

Court File No. CV-20-00639312-00CL

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

**BETWEEN:**

**CROWN CAPITAL PRIVATE CREDIT FUND, LP by its general partner,  
CROWN CAPITAL PRIVATE CREDIT MANAGEMENT INC.**

Applicant

- and -

**MILL STREET & CO. INC.**

Respondent

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

**AMENDED FACTUM OF THE RESPONDENT**

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**AMENDED FACTUM OF THE RESPONDENT**

**PART I – OVERVIEW**

1. This Amended Factum replaces the Factum of the Respondent given that the Applicant served its factum and further evidence after the Respondent's Factum was filed and there was a further record and cross-examination that has taken place since then. Accordingly, no reference needs to be made to the original Factum of the Respondent.

2. The applicant, Crown Capital Private Credit Fund, LP, by its general partner, Crown Capital Private Credit Management Inc. ("CCPCF"/"Crown"), seeks the appointment of A. Farber & Partners Inc. ("Farber") as a receiver with respect to the assets, undertakings and properties of the respondent, Mill Street & Co. Inc. ("Mill Street").

3. Crown's application is predicated on the allegation that Mill Street is in default of a Credit Agreement between the parties and does not suggest that Mill Street is insolvent in any manner

4. In support of its allegation that Mill Street is in default under the Credit Agreement, Crown relies on a laundry-list of alleged technical defaults falling into 3 categories:

- a. Financial defaults – being late payments of interest for August, November and December 2019;
- b. Reporting defaults – being late delivery of reports; and,
- c. Failure to observe covenants.

5. With respect to 4(a), Crown admitted on cross-examination that Mill Street was current on its financial defaults as of mid-March, 2020 and the evidence indicates that all payments have been up to date since January 2020.

6. With respect to 4(b), Crown has acknowledged that it did not issue any notice, letters or an email notifying Mill Street of such a default and upon issuing such default, the evidence shows that Mill Street cured the default within the “cure provision” timelines under the Credit Agreement and generally long before receiving notice of the default.

7. With respect to 4(c), Crown has referred to a single email sent in August 2019 which suggested that Mill Street might be out of covenant but without any back-up calculations to support the allegation. They also haven't disputed any of Mill Street's calculations provided since that date demonstrating that Mill Street was within its covenants.

8. The remaining alleged breaches of covenants are highly technical and are inconsistent with the evidence as to Crown's position in relation to them throughout their relationship.

9. Mill Street has denied all of the defaults and has demonstrated that Crown has not regarded any of the items now complained of as defaults until very recently. Furthermore, Crown's actions are entirely inconsistent with the default allegations that they are now alleging.

10. Crown has clearly manufactured the alleged defaults as part of its strategy to prematurely call a 10-year loan that is not otherwise due.

11. Even with the operational shut-downs mandated by COVID-19, Mill Street remains a healthy and viable company, which owns and operates companies employing approximately 500 people, and supports businesses all across the province.

12. Given the repeated failures on the part of Crown to honour its obligations under the Credit Agreement and other promises made to it, Mill Street had already commenced the process for seeking alternative financing to replace Crown as its lender.

13. Mill Street has received an early indication that it will be in a position to fully repay Crown this Fall and will keep Crown's debt current and up to date in the interim as well as continue to honour its reporting and other covenants under the Credit Agreement.

14. It would be impossible for Mill Street to raise sufficient equity to replace Crown if a Receiver was running or overseeing Mill Street or otherwise attempting a parallel process to liquidate portfolio companies.

15. The appointment of a receiver would materially and negatively impact Mill Street's ability to do the very thing that Crown wants, and that Mill Street is prepared to do - to raise equity to pay out the loan. Mill Street has attempted, through good faith negotiations with Crown, to implement this commercial arrangement, and remains willing to do so.

16. Finally, there is no urgency or material prejudice to Crown allowing Mill Street reasonable time to refinance.

17. Mill Street also objects to the selection of Farber as a receiver when Crown is aware that such appointment would present a serious conflict given Mill Street's recent retainer of Farber to review and provide advice on its internal operations, which retainer included a strict agreement of confidentiality that could operate against Mill Street and its stakeholders' interests.

