorsement, the Richmond Hill Property, the Shouldice Property and the Brampton Property are referred to collectively as the "Properties".

Financing of the Project

[10] The Project has been financed by a combination of loans from third-party lenders and equity contributions of Richmond Hill, representing equity contributed principally by the limited partners of Richmond Hill.

[11] At the present time, the principal financing arrangements in place are the following:

- (1) Loans made by Meridian Credit Union Limited ("Meridian") in favour of Richmond Hill (collectively, the "Meridian Loan") secured by a first charge on the Project (the "Meridian Charge") and a first general assignment of rents; and
- (2) A loan made by Romspen in favour of the Debtors together with an outstanding loan acquired by Romspen (collectively, the "Loan"), secured by the Bridging Charge (defined below) and the Romspen Third Charge (defined below), both of which rank behind the Meridian Charge.

These financing arrangements are further described below.

The Meridian Loan

[12] Pursuant to a credit agreement dated March 2, 2017 (the "Meridian Credit Arrangement"), Meridian extended a loan in the maximum principal amount of \$59 million to Richmond Hill. In addition, pursuant to an agreement dated July 27, 2018, Meridian extended an interim loan of \$4.4 million to Richmond Hill. As of November 7, 2018, Richmond Hill owed \$43,371,985 under these loan arrangements and certain other facilities extended by Meridian (collectively, the "Meridian Loan"). Interest has not been paid on the Meridian Loan since August 2018 and continues to accrue. As mentioned, the Meridian Loan is secured by a first ranking charge, the Meridian Charge, in the principal amount of \$75 million.

The Romspen Loan Arrangements

[13] The Romspen loan arrangements comprise a loan made to the Debtors and an outstanding loan acquired by Romspen, which will be addressed in turn.

The Romspen Loan

[14] Pursuant to a financing commitment dated December 11, 2017, as amended by a supplement dated June 10, 2018 (collectively, the "Commitment"), Romspen loaned the amount of \$81.2 million to the Debtors on a joint and several basis (the "Romspen Loan"). The Romspen Loan was evidenced, among other things, by a joint and several promissory note of the

Debtors in the principal amount of \$81.2 million. Of this amount, approximately \$49 million was loaned to Shouldice and \$10 million was loaned to Brampton, in each case to repay all outstanding debt in respect of these properties. In addition, \$19.5 million was loaned to Richmond Hill to partially repay the Bridging Finance Loan (defined below) and \$3,280,500 was loaned to Richmond Hill for use in respect of the Project.

[15] The Romspen Loan is fully advanced. Interest accrues on the Romspen Loan at the rate of 11.45 percent per annum. As of November 1, 2018, according to a schedule derived from the records of Richmond Hill, \$22,382,788 was owed in respect of the monies loaned to Richmond Hill (I note that Romspen calculates a slightly larger amount that is used below but the difference is not material for these proceedings), \$49,324,156 was owed in respect of the monies loaned to Shouldice, and \$10,071,200 was owed in respect of the monies loaned to Brampton, for a total of \$81,778,143 owing on a joint and several basis by the Debtors. Interest has not been paid on the Romspen Loan since August 2018 and is accruing at the rate of slightly less than \$1 million per month.

The Bridging Finance Loan and the Bridging Charge

[16] The Bridging Charge secures a loan made by Sprott Bridging Income Fund LP to Richmond Hill pursuant to a commitment letter dated February 9, 2016, as amended. This loan was originally in the principal amount of \$15,840,201 but was subsequently increased in stages to \$40,850,000 (the "Bridging Finance Loan"). In this Endorsement, the Romspen Loan and the Bridging Finance Loan are collectively referred to as the "Loan".

[17] Pursuant to the Commitment, Romspen loaned Richmond Hill \$19.5 million, which was used to reduce the outstanding amount of the Bridging Finance Loan. The outstanding balance of the Bridging Finance Loan and the security therefor, including the Bridging Charge, were then acquired by Romspen by way of a transfer upon payment by Romspen to Bridging Finance Inc. of \$19,590,206.47.

[18] At the present time, Romspen says approximately \$25 million is owing in respect of monies advanced to Richmond Hill. There is an issue regarding whether the amount secured by the Bridging Charge is limited to the amount outstanding at the time of the transfer of the Bridging Finance Loan to Romspen plus accrued interest or is the principal amount of the Bridging Charge, being \$40.85 million. However, this is not an issue to be determined in these proceedings. I have proceeded on the basis that the total amount owing by the Debtors jointly and severally secured against the Properties is the amount of the Romspen Loan and therefore the resolution of this issue does not affect the analysis or the determinations made below.

The Romspen Security in the Properties

[19] As security for the Bridging Finance Loan and the Romspen Loan, Romspen holds the following:

- (3) a second charge on the Project in the principal amount of \$40,850,000, originally given in favour of Bridging Finance Inc. and transferred to Romspen on May 24, 2018 (the “Bridging Charge”);
- (4) a third charge against the Project in the principal amount of \$5 million (the “Romspen Charge”);
- (5) a subordinate general assignment of rents of the Project;
- (6) a first charge over the Shouldice Property in the principal amount of \$81.2 million (the “Shouldice Charge”), together with a general assignment of rents and a specific assignment of the Hospital Lease; and
- (7) a first charge over the Brampton Property in the principal amount of \$81.2 million (the “Brampton Charge”) together with a general assignment of rents in respect of the Brampton Property.

Status of the Project

[20] The Project is over budget. Based on the most recent report dated November 23, 2018 of Pelican Woodcliff Inc. (“Pelican”) (the “Pelican Report”), the Project’s cost consultant, the net project budget has increased by approximately \$39,000,000 from \$83,000,000 to \$122,000,000 (including holdback and reserves).

[21] Meridian stopped funding the Project under the Meridian Loan in early 2018 due to increases in the construction budget. Since then, the Debtors have funded construction costs, including the costs of certain remediation work required as a result of cracks in the slab-on-grade, which are the subject of a dispute between Richmond Hill and Dineen Construction Corporation (“Dineen”), the former general contractor for the Project.