## PART II – FACTS

### BACKGROUND AND THE CREDIT AGREEMENT:

18. Mill Street is a private equity firm which owns, operates and provides management services to a diverse group of companies throughout North America. Noah Murad (“Noah”) is the President of Mill Street.<sup>1</sup>

19. Mill Street is a successful company which was recently ranked by the Globe and Mail at No. 13 on their ranking of Canada’s Top Growing Companies and at No. 14 on by Financial Post Magazine on their Innovation Nation 150 List.<sup>2</sup>

20. The current Covid-19 pandemic has not affected the overall profitability of Mill Street’s portfolio companies.<sup>3</sup>

21. Crown Capital Partners Inc. (“CCPI”) is a publicly traded company that specializes in providing capital to successful mid-market companies. CCPCF is a wholly owned subsidiary of CCPI (collectively referred to as “Crown”).<sup>4</sup>

22. Christopher A. Johnson (“Chris”) is the President and CEO of Crown. Timothy Oldfield (“Tim”) is the Chief Investment Officer of Crown. Josh Axler (“Josh”) is an investment manager with Crown.<sup>5</sup>

23. In January, 2018, Noah met with Chris to discuss a potential partnership between the parties, with Mill Street obtaining an acquisition line from Crown to continue its pace of growth without further dilution to ownership.<sup>6</sup>

24. Over subsequent meetings, Chris represented that Crown’s investment strategy would be to provide long-term patient debt and act as a quasi-equity partner without any dilution of equity interests on the part of Mill Street’s ownership. Chris expressed that Crown would

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<sup>1</sup> Affidavit of Noah Murad, sworn April 17, 2020 (“Murad Affidavit”), Responding Application Record (“RAR”), Tab 1, paras 1 and 4-5

<sup>2</sup> Murad Affidavit, RAR, Tab 1, paras 44 - 45

<sup>3</sup> Murad Affidavit, RAR, Tab 1, para. 13

<sup>4</sup> Murad Affidavit, RAR, Tab 1, paras 6-8

<sup>5</sup> Murad Affidavit, RAR, Tab 1, paras 9-11

<sup>6</sup> Murad Affidavit, RAR, Tab 1, para 14

defer to Mill Street's judgment on critical and material decisions related to its portfolio. Crown represented throughout the negotiations that it intended to stay with Mill Street for longer than the 10-year term of the Credit Agreement and made recommendations for Mill Street to focus on its growth. At all times, Crown indicated that in furtherance of making this a long-term venture, there would be the option to extend the term of the Credit Agreement at its conclusion, as well as the ability to invest as much as \$30 million over the course of the agreement.<sup>7</sup>

25. Based on Crown's representation of a long-term, alignment on strategic initiatives, mutually beneficial growth and collaboration, Mill Street ceased negotiations with other entities and worked with Crown to come to a credit arrangement transaction.<sup>8</sup>

26. Upon completion of substantial due diligence of Mill Street by Crown, on May 16, 2018, the parties entered into a credit agreement (the "Credit Agreement").<sup>9</sup>

#### **The Terms under the Credit Agreement and Financial Incentives to Crown**

27. Under the Credit Agreement, Crown was to provide \$10 million ("Credit Amount") to Mill Street (less fees). Crown's debt was secured by a registered general security interest on Mill Street, which was first in ranking, and a share pledge of 100% of the ownership of the common shares of Mill Street (the "Security").<sup>10</sup>

28. The Credit Agreement stipulated the entirety of the obligations of the parties, certain covenants and financial ratios set by Crown, monthly and quarterly reporting to Crown, that Crown was to consent to certain material transactions entered into by Mill Street and that Mill Street would pay an interest for the Credit Amount payable monthly at \$100,000.00.<sup>11</sup>

29. In addition to interest payments, Crown would also receive a fee on closing of the Credit Agreement transaction, 5% of profit withdrawals by shareholders, and an additional bonus of 5% on the growth of Mill Street's equity, based on a pre-determined formula.<sup>12</sup>

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<sup>7</sup> Murad Affidavit, RAR, Tab 1, paras 15, 17, 19 and 21-23

<sup>8</sup> Murad Affidavit, RAR, Tab 1, para 24

<sup>9</sup> Murad Affidavit, RAR, Tab 1, paras 17 and 25 and Exhibit "#", Credit Agreement.

<sup>10</sup> Murad Affidavit, RAR, Tab 1, para 26

<sup>11</sup> Murad Affidavit, RAR, Tab 1, paras 28-29

<sup>12</sup> Murad Affidavit, RAR, Tab 1, para 31.

30. The Credit Agreement was for a 10-year term. If the Credit Amount was paid back sooner, there were pre-payment penalties which meant to penalize Mill Street for backing out of the Credit Agreement arrangement before completion of the term. Said penalties would decline over time and aligned with the parties' long-term outlook for the partnership.<sup>13</sup>

### **OPERATIONS AFTER ENTERING INTO THE CREDIT AGREEMENT**

31. For the first approximately 18 months after entering into the Credit Agreement, Mill Street and Crown's relationship was amicable. Mill Street made interest payments to Crown. In addition, employees of the parties would speak regularly to discuss the activities of their counterparts. Members of Crown would even attend Mill Street offices from time to time. As they did during negotiations, Crown continued to encourage Mill Street to follow its strategic advice and indicated that this would ensure Mill Street would get further funding from Crown.<sup>14</sup>

32. Throughout this time, not once did Crown indicate any issues with how the Credit Agreement was being carried out, or that Mill Street was in default of the terms of the Credit Agreement. In fact, Mill Street received a "Crown Jewel" award from Crown for its performance in Crown's portfolio.<sup>15</sup>

### **RELATIONSHIP WITH CROWN BEGINS TO DETERIORATE**

#### **Failure to Provide Further Funding to Mill Street and Proposed Term Sheet**

33. Despite its earlier representations of providing further investments into Mill Street, Crown never funded any money beyond the initial Credit Amount.<sup>16</sup>

34. When Mill Street approached Crown in November, 2018 for additional funding to assist Mill Street with its redemption of long-term preferred shareholders, providing working capital and restructuring its balance sheet, contrary to Crown's previous representations, Chris indicated that Crown could only provide funding to Mill Street for acquisitions only.<sup>17</sup>

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<sup>13</sup> Murad Affidavit, RAR, Tab 1, paras 35-38.

<sup>14</sup> Murad Affidavit, RAR, Tab 1, paras 40-41 and 46-48.

<sup>15</sup> Murad Affidavit, RAR, Tab 1, paras 42-43 and Exhibit "B", email regarding Crown Jewel award.

<sup>16</sup> Murad Affidavit, RAR, Tab 1, para 49

<sup>17</sup> Murad Affidavit, RAR, Tab 1, paras 50-51



35. Crown began to advise Mill Street that to increase its funding access, amounts would need to be transferred to Crown's managed funds. Although Crown indicated that it would issue a term sheet for this arrangement, no such term sheet was received. Eventually Crown advised that the delay was due to internal matters with respect to calculations from Crown.<sup>18</sup>

***The Proposed Acquisition Transactions***

36. Between November, 2018 and January, 2019, Mill Street proposed two large acquisition transactions to Crown. At the outset, Chris represented that funding would be provided for one of the acquisitions, and for the next three months, Josh worked with Mill Street's management to develop an investment memo. Mill Street's acquisition would have doubled its profits, size, and provided it with a national presence.<sup>19</sup>

37. From November, 2018 until about May, 2019, extensive due diligence took place, as well as regular communications through representatives of each as Mill Street continued to move forward with the vendors of the target acquisition company. Despite this, Crown delayed providing any of the necessary funding.<sup>20</sup>

38. Subsequently, when the parties' representatives met, Crown recommended that if Mill Street wanted to complete them, it should raise equity financing on its own. Chris, Tim and Josh also suggested working towards a different type of structure that would support smaller acquisitions on a case-by-case basis, subject to some of parameters.<sup>21</sup>

39. Although it became clear to Mill Street that Crown was not going to issue the proposed term or provide funding solutions, and Mill Street began to question Crown's long-term commitment, because the cost of refinancing so early in the Credit Agreement would be punitive and prohibitive to Mill Street, it chose not to explore such steps, and instead continued to abide by the terms required by it under the Credit Agreement. Mill Street ended up losing the proposed acquisition due to the delays in raising funding (which it had later found on its own).<sup>22</sup>

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<sup>18</sup> Murad Affidavit, RAR, Tab 1, paras 53-55