[22] The Project is also behind schedule. Based upon the latest construction schedule, construction was to have been completed on October 1, 2018. However, at the present time, it is only 80 percent complete. Moreover, construction has effectively ceased, apart from a small amount of work that is proceeding as a result of settlement agreements with three lien claimants, which have enabled these trades to continue to work on the Project.

[23] Richmond Hill originally contracted with Dineen as the general contractor for the Project. In August 2018, Dineen terminated its contract, prompted by Dineen’s concern for payment after learning that Meridian was no longer advancing funds to finance the construction and that Meridian had refused to confirm that it would advance the funds necessary to complete the Project.

[24] Between August 3, 2018 and September 28, 2018, Dineen and eleven trades filed construction liens totalling \$16,542,335.75 against the Richmond Hill Property (collectively, the “Liens”). The largest Lien was registered by Dineen. Richmond Hill says Dineen’s Lien claim duplicates the other claims of the trades with respect to the Project. Richmond Hill says that currently approximately \$8 million is required to discharge all the Liens in respect of the Project. Romspen and Meridian acknowledge there is duplication in the Lien claims.

[25] Because the Loan was fully advanced and Meridian had stopped advancing monies under the Meridian Loan, the Debtors, and in particular Richmond Hill, have experienced a liquidity crisis commencing August 2018. Since that time, the Debtors have made serious, but unsuccessful, efforts to enter into a sale or refinancing transaction that would pay out Romspen and Meridian.

[26] Richmond Hill has selected a different general contractor, Greenferd Construction Inc. ("Greenferd"), to manage the interior works to make the Project suitable for the future tenants, referred to as the "Fit-Out Works". Richmond Hill has recently also engaged Greenferd to take over the role of general contractor for the remaining construction of the Project.

[27] Richmond Hill says that it now expects substantial completion of the Project to occur during May 2019. In view of the construction delay, Richmond Hill has sought and obtained signed acknowledgements regarding the new target occupancy date from future tenants who have contracted for 72 percent of the gross leasable space in the Project and who represent 76 percent of the total projected rent roll. These acknowledgements have provisions that permit Richmond Hill to extend the commitments of these tenants to May 30, 2018.

[28] Meridian's consultant on the Project, Glynn Group Incorporated ("Glynn"), has reviewed the Pelican Report and has made a number of comments, including the following.

[29] First, Glynn agrees with Pelican that construction of the Project will only be back up and running in a productive manner by the middle of January 2019. Second, given the volume of construction remaining, the Project requires "extremely intensive" supervisory, scheduling and management oversight" to achieve the timelines contemplated by Pelican and the Debtors. Third, the selection of a new general contractor/construction manager is "pivotal" to the success of the Project going forward. Fourth, the scenario of a new general contractor/construction manager working with the existing trades is the best scenario and is contemplated by the budget reviewed by Pelican. However, Pelican was also of the opinion that it may not be possible to convince these trades to return to the Project given the recent history of non-payment and the existence of the Liens.

Demands under the Loan and the Meridian Loan

[30] The registration of the Liens and the failure of the Debtors (and the other guarantors under the Loan) to remove the Liens from title to the Richmond Hill Property constitutes a default under the Commitment under and each of the Meridian Charge, the Romspen Charge, the Shouldice Charge, the Brampton Charge and the Bridging Charge (collectively, the "Charges").

[31] The existence of the Liens on the Richmond Hill Property also constitutes a serious material adverse change under the Loan. Section 16.16 of the Commitment provides that if, in the opinion of Romspen, an adverse material change occurs in respect of any of the Debtors, its business, a charged property or Romspen's security, the whole balance of the Loan becomes immediately due and payable and becomes enforceable. The Bridging Finance Loan and the Meridian Credit Agreement contain similar provisions.

[32] In addition, the failure to pay municipal taxes when due also constitutes a default under the Commitment and the Charges. It is understood that tax arrears are owing in respect of each of the Properties and that further arrears are being incurred.

[33] On September 12, 2018, Romspen made demand on the Debtors (among others) and issued notices pursuant to s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). On November 12, 2018, Meridian also made demand on Richmond Hill, among others, and issued similar notices under s. 244 of the BIA. The Debtors do not deny that they are in default under the Commitment, the Bridging Finance Loan, the Meridian Loan and the Charges.

[34] The Debtors also do not dispute that each Charge held by Romspen and Meridian in respect of the Properties provides for the appointment of a receiver in the event of default under the Loan and the Meridian Loan. The Romspen Charge also expressly contemplates the appointment of a construction lien trustee under the *Construction Act*, R.S.O. 1990, C. 30 (the "CA") in the event of default.

The Receivership Application

[35] As mentioned, in the Receivership Application, Romspen seeks the appointment of a receiver over the properties and assets of Richmond Hill having the necessary powers to engage third parties to complete the construction of the Project. Romspen also seeks the appointment of a receiver over the assets of Shouldice and Brampton.

[36] The receivership order sought by Romspen included the power to sell the assets of each of the Debtors. However, the principal purpose of the Romspen application in respect of Richmond Hill is the appointment of a receiver to supervise the completion of construction of the Project. Romspen also says the principal purpose of the appointment of a receiver over the assets of Shouldice and Brampton is to ensure that the priority of funds advanced under the proposed Receivership Financing (defined below) is preserved in respect of these Properties as well as the Richmond Hill Property. Accordingly, Romspen has indicated that it is prepared to exclude the power of sale in respect of the Properties from any order that the Court may grant.

[37] Romspen has filed a report of Ernst & Young Inc., the proposed receiver (the "Proposed Receiver"), which sets out its proposed course of action. The Proposed Receiver states that it intends to engage Elm Development Corp. as the construction manager for the Project.

[38] Meridian supports the Receivership Application of Romspen and has committed to the Receivership Financing (defined below) with Romspen. In this Endorsement, the term "Receivership Applicants" refers to Romspen and Meridian in the circumstances in which they join in making the same submissions in these proceedings.