<sup>19</sup> Murad Affidavit, RAR, Tab 1, para 58

<sup>20</sup> Murad Affidavit, RAR, Tab 1, paras 59-62

<sup>21</sup> Murad Affidavit, RAR, Tab 1, paras 66-68

<sup>22</sup> Murad Affidavit, RAR, Tab 1, paras 70-71

***Crown's Dwindling Portfolio and Development of a "Power Fund"***

40. During a meeting in September 2019, Chris communicated to Noah that he was exploring a new private equity fund platform that Crown was looking to create and asked Mill Street to become that fund. Chris commended Mill Street's ability to source and execute on acquisitions and grow them. The driving force behind his proposal was Crown's new strategy to raise private funding. Finally, Chris advised that Crown was expecting to recover funds from troubled investments and that it would invest those amounts into Mill Street when it was converted into an equity fund based on this proposal.<sup>23</sup>

41. It was apparent that Crown was modifying their business plan to exclude long-term financing due to the fact that unlike Mill Street, the other long-term financing transactions in Crown's portfolio, were either in arrears or in financial difficulty.<sup>24</sup>

42. As a result of Crown's modified business plan and their satisfaction with Mill Street's performance, Chris offered to convert Mill Street's Credit Agreement into an equity purchase into Mill Street; a commitment for additional funding; and to have Mill Street transform into a limited partnership whereby its management would be given partnership units and the authority to operate/manage certain problematic investments within Crown's portfolio.<sup>25</sup>

43. In the months following November, 2018, Mill Street and Crown worked on this potential transaction including details of the financial terms of the fund; the performance of Mill Street's subsidiaries; the valuation of Mill Street; the return profile of the fund; and specifically the injection of a further \$15 million of capital into Mill Street.<sup>26</sup>

44. After almost a year of working on the proposed fund, in an October, 2019 meeting, Chris expressed that Crown had just completed its worst financial quarter since its IPO, and that they could not afford the time, resources and capital towards the proposed fund with Mill Street, but could revisit the matter again in the summer of 2020.<sup>27</sup>

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<sup>23</sup> Murad Affidavit, RAR, Tab 1, paras 72-75

<sup>24</sup> Murad Affidavit, RAR, Tab 1, paras 76-78

<sup>25</sup> Murad Affidavit, RAR, Tab 1, para 79 and Exhibit "K", email with memorandum from Chris.

<sup>26</sup> Murad Affidavit, RAR, Tab 1, paras 80-89

<sup>27</sup> Murad Affidavit, RAR, Tab 1, paras 90-91 and Exhibit "N"

## ATTEMPTS TO FINANCE THE GNI TRANSACTION

45. During the same time that Mill Street was looking into a transaction model to modify the Credit Agreement with Crown, due to a dispute with one of its minority partners which was the subject of an arbitration, Mill Street had the opportunity to acquire the remaining minority interest in its top-earning subsidiary, Great Northern Insulation (“GNI”).<sup>28</sup>

46. Mill Street approached Crown to assist with the buy-out and refinancing of GNI (the “GNI Transaction”). The financial impact of the GNI Transaction to Mill Street’s equity value was specifically discussed and calculated during the meeting at Crown’s offices. Completing the GNI Transaction would increase the overall value of Mill Street’s portfolio, and Crown’s security, even if the proposed equity fund was not completed. Despite this, Crown was unable to provide any funds to put towards the GNI Transaction.<sup>29</sup>

47. By this time, Mill Street had already begun discussions with Fiera Capital (“Fiera”) to complete the GNI Transaction, through the introduction via Chris, since the proposed equity fund was not variable and there were no alternatives from Crown. Crown was informed and kept apprised of the developments and strategic value of the GNI Transaction.<sup>30</sup>

48. Crown was also informed that due to the GNI arbitration and pressure on Mill Street’s cash flow from the refinancing, interest payments under the Credit Agreement may be slightly delayed. Until the within proceedings, Crown never took issue with Mill Street’s request to delay said payments. To that end, an interest payment payable on December 1, 2019 and January 2, 2020 (when the arbitration was almost complete) were paid later than when they would have been otherwise due. Crown raised no issue with this at the time aside from a general complaint about the delay in passing.<sup>31</sup>

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<sup>28</sup> Murad Affidavit, RAR, Tab 1, para 96

<sup>29</sup> Murad Affidavit, RAR, Tab 1, paras 95-99.

<sup>30</sup> Murad Affidavit, RAR, Tab 1, 100-103.

<sup>31</sup> Murad Affidavit, RAR, Tab 1, paras 104-108

**MILL STREET'S ALLEGED DEFAULT UNDER THE CREDIT AGREEMENT**

49. Crown's first complaint about the late interest payments came in January 2020 to which Mill Street responded by reminding Crown that it was due to Crown's decision to back out of a term sheet for further funding, or creating the new proposed equity fund, coupled with the buy-out of the shareholder through the arbitration that was taking place later than month.<sup>32</sup>

50. Unfortunately, it appeared that Crown was now trying to re-characterize Mill Street's relationship with it to create a default under the Credit Amount.<sup>33</sup>

**Initial Allegations of a Default**

51. Mill Street denies that it has been in default of the Credit Agreement. Crown has manufactured Mill Street defaults or is leveraging cured, waived, or minor technical defaults to call a 10-year loan that is not otherwise due – to address its internal cash flow concerns.<sup>34</sup>

52. Despite claiming that Mill Street's defaults began at the outset of the Credit Agreement, there was never any discussion between the parties, or notice from Crown, of any such default(s) until January, 2020 at the earliest.<sup>35</sup>

53. Since the Credit Agreement, Mill Street and Crown maintained an open dialogue on each other's activities, and actively discussed various iterations by which the relationship between the parties could grow or otherwise transfer beyond that of just a lender-borrower.<sup>36</sup>

54. After receiving a letter from Crown on January 17, 2020, shortly after the GNI Transaction was completed, which claimed that the default was based on the November, 2019 and December, 2019 interest payments being late, and other unspecified alleged defaults, Mill Street responded to Crown to deny the allegations.<sup>37</sup>

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<sup>32</sup> Murad Affidavit, RAR, Tab 1, para 108

<sup>33</sup> Murad Affidavit, RAR, Tab 1, para 109

<sup>34</sup> Murad Affidavit, RAR, Tab 1, para 110

<sup>35</sup> Murad Affidavit, RAR, Tab 1, para 111

<sup>36</sup> Murad Affidavit, RAR, Tab 1, para 112

<sup>37</sup> Murad Affidavit, RAR, Tab 1, paras 113-116

### **Discussions to Unwind the Transaction Agreement**

55. In February, 2020, representatives of Mill Street and Crown met to discuss the relationship between the parties and the default allegations. For the first time since the parties entered the Credit Agreement, Chris expressed that Crown was unhappy with its investment in Mill Street, and took the position that, despite having been aware of the GNI Transaction throughout the its negotiation and finalization, that Crown's security position in Mill Street was compromised because of the GNI Transaction, which Crown alleged was completed without its consent. Chris also alleged that the delay in making the interest payments for November and December, 2019 had created a situation whereby Crown had no choice but to hold Mill Street in default, to terminate said agreement and demand full repayment of the Credit Amount.<sup>38</sup>

56. Mill Street made it clear that Crown specifically knew about the GNI Transaction; that its Security was actually improved by the GNI Transaction; and that Crown was advised that the interest payments would be slightly delayed as a result of same – and had since been paid.<sup>39</sup>

57. Ultimately, it appeared that the partnership between the two companies had broken down the parties agreed to allow Mill Street to find an alternative source of financing to repay Crown over the next two quarters.<sup>40</sup>

58. There was no indication that there was any urgency or immediacy related to repayment of the Credit Amount, but simply that it was to be done expeditiously and that the longer it took, the less likely the pre-payment penalty could be reduced.<sup>41</sup>

59. Crown submitted an Amending Agreement and proposed forbearance that departed drastically from what had been discussed, so Mill Street sent the Amending Agreement to its external counsel for review and revision.<sup>42</sup>

60. Mill Street also met with the company that Chris had referred them to, in order to work on a potential transaction to buy-out of Crown's loan. Mill Street also had engaged with a broker to seek out alternative equity or debt partners that would be required in order to repay the

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<sup>38</sup> Murad Affidavit, RAR, Tab 1, paras 117-119