The Receivership Financing

[39] Romspen and Meridian have provided the Court with a signed term sheet for a joint financing in the amount of \$35 million to fund the proposed receivership (the "Receivership Facility"). The following are the principal terms of this Facility.

[40] The principal amount of the Facility of \$35 million is available in two tranches – a tranche of \$15 million to be provided by Romspen (the “Romspen Tranche”) and a tranche of \$20 million to be provided by Meridian (the “Meridian Tranche”). The Meridian Tranche is to be available only after specified construction work described in a schedule to the Pelican Report (although the term sheet refers to a prior Pelican report dated October 21, 2018) is completed, in which event the loan/value covenant under the Meridian Credit Agreement would be brought into compliance permitting further advances under that Agreement.

[41] The Receivership Facility would have a one-year term, and would bear interest at a rate of 15 percent under the Romspen Tranche and at the rate provided for under the Meridian Credit Agreement for the Meridian Tranche. The Receivership Applicants say this would result in a blended rate of approximately nine percent.

[42] Advances under the Romspen Tranche of the Receivership Facility are to be secured by a charge ranking behind the Meridian Charge but ahead of all other charges on the Properties, including the Liens. Advances under the Meridian Tranche are to be secured on the Richmond Hill Property in priority to all other charges on that Property.

[43] The Receivership Facility contemplates fees of three percent of the maximum amount of the Romspen Tranche to Romspen and of \$170,000 to Meridian.

The CCAA Application

[44] In addition to opposing the Receivership Application, the CCAA Applicants, which effectively includes the Debtors, have brought an application for certain relief under the CCAA, including an initial stay of proceedings and the appointment of KSV Kofman Inc. as the Monitor in respect of the proposed proceedings. The order sought also includes approvals of the DIP Facility and related charge (the “DIP Charge”), of a financial advisor agreement dated October 19, 2018 between Atlas Global Healthcare Ltd., one of the CCAA Applicants, and FTI Capital Advisors – Canada ULC (“FTI”) and a related charge (the “FTI Charge”), of a directors’ and officers’ charge in the aggregate amount of \$500,000, and of an administration charge in the aggregate amount of \$1.5 million.

The DIP Facility

[45] In the CCAA Application, the CCAA Applicants have included a signed term sheet dated as of November 26, 2018 respecting the DIP Facility between PointNorth Capital (PNG) LP and PointNorth Capital (O) LP (collectively, “PointNorth”), as lenders on behalf of certain funds and accounts (collectively “PointNorth”), on the one hand, and each of the CCAA Applicants, on the other. The following sets out the principal terms of the DIP Facility.

[46] The DIP Facility is a non-revolving facility that accrues interest at 15 percent per annum compounded monthly and has a term of one year, subject to earlier termination under certain circumstances. The total availability under the DIP Facility is \$50 million to be funded in two equal tranches – the first upon the issuance of the initial order sought under the CCAA including approval of the DIP Facility and the second on or about February 1, 2019. The DIP Facility also includes provision for an additional loan of up to \$2,830,000 to cover overrun construction costs (the “Bulge Facility”).

[47] The DIP Loan requires payment of a commitment fee of \$750,000, a monthly administration fee of \$50,000 and an early exit payment fee on repayment of any portion of the DIP Facility to top up aggregate interest payments to \$6,875,000.

[48] The DIP Facility contemplates the following use of proceeds: (1) to pay advisory, consultant and legal fees of the lenders, the CCAA Applicants and the Monitor; (2) to pay interest, fees and other amounts owing under the DIP Facility; (3) to fund the working capital requirements of Richmond Hill and property taxes and insurance of the other Debtors during the CCAA proceedings; and (4) to fund the costs to complete the Project in accordance with the budget for the Project, estimated to be \$28.261 million plus certain amounts to address certain Lien claims.

[49] The DIP Facility contemplates a charge over all the property and assets of the CCAA Applicants, including the Richmond Hill Property, ranking prior to all other charges other than the Meridian Charge. Accordingly, the DIP Facility requires a charge ranking behind the security in favour of Meridian on the Richmond Hill Property but ahead of the security in favour of Romspen on each of the Properties. Further, the DIP Facility contemplates subordinate charges over a fourth property (the "Mississauga Property") that is not subject to any security in favour of either Meridian or Romspen.

Applicable Law

[50] The appointment of a receiver and manager is governed by s. 43 of the BIA and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, both of which provide that the Court may appoint a receiver where it is "just or convenient" to do so. Although s. 68 of the CA does not specify that the requirement for the appointment of a construction lien trustee is satisfaction of the "just or convenient" test, Ontario courts have relied on this test in making such an appointment: see, for example, *WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.*, 2009 CanLII 31188 (Ont. S.C.).

[51] It is trite law that, in considering whether to appoint a receiver, a court should have regard to all the circumstances of the case but in particular to the nature of the property and the rights and interests of the affected parties in relation thereto: see, for example, *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. C.J. (Gen. Div.)), at para. 11.

[52] The granting of a stay of proceedings on an initial application under s. 11.02(1) of the CCAA requires the applicant demonstrate that it is a "debtor company" as defined in s. 2(1) of the CCAA and that circumstances exist that make the order appropriate.

[53] For this purpose, I adopt the following description of the purpose of the CCAA in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at p. 88:

The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. ... When a company has recourse to the C.C.A.A., the

Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

[54] There is no dispute that each of the CCAA Applicants are debtor companies for the purposes of the CCAA. Further, each of the Debtors is insolvent in that, regardless of the values of the Richmond Hill Property on completion of the Project, and of the Shouldice Property after redevelopment of that Property, they are currently unable to meet their respective obligations as they fall due.

[55] In the present case, because the CCAA Application also requires approval of the DIP Facility at this time, the provisions of s. 11.2 of the CCAA governing the approval of any charge to secure debtor-in-possession financing, while not technically applicable unless the CCAA Application is granted, also inform the determinations made in this Endorsement. In this regard, s. 11.2(4) provides that, among other things, in deciding whether to approve such a charge, a court is to consider the following factors:

- (a) the period during which the company is expected to be subject to proceedings under the CCAA;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report, if any.

Analysis and Conclusions

[56] There is no obvious priority of consideration of the Receivership Application and the CCAA Application. Moreover, each must be judged independently on its own merits. It is at least theoretically possible that each application could be denied. However, as a practical matter, the parties require that the Court grant the relief sought in one of the applications in order that construction of the Project can restart under the supervision of either a court-appointed receiver or Richmond Hill as a debtor-in-possession. Further, the considerations respecting the merits of each application are broadly similar. Accordingly, I propose to address the considerations raised by the parties first and then to set out my determinations regarding the applications.

[57] The considerations raised by the parties fall broadly into four categories – operational issues, the nature of the property involved, the respective rights and interests of the parties and the respective costs of the prospective proceedings. I will deal with each of these considerations in turn.

Operational Issues Pertaining to the Competing Applications

[58] The CCAA Applicants have raised two considerations that they urge the Court to take into account pertaining to the manner in which it is proposed to conduct the remaining construction of the Project: (1) the comparative feasibility of the respective financial plans of the parties; and (2) the comparative feasibility of the respective construction plans of the parties. I will address each of these considerations separately before addressing whether one of the operational plans is demonstrably superior to the other.

The Competing Financial Plans

[59] The CCAA Applicants argue that their financial plan is more realistic than the Romspen receivership plan, which they suggest is unrealistic in the sense of not feasible.

[60] The financial plan of the CCAA Applicants contemplates an availability of \$50 million under the DIP Facility. In the current cash flows provided to the Court, which also form the budget for the purpose of the DIP Facility, Richmond Hill would have a cushion of approximately \$5 million to cover cost overruns. In addition, the DIP Facility provides for the possibility of the Bulge Facility to cover further cost overruns.

[61] The financial plan of the proposed receivership is based on the Receivership Facility. It is limited to \$35 million, of which the Meridian Tranche of \$20 million is available only if the hard construction costs do not materially exceed those contemplated in a schedule to the Pelican Report. The Receivership Facility also does not have any significant amount of cushion for cost overruns. However, each of Romspen and Meridian are of the view that these costs are achievable and that they will deal with any unanticipated cost overruns. They are also of the view that the budget of the CCAA Applicants includes certain costs in amounts that are either unnecessary or larger than necessary.

[62] The principal differences between the two plans pertain to lower interest costs and professional fees of the Receivership Financing as well as a different view of the amounts required to pay the Lien claimants and a larger cushion for contingencies under the DIP Facility.

[63] While there is some benefit in the greater flexibility provided by the DIP Facility, I am not persuaded that, on balance, the financial plan for the receivership is unrealistic, as the CCAA Applicants suggest. It is consistent with the estimate of capital costs to completion of Pelican, Richmond Hill's own quantity surveyor, which the CCAA Applicants also use in their budget. Those capital costs have also been reviewed and approved by Meridian's quantity surveyor. Further, as Romspen acknowledges, the terms of the Receivership Financing, as well as the limited scope of the proposed receivership order in respect of Shouldice and Brampton, effectively require Romspen to fund any cost overruns provided they will translate into increased equity in the Project. In addition, as mentioned, a principal difference between the two plans is a more conservative estimate of certain payments (i.e. involving larger payments) in the financial

plan of the CCAA Applicants. It is not possible to estimate these latter costs with any degree of certainty at the present time.

[64] Based on the foregoing assessment of the considerations raised by the parties, I conclude that the evidence before the Court does not establish that the financing plan of the Receivership Applicants is unrealistic in the sense that it is not feasible or that the financing plan of the CCAA Applicants is materially better than the plan of the Receivership Applicants.

The Competing Construction Plans

[65] The CCAA Applicants also argue that their construction plan is more reliable than that of the proposed receivership. In particular, the CCAA Applicants argue that they are better placed to get the construction restarted because of their prior familiarity with the construction plan and schedule, as well as their relationship with the trades. Romspen and Meridian say that Elm is experienced in workout construction projects and is therefore more than capable of restarting the Project in a reasonable time.

[66] I do not think that the record provides a basis for preferring one construction plan over the other for the following reasons.

[67] First, while Richmond Hill has more experience of, involvement in, and knowledge of, the Project, this cuts both ways. Under its supervision, the capital costs of the Project have increased very significantly. While Richmond Hill disputes the \$38 or \$39 million figure of Pelican, it acknowledges at least \$32 million in cost overruns. There are, therefore, valid grounds for concern regarding the ability of Richmond Hill's management to control construction costs. In addition, under Richmond Hill's supervision, the trades previously working on the Project have ceased working and registered construction liens. A decision will have to be made on an individual trade basis whether to settle with, or to replace, the trade. This may be affected in part by the state of the current relationship between Richmond Hill and each of the affected trades.

[68] Second, Richmond Hill has been forced to engage a new general contractor for the construction, Greenferd. Both Greenferd and Elm appear to have a similar degree of familiarity with the Project and a similar challenge of "getting up to speed". I cannot find that Elm is any more of a risk than Greenferd on the record before the Court.

[69] Third, the more aggressive construction schedule proposed by Richmond Hill in the affidavit of Peter Grigoras, sworn November 14, 2018 (the "Grigoras Affidavit"), is not consistent with the opinion of Pelican, its own quantity surveyor. As noted above, Pelican is of the view that construction would restart in early January and that substantial performance would not be achieved until late June 2019. I see no basis for concluding that there will be no "ramp-up" time under a CCAA proceeding, as the CCAA Applicants suggest.

[70] Fourth, the CCAA Applicants say the Court should be mindful of the specialized nature of the Project as a hospital and the fact that Richmond Hill has engaged specialized employees and consultants to address the complicated issues associated with construction of such a building. However, to the extent that Richmond Hill has engaged any such individuals as employees or consultants, a receiver would also be in a position to engage them to receive the benefit of their

expertise. The real significance of this consideration, if any, lies in the increased costs that would be incurred beyond those currently contemplated by the Receivership Facility but are apparently included in the budget used for the DIP Facility.