<sup>39</sup> Murad Affidavit, RAR, Tab 1, paras 120-121

<sup>40</sup> Murad Affidavit, RAR, Tab 1, paras 122-124

<sup>41</sup> Murad Affidavit, RAR, Tab 1, paras 124-129

<sup>42</sup> Murad Affidavit, RAR, Tab 1, paras 128-130

Credit Amount to Crown. Since then, Mill Street has found entities which will be able to provide funds for it to make full repayment of the required amounts to Crown over the course of the next two quarters as had been contemplated by the parties during their discussions.<sup>43</sup>

61. Throughout this time, Mill Street has also continued to maintain complete and transparent communications with Crown, with respect to the steps they were taking to find a transaction to repay Crown, complied with their reporting requirements and continued to make timely payment of all interest owed under the Credit Agreement.<sup>44</sup>

62. Crown completed its filings of financial statements and management discussions, on March 13, 2020, making no mention of Mill Street being in default of the Credit Agreement.<sup>45</sup>

63. Then, on March 20, 2020, a week removed from Crown having completed its filings, Crown's stock price, which is publicly traded, took a significant hit.<sup>46</sup>

64. On that date, Chris reached out Noah to ask for comments on the Amending Agreement. Noah advised him that Mill Street would provide comments by Monday after hearing from its counsel (which it did). Chris also told Noah that he was close to drafting a demand letter on the Credit Amount. Noah denied the default and advised Chris that Mill Street was looking at re-financing options. Chris said he would continue to hold off on a demand letter so long as there was a mutually agreeable way of proceeding. Noah understood that to mean negotiating the Amending Agreement, which Mill Street was willing to do.<sup>47</sup>

65. On March 24, 2020, a day after the shut-down of non-essential businesses in Ontario was announced, Chris called and threatened to direct the matter to a court appointed receiver so he could "control [Mill Street's] business", and "do what he is good at, calling loans." Chris offered a new amending agreement that changed the term of the loan to end in September, 2020, and appointed an advisor to sell GNI (now fully owned by Mill Street).<sup>48</sup>

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<sup>43</sup> Murad Affidavit, RAR, Tab 1, paras 131-132

<sup>44</sup> Murad Affidavit, RAR, Tab 1, para 134

<sup>45</sup> Murad Affidavit, RAR, Tab 1, paras 135-136

<sup>46</sup> Murad Affidavit, RAR, Tab 1, para 137

<sup>47</sup> Murad Affidavit, RAR, Tab 1, paras 138-139

<sup>48</sup> Murad Affidavit, RAR, Tab 1, paras 140-143

66. Based on the threat to make immediate demand for payment and the proposed alternative amendments to the Credit Agreement, it became clear to Mill Street that Crown was using the “default” allegation to threaten a demand, and to attempt to explore a takeover of Mill Street similar to what it had just done with WireIE, another one of its long-term debtors.<sup>49</sup>

67. The following day, on March 25, 2020, despite having only received the new proposed amendment the night before, Crown, through its counsel, sent a demand under the Credit Agreement (the “Demand”). Mill Street was unable to consult with counsel on the new proposed amendments, which Mill Street had already begun to do that morning.<sup>50</sup>

68. The Demand was prefaced on the basis of the earlier alleged defaults of the November and December, 2019 interest payments being late (although they had since been paid and accordingly any such default, cured) and a general allegation of breaches of covenants in the Credit Agreement which were vague and unspecified. The Demand further indicated that Crown was prepared to act within the 10-day notice period to appoint a receiver if the Credit Amount was not repaid, despite the government shut-downs which had been ordered for non-essential businesses as a result of COVID-19.<sup>51</sup>

69. Mill Street responded to Crown through a letter by its counsel on March 25, 2020 denying that any default existed under the Credit Agreement, including accountant prepared financial reports showing that Mill Street was always in covenant with the Credit Agreement. Mill Street advised Crown that it believed that the Demand was made in bad faith.<sup>52</sup>

70. On that same day, a representative of Fiera reached out to Noah and told him that Chris reached out to them to inform them of the Demand. Noah also learned that Chris solicited Mill Street’s COO, Ezio D’Onofrio, by LinkedIn.<sup>53</sup> These predatory actions occurred the day after an evening phone call about an amending agreement and during the COVID-19 work stoppages where most business were adapting to the current financial climate.<sup>54</sup>

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<sup>49</sup> Murad Affidavit, RAR, Tab 1, paras 145-148