[71] Fifth, the CCAA Applicants also suggest that the involvement of OMERS, as an investor in PointNorth, and of Dream Alternatives Lending Services LP, as a participant in the DIP Facility, is a significant advantage. They suggest that the expertise of these organizations will translate into better cost administration and the availability of construction expertise. While such involvement would be desirable, there is nothing to demonstrate that such benefits will accrue to the Project. Moreover, each of PointNorth and Romspen has expertise in the administration of construction projects in a workout situation and an incentive to require careful oversight.

[72] Lastly, while I agree that, in certain circumstances, a debtor-in-possession restructuring may impart greater confidence in the financial stability of the debtor than a receivership, I am not persuaded that this is an important consideration in the present case. The liquidity problems of Richmond Hill have been transparent to all of the trades working on the Project for some time and to the future tenants. It is not clear that a CCAA proceeding would restore confidence in Richmond Hill if the same management continued to be involved with the Project, even with a new general contractor.

Conclusion Regarding Operational Issues Pertaining to the Competing Applications

[73] Each of the proposed plans for completing the Project of the Receivership Applicants and the CCAA Applicants carries its own risks. I have considered whether, when viewed in their entirety, the construction and financing plans of one of these parties is materially superior to the other, or more credible than the other, such that this should be a consideration to be taken into account in the Court's determination. Given the evidence before the Court, I am not persuaded, however, that the plan of either the CCAA Applicants or the Receivership Applicants is materially superior to, or more credible than, the other. In particular, I cannot conclude that either the CCAA Applicants' plan or the Receivership Applicants' plan is more likely to achieve construction completion on time and on budget. Given the number of variables involved, any such determination would be highly speculative at this time. Nor do I think that the CCAA Applicants have demonstrated that the Receivership Application, if granted, will result in the Project failing to be completed, as the CCAA Applicants suggest. Accordingly, I do not consider the operational features of the plans of the parties to be a significant consideration weighing in favour of either the CCAA Application or the Receivership Application.

The Nature of the Property

[74] An important consideration in this proceeding is the nature of the property at issue.

[75] The Receivership Applicants say that each of the Debtors is a single-project real estate development company. Romspen says that courts have generally held that there is no principled basis for granting a stay under the CCAA to prevent real estate lenders from enforcing their security. Meridian submits that courts will generally refuse to grant a stay where CCAA protection would place the value of the security of secured creditors at risk. Both rely on the

decisions in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 83 B.C.L.R. (4th) 214 and in *Dondeb Inc. (Re)*, 2012 ONSC 6087, 97 C.B.R. (5th) 264.

[76] In *Cliffs Over Maple Bay Investments*, Tysoe J.A. stated the following at para. 36:

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

[77] In *Dondeb Inc.*, after referring to the above statement of Tysoe J.A., C. Campbell J. went on to refer with approval to the following comments of Kent J. in *Octagon Properties Group Ltd. (Re)*, 2009 ABQB 500, 486 A.R. 296, at para. 17:

This is not a case where it is appropriate to grant relief under the CCAA. First, I accept the position of the majority of first mortgagees who say that it is highly unlikely that any compromise or arrangement proposed by Octagon would be acceptable to them. That position makes sense given the fact that if they are permitted to proceed with foreclosure procedures and taking into account the current estimates of value, for most mortgagees on most of their properties they will emerge reasonably unscathed. There is no incentive for them to agree to a compromise. On the other hand if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

[78] The CCAA Applicants do not deny this line of cases but suggest that it is not applicable in the present circumstances. They suggest that the circumstances are much closer to the circumstances in *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319, 96 B.C.L.R. (4th) 77 and *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775, in which courts ordered a stay under the CCAA in preference to the appointment of a receiver.

[79] In *Forest & Marine Financial Corp.*, at para. 26, Newbury J.A. distinguished the circumstances from those in *Cliffs Over Maple Bay Investments* as follows:

In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself, which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act - to preserve the status quo while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the means contemplated by the Act - a compromise or arrangement - can be developed, negotiated and voted on if necessary. If the Partnership is ultimately able to arrange a refinancing in respect of which creditors need not compromise their rights, so much the better. At this point, however, it seems more likely a compromise will be necessary and the Partnership must move promptly to explore all realistic restructuring alternatives.

[80] The same analysis was applied by Fitzpatrick J. in *Pacific Shores Resort & Spa Ltd.*, at para. 39:

I am of the view that, similar to the facts under consideration in *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para. 26, 273 B.C.A.C. 271, this is a situation where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of the parties. The CCAA proceedings have only begun, and I have no doubt that any plan will evolve over time given the usual negotiations that one would expect to occur between the petitioners and the major stakeholders while the stay is in place.

[81] The CCAA Applicants suggest that Richmond Hill in particular should be treated as a business because it has approximately 20 employees and consultants and because it has contracted with approximately 20 future tenants. They also suggest that the relationships among the CCAA Applicants and the Debtors are complex with the result that a CCAA proceeding is more appropriate.

[82] I do not think that any of the Debtors can properly be characterized as a business in the sense contemplated in the cases relied upon by the CCAA Applicants. There is no demonstrated ongoing business of any of the Debtors. There are only a limited number of employees and consultants of Richmond Hill and these individuals are employed solely for the purpose of building the Project. The fact that approximately 20 entities have executed leases for space in the Project when it is completed also does not establish the existence of a business at the present time. Nor have the CCAA Applicants demonstrated that the relationship between themselves is sufficiently complex to require a CCAA proceeding to properly identify the respective stakeholder interests in the debtor companies and ensure fair treatment of such interests.

[83] More generally, the circumstances in the cases relied upon by the CCAA Applicants are very different from the present circumstances in a number of significant respects. In *Forest & Marine Financial*, the debtor companies were engaged in a very different business from real estate development – that of providing financing and advisory services. The assets of the debtor companies comprised a loan portfolio of many types of assets as well as an office building and the liabilities included both secured debt and “investment receipts” issued to the public. In *Pacific Shores Resort & Spa*, the debtor companies employed approximately 250 persons and were in the business of selling vacation ownership products and deeded ownership products, and the management of such interests, including the management of several resorts. Moreover, and significantly, in both cases, the court concluded that the secured creditors were well covered by the equity in the debtor companies. In my view, therefore, the present circumstances are much closer to those in *Dondeb* and *Cliffs Over Maple Bay Investments* than they are to the circumstances in *Forest & Marine Financial* and *Pacific Shores Resort & Spa*.

[84] The foregoing analysis suggests that there are no features of the business of the Debtors, or of the Properties, that render a CCAA proceeding necessary, or more appropriate than a receivership proceeding, to address the current liquidity difficulties of the Debtors and the need to complete the Project with an additional injection of funds from third parties. The proposed receivership proceeding and the proposed CCAA proceeding should each accomplish the objective of completion of construction of the Project. However, the case law suggests that, in similar circumstances, particularly where the security coverage of secured creditors is in question, courts have given effect to the rights of secured creditors by granting a receivership order. This consideration weighs in favour of a receivership order in the present circumstances. To be clear, however, I think that the judicial preference for a receivership over a CCAA proceeding in the circumstances of a single-project real estate development corporation is not so much a free-standing rule, as Romspen suggests, as it is the outcome of a consideration of the other factors discussed below.

Legal Rights and Interests of Meridian and Romspen

[85] Meridian and Romspen submit that where the contract between a lender and a borrower provides for the appointment of a receiver in the event of a default, a court should not ordinarily interfere. In short, they argue that the Court should give effect to their contractual rights.

[86] As mentioned, the Court is required to assess whether the appointment of a receiver is “just or convenient” having regard to all of the circumstances. In this context, I do not think that the rights of secured creditors who choose to seek the benefits of a court-appointed receiver over a privately-appointed receiver are as unqualified as Romspen suggests. Nevertheless, the legal rights of Meridian and Romspen are an important consideration in making a determination regarding the appropriateness of relief under the CCAA as well as the application of the “just or convenient” test for the appointment of a receiver. In this regard, two considerations are of particular significance.

The Security Position of Meridian and Romspen

[87] First, there is a real possibility that the consequence of the priority to be afforded the DIP Charge, which is a condition of any CCAA proceeding, would be to diminish the security of Romspen and, to a lesser extent, of Meridian. For clarity, it should be noted, however, that the security of these creditors will only be “primed” as a practical matter to the extent that the monies advanced under the DIP Facility exceed the monies that would otherwise be advanced under the Receivership Financing, given that prior-ranking construction financing is required under each plan to complete the Project.

[88] The CCAA Applicants argue that, on the basis of their evidence, both Romspen and Meridian are fully secured with the result that there is no practical significance to this concern. I agree that, given the terms of the DIP Facility, and subject to the resolution of one issue acknowledged by counsel for PointNorth, it is unlikely that Meridian would be adversely affected by the imposition of that Facility in priority to the Meridian Loan. However, the situation in respect of Romspen is not as clear. This requires a consideration of the evidence in the record.

[89] The CCAA Applicants have provided appraisals of the Properties that they say demonstrate that Romspen is very well secured. Conversely, Romspen has provided internal valuations for the Properties that place Romspen’s security “on the cusp”, in that they suggest that the aggregate value of the equity in the Shouldice Property, the Brampton Property and the completed Project, after deduction of the amount of the Meridian Loan and the DIP Facility, would be no greater than the outstanding amount of the Loan at the present time and could be materially less than such amount. Romspen also notes that, given the interest rate under the Loan, interest continues to accrue at the rate of slightly less than \$1 million per month eroding any existing equity. Accordingly, under these valuations, Romspen could suffer a deficiency under a CCAA proceeding using its estimate of the costs of such a proceeding. On the other hand, using more optimistic assumptions, the same valuation models would provide a cushion of coverage for Romspen.

[90] I do not think that the appraisals provided by the CCAA Applicants are sufficiently reliable that the Court can rely on them on a balance of probabilities standard for the following reasons.

[91] With respect to the Project, the appraisal of the CCAA Applicants was conducted on a "fully built" basis. It also assumes 100 percent occupancy at certain projected rental rates. While Richmond Hill has contracted for a large portion of the rental space, there is a real risk until the Project is fully completed that the projected rental stream will not be achieved for a number of reasons. Accordingly, it logically follows that the value of the Project at the present time must be discounted from this appraisal value to reflect such risks. With respect to the Shouldice Property, the appraisal of the CCAA Applicants is based on the assumption that the Shouldice Property can be rezoned for the development contemplated in the appraisal. There is, however, no evidence on the feasibility of such development. Accordingly, neither of these appraisals provides a reliable valuation of these Properties at the present time.

[92] On the other hand, the internal valuations of Romspen make certain assumptions regarding occupancy rates and an appropriate capitalization rate that are likely to be conservative given Romspen's status as a subordinated lender to the Debtors. The sensitivity analysis provided by Romspen demonstrates a range of values as these assumptions are varied that would result in Romspen's security position falling between a material deficiency and a moderate excess of coverage. In the absence of any basis for determining the appropriate assumptions, it is also not possible to rely on these internal valuations.

[93] It is therefore necessary to seek other objective evidence regarding a realistic range of values for the Project.

[94] In this case, the best objective evidence is PointNorth's position, as the lender under the DIP Facility. If PointNorth accepted the Debtor's estimate of value, it would not have required that the DIP Charge prime the Romspen security, much less required that the CCAA Applicants provide the additional security on the Mississauga Property. Given PointNorth's requirement of these terms of the DIP Facility, I think it is a fair inference that PointNorth does not share the Debtor's confidence in the value of the Properties.

[95] In addition, the inability of the Debtors to obtain financing at the indicative values in the term sheets set out in the Grigoras Affidavit is further evidence that the appraisal values put forward by the CCAA Applicants are not reliable indicators of the current values of the Properties. In this respect, the indicative term sheet of PointNorth attached to that Affidavit is of particular relevance.