<sup>50</sup> Murad Affidavit, RAR, Tab 1, para 146

<sup>51</sup> Murad Affidavit, RAR, Tab 1, para 147

<sup>52</sup> Murad Affidavit, RAR, Tab 1, paras 149-150

<sup>53</sup> Murad Affidavit, RAR, Tab 1, para 151

<sup>54</sup> Murad Affidavit, RAR, Tab 1, para 152

### **The Defaults Alleged by Crown**

71. In response to the letter from Mill Street's counsel of March 25, 2020, denying that it was in default of the Credit Agreement, on or about April 1, 2020, counsel for Crown responded to Mill Street and enclosed notice of intention to endorse security under the *Bankruptcy and Insolvency Act (Canada)* on the basis that Mill Street was in default of the Credit Agreement. The letter from Crown's counsel also challenged Mill Street's position that it "[did] not accept that it is in default in any manner" and then continued to list 20 sub-points, enumerated from letters (a) to (t) of alleged defaults by Mill Street under the Credit Agreement.<sup>55</sup>

72. In response to the April 1, 2020 letter, Mill Street continues to maintain that it was not and is not in default of the Credit Agreement. Prior to receipt of the April 1, 2020 letter aside from the Demand, which only related to default with respect to late payment of interest amounts in November and December, 2019, which Mill Street had denied was accurate, there had been no comments or notice by Crown to Mill Street with respect to any of the alleged defaults contained in the April 1, 2020 letter, or otherwise, prior to this time.<sup>56</sup>

73. Mill Street states that Crown manufactured the defaults and/or is leveraging cured, waived, or minor technical defaults as part of its strategy to call a 10-year loan that is not otherwise due.<sup>57</sup>

74. In its correspondence of April 1, 2020, Crown's counsel set out 20 specific alleged defaults, all of which have been answered directly by Mill Street in its responding affidavit.<sup>58</sup>

75. A summary of the responses to each of the 20 allegations are set out at Exhibit "A" to the Supplementary Affidavit of Noah Murad and demonstrate that many of the alleged defaults are extremely technical in nature; had never been previously raised; and had mostly been cured prior to receipt of the April 2020 letter.<sup>59</sup>

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<sup>55</sup> Murad Affidavit, RAR, Tab 1, paras 154-155

<sup>56</sup> Murad Affidavit, RAR, Tab 1, paras 156-157

<sup>57</sup> Murad Affidavit, RAR, Tab 1, paras 154-158

<sup>58</sup> Murad Affidavit, RAR, Tab 1, paras 159-202

<sup>59</sup> Supplementary Murad Affidavit, Further Responding Application Record ("FRAR"), at Exhibit "A"



**CROWN'S SATISFACTION WITH MILL STREET**

76. Aside from the recent issues raised in the Demand, Crown had always indicated that it was happy with its investments in Mill Street and that it valued Mill Street's opinion and expertise. Crown always praised Mill Street, indicated that it was considering to transition the Credit Agreement into a partnership type venture and that it was satisfied with the relationship between the parties.<sup>60</sup>

77. Crown had even provided Mill Street with the "Crown Jewel" Award for its contributions to the performance of Crown's portfolio in early 2019<sup>61</sup>. This award is after the time which Crown now alleged there had been defaults.

**CROWN'S CORPORATE FILINGS ON SEDAR SHOW NO DEFAULT**

78. While Crown claims that Mill Street is in default of the Credit Agreement, and has been since shortly after entering into said agreement, when Crown completed its most recent filings on SEDAR as required by the OSC, it made no reference that Mill Street was in, or in jeopardy of being in default of its obligations to Crown. In fact, it listed Mill Street as being "Current".<sup>62</sup>

**FARBER'S CONFLICT FROM BEING APPOINTED AS A RECEIVER**

79. In the event that the Court decides to appoint a receiver in this matter, it cannot be Farber, as proposed by Crown.<sup>63</sup>

80. Up until September, 2019, Mill Street had an engagement, worth over \$100,000.00 with Farber with respect to Farber's provision of consulting services. Over the course of this engagement, Farber was provided with extensive confidential information regarding the operations and workings of Mill Street and its portfolio of companies.<sup>64</sup>