[96] Similarly, the failure of a proposed sale of the Shouldice Property on the terms, and at the value, set out in the Grigoras Affidavit due to the purchaser's failure to satisfy the financing condition is also evidence that the value ascribed to that Property by the CCAA Applicants is not credible.

[97] The foregoing evidence does not, however, establish a credible value or range of values for the Richmond Hill Property or the Shouldice Property. In these circumstances, I think the Court can find no more than that the equity in the Properties lies somewhere between the

Romspen internal values and values that are materially less than the aggregate value ascribed to them by the Debtors.

[98] The Court must therefore proceed on the basis that there is at least a reasonable possibility that the DIP Facility would adversely affect the Romspen security position. There is, therefore, a real possibility that, under the proposed CCAA proceedings, the Debtors would be “playing with Romspen’s money” by virtue of the terms of the DIP Facility, as Romspen suggests. In other words, as in *Octagon Properties Group*, under the proposed CCAA proceedings, Romspen would be paying the cost to permit the Debtors to buy some time. This is also a consideration that weighs in favour of a receivership.

[99] I note, as well, that there is an inherent check and balance on the foregoing value assessment in the CCAA Applicants’ favour. The grant of the requested receivership order would not prevent the CCAA Applicants from continuing to market the Properties with a view to a sale or refinancing transaction that would repay Meridian and Romspen. If the values of the Properties do in fact approach the values suggested by the CCAA Applicants, it should be possible to conclude such a transaction and, thereby, to retain the remaining equity in the Properties for the benefit of the subordinated lenders and equity holders.

The Contractual Rights of Meridian and Romspen

[100] Second, the effect of a CCAA proceeding would be to deprive Meridian and Romspen of the right to cause a change in the management of the Project in the very circumstances in which their security contemplates such a right. The Receivership Applicants have lost faith in the Debtors’ management and an acknowledged default has occurred. Meridian and Romspen have bargained for the right to have a receiver take over control of, and to complete, the construction of the Project in these circumstances. There must be a good reason to deprive them of that right.

[101] In the present circumstances, however, this right has a particular significance because oversight and control of the construction costs is likely to impact the value of Romspen’s security and, in an extreme case, of Meridian’s security. A court-appointed receiver must justify its actions to the court and thereby to the creditors. It is exposed to potential liability if it is grossly negligent in the performance of its duties. Accordingly, secured creditors would reasonably expect to have more input into a receiver’s actions than they would into the actions of the Debtors’ management in a CCAA proceeding. While this might not be significant in a status quo situation, it is an important consideration in the present circumstances in which significant construction activity must take place, and significant additional debt must be incurred, to complete the Project.

[102] Accordingly, I conclude that the assertion by the Receivership Applicants of their contractual rights in the present circumstances, as well as their loss of faith in the management of the Debtors, must be important considerations for the Court.

The Interests of the Other Stakeholders in the Project

[103] Based on the foregoing, the proposed CCAA proceedings would have the two adverse or potentially adverse effects on the Receivership Applicants described above. The CCAA Applicants argue, however, that any such prejudice to the Receivership Applicants is more than

offset by the operational benefits of a CCAA proceeding and the benefits to the other stakeholders in the Project.

[104] I have dealt with the alleged operational benefits of the proposed CCAA proceeding above. I have concluded that the CCAA Applicants have not established that there are material operational benefits that make a CCAA proceeding superior to a receivership proceeding. This is therefore not a factor to be taken into consideration.

[105] The position of the CCAA Applicants that there are other stakeholders who will benefit from a CCAA proceeding and whose interests counterbalance the interests of the Receivership Applicants raises an important issue in these applications. Such stakeholders fall into two categories – future tenants and subordinate creditors and equity owners.

[106] The future tenants are critical to the success of the Project. It is of fundamental importance that the tenancy agreements in place continue and that any unrented space be rented as soon as possible. However, I am not persuaded that the future tenants who have contracted with Richmond Hill are more likely to favour a CCAA proceeding over a receivership. There is no evidence to this effect in the record. The more likely position is that the future tenants are more concerned with satisfaction that the Project, including the Fit-Out Works in respect of their space, will be completed in accordance with the timelines contemplated. In this respect, I think the future tenants are likely to be neutral as between a receivership or CCAA proceedings.

[107] The subordinated creditors of the Project comprise the trade creditors and certain unsecured lenders to the Project. The former include the Lien claimants whose priority has been established and any future trade creditors who will need to be kept current in order to complete the Project. The interests of these parties pertain to operational issues that are not affected by the nature of the proceeding that results in a restart of construction of the Project.

[108] On the other hand, the unsecured creditors and the equity holders in the Project rank junior to Meridian and Romspen. A CCAA proceeding, which entails prejudice or potential prejudice to senior ranking creditors in favour of junior ranking creditors and equity holders can only be justified, if ever, on the basis of larger societal interests.

[109] Meridian and Romspen submit that, as single-project real estate development companies, the insolvency of the Debtors, and in particular of Richmond Hill, does not raise any such interests. They rely on the decisions in *Cliffs Over Maple Bay Investments* and *Dondeb*, and in particular on the statements in those decisions cited above. Three considerations emerge from the case law set out above which are important in the present circumstances.

[110] First, where there is no business but rather a single-project real estate development company having mortgage lenders, it is not realistic to contemplate the possibility of a plan of compromise or arrangement under the CCAA that gives Meridian and Romspen less than a full payout of their indebtedness from the proceeds of any sale or a refinancing. In particular, there can be no justification for transferring value from Meridian and Romspen to more junior creditors or the equity holders.

[111] Second, for the same reason, there is no basis on which subordination of the priority position of Meridian and Romspen to that of a DIP Lender can be justified beyond the

construction costs contemplated by the financing plans of the parties to the extent such costs translate into equity in the Project and therefore do not diminish the security of these creditors.

[112] Third, for the foregoing reasons, it is questionable whether the CCAA proceedings contemplated by the CCAA Application can be said to further the purpose of the CCAA as set out above for the following reasons.

[113] In the present case, the CCAA is not being proposed with a view to “stabilizing” the present circumstances of the Debtors and allowing the Debtors the benefit of the status quo with a view to putting a restructuring plan to the stakeholders. There are two elements to this conclusion.

[114] First, it is not meaningful to talk of the maintenance of the status quo for the reason that, as discussed above, construction of the Project, being the only activity of Richmond Hill, is currently almost completely shut down. The Court is not being asked to grant relief to maintain that status quo. It is being asked to determine which of the two legal procedures – a receivership or a CCAA proceeding – should be ordered with a view to furthering a resumption of the construction of the Project under a new construction general contractor. Moreover, while the DIP Facility provides for some working capital, the DIP Facility is a non-revolving facility whose predominant purpose is to provide construction financing in a material amount which is necessary to permit construction to restart. In effect, the CCAA Applicants ask the Court to impose a third construction lender on the Project in priority to the existing lenders. This is beyond the usual nature and purpose of a DIP loan for working capital purposes. It underscores the fact that mere “stabilization” of the alleged business of the Debtors would serve no useful purpose. In short, the CCAA Applicants do not seek relief under the CCAA for the purpose of maintaining the status quo, or for “stabilizing” the situation, in the sense in which those terms are generally understood in the context of CCAA proceedings.

[115] Second, the CCAA Applicants do not contemplate a plan of compromise or arrangement as understood for the purposes of the CCAA for the reason that, as mentioned, Meridian and Romspen cannot be compelled to accept less than a complete payout of the Meridian Loan and the Loan, respectively, out of the proceeds of a sale or a refinancing. The “plan” of the CCAA Applicants is to seek to repay Meridian and Romspen out of the proceeds of a future sale or refinancing, if possible, after completion of the Project.

[116] Fundamentally, the purpose of the CCAA Application is not to restructure the business of the Debtors with a view to continuing their business but rather to maintain control of the Project by a Court-ordered imposition of new construction financing in the hope of realizing value for the subordinated lenders and equity holders. However, such control comes at the cost of prejudice to the rights, and potentially to the security position, of Romspen and Meridian. In this regard, the circumstances are similar to those in *Callidus Capital Corp. v. Carcap Inc.*, 2012 ONSC 163, 84 C.B.R. (5th) 300.

[117] The Debtors have experienced a liquidity crisis since August 2018. None of the Debtors has any working capital with which to carry on business. The Debtors have explored a number of sales and refinancing options and have been unsuccessful. There is no sale or refinancing

option available to the Debtors at the present time. The CCAA Application is the only means available to them to preserve control over the continued construction of the Project.

[118] The purpose of the CCAA Application is to maximize the value of the Project. In the abstract, this is a desirable objective. However, in the present circumstances, it is not. It is the hope of the CCAA Applicants that sufficient value will be realized upon completion of the Project to make a sale or refinancing transaction feasible. If they are successful in realizing additional value, the subordinate creditors and the equity holders will benefit. However, if they are unsuccessful, Romspen and, in an extreme case, Meridian may well suffer a loss. The proposed CCAA proceeding therefore places the risk of a reduction in the value on Romspen and Meridian.

[119] This is inconsistent with the purpose of the CCAA which is to preserve the status quo in order to facilitate a plan of compromise or arrangement among the creditors of a debtor company, not to transfer risk, and potentially value, from senior creditors to junior creditors and equity holders without the consent of the senior creditors.

[120] Based on the foregoing, I conclude that the CCAA Applicants have failed to establish that the prejudice to the Receivership Applicants is offset by the benefits of the proposed CCAA proceeding.

The Respective Costs of a Receivership Versus a CCAA Proceeding

[121] Romspen alleges that the costs of a receivership will be less than the costs of a CCAA proceeding. While this is acknowledged by the CCAA Applicants, the parties dispute the extent of the difference. Counsel agree that the disputed difference is roughly \$5-6 million i.e. between a difference of \$5 million and a difference of \$11 million. The difference pertains largely to the difference in the estimated costs discussed above in respect of the financing plans of the parties. Romspen says this consideration is important in respect of its position as a secured lender to the extent that the security for the Loan may not exceed, or only minimally exceeds, the current value of the Properties, which it considers to be the case.

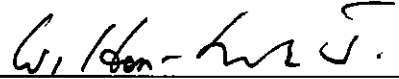
[122] However, for the reasons discussed above, the Court is not in a position to make any determination on the likely difference in costs between these two proceedings beyond the agreed difference of \$5 million. Any other figure would be speculative based on operational assumptions regarding the Project construction operations that may or may not prove to be appropriate.

[123] The more important cost considerations, which have been addressed above, are the extent to which the CCAA proceeding would result in less control over the financing of the much larger costs of completion of the Project, in a larger advance under the DIP Facility than would otherwise have been made under the Receivership Financing, and in a larger subordination of the security position of Romspen and Meridian.

[124] Accordingly, while the CCAA proceeding appears to entail costs of at least \$5 million more than as receivership proceedings, the fact that a receivership proceeding would be less expensive than a CCAA proceeding is, by itself, not a significant factor in the Court's determination in this Endorsement.

Conclusions

[125] Based on the considerations addressed above, I conclude that it would not be appropriate to grant the CCAA Application and that it is instead just and convenient to grant the Receivership Application for the appointment of a receiver without a power of sale in respect of the Properties.

A handwritten signature in black ink, appearing to read "Wilton-Siegel J.", is written over a horizontal line.

Wilton-Siegel J.

Date: December 10, 2018

ROYAL BANK OF CANADA
Applicant

- and -

ZSD ELECTRIC INC.
Respondent

APPLICATION UNDER s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C-43 and s. 243 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, ss. 67(1)(a) and (e) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 and Rules 3 and 14.05(2), (3) (g) and (h) of the *Rules of Civil Procedure*

Court File No. CV-25-00004090-0000

ONTARIO SUPERIOR COURT OF JUSTICE
Proceeding Commenced at Brampton Ontario

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