81. Farber's own engagement letter to Mill Street, includes a strict clause of confidentiality, which specifically stated that Farber recognized that their professional reputation was built on maintaining absolute confidentiality and discretion. Mill Street expected Farber to

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<sup>60</sup> Murad Affidavit, RAR, Tab 1, paras 204-207

<sup>61</sup> Murad Affidavit, RAR Tab 1, para. 43 and Exhibit "B"

<sup>62</sup> Murad Affidavit, RAR, Tab 1, para 135 and Exhibit "V", SEDAR Filing

<sup>63</sup> Murad Affidavit, RAR, Tab 1, paras 210 and 215

<sup>64</sup> Murad Affidavit, RAR, Tab 1, paras 211 and 217

maintain strict confidentiality with respect to their engagement and all communications exchanged as a result thereof. Some of the material that was delivered to Farber as part of their engagement, included, among other things, Mill Street's 2019 plan/outlook.<sup>65</sup>

82. Notably, Crown has had no discussions with Mill Street with respect to appointing Farber as a receiver. As even prior to Mill Street's objection, Farber and Crown were already aware that a conflict exists - therefore some information must have already been passed between Farber's personnel - the details of which have not been provided to the Court.<sup>66</sup>

83. Farber has confidential information regarding the inner workings of Mill Street, information which Mill Street expected to be maintained with "absolute confidentiality". Mill Street does not consent to any waiver of confidentiality in this regard. Allowing Farber to act as a receiver, if this Court chooses to appoint one, would be severely prejudicial to Mill Street.<sup>67</sup>

#### **BUYOUT OF THE CREDIT AMOUNT AND RELATIONSHIP WITH CANNACORD**

84. Based on the meeting between the parties in early 2020, even though the term of the Credit Agreement is far from over, and while there is no default, it was agreed that the relationship between the parties was falling apart that the parties would work together to arrange to have the Credit Amount repaid so they could go their separate ways as soon as possible.<sup>68</sup>

85. Mill Street had no obligation to agree to any such arrangements as they remained in good standing under their obligations under the Credit Agreement. Instead, Mill Street decided that it would continue to look for financing to buy out the Credit Amount owed to Crown.<sup>69</sup>

86. Mill Street has been in on-off discussions with Cannacord since as early as March, 2019, as such discussions were ongoing simultaneously to Mill Street's discussions with Crown for funding on the various proposed acquisitions.<sup>70</sup>

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<sup>65</sup> Murad Affidavit, RAR, Tab 1, paras 212-213

<sup>66</sup> Murad Affidavit, RAR, Tab 1, para 216-217

<sup>67</sup> Murad Affidavit, RAR, Tab 1, paras 218-219

<sup>68</sup> Murad Affidavit, RAR, Tab 1, paras 228

<sup>69</sup> Murad Affidavit, RAR, Tab 1, para 225

<sup>70</sup> Murad Affidavit, RAR, Tab 1, paras 227

87. As of April, 2020, Cannacord has advised Mill Street that it has fielded offers from a number of potential parties who will be able to provide Mill Street with the necessary financing required to buy out the Credit Amount owed to Crown. Cannacord expects that this financing will be able to close within 180 days, barring any further disruption from COVID-19.<sup>71</sup>

88. Mill Street continues to pay the interest obligations to Crown under the Credit Agreement, and abide by the other terms under said agreement. Once said funding through Cannacord is arranged, it is Mill Street's intention to buy out the Credit Amount from Crown and thereby end the Credit Agreement.<sup>72</sup>

89. To date, Mill Street, and the companies in its portfolio, continue to operate in the normal course, all of which is known to Crown through Mill Street's reporting to it. There is no risk to the loan or its assets as alleged by Crown.<sup>73</sup>

90. Appointing a receiver will only cause Mill Street to incur substantial fees that will diminish its ability to pay Crown and other creditors and otherwise add unnecessary costs to Mill Street in completing the buy-out of the Credit Agreement as contemplated between the parties.<sup>74</sup>

91. Due to Crown's failed investments, tumbling stock price and now the business shut-downs due to COVID-19, Crown is attempting to fabricate a default under the Credit Agreement to attempt a takeover of Mill Street's operations and cash-flow to support its own operations.<sup>75</sup>

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<sup>71</sup> Murad Affidavit, RAR, Tab 1, paras 229

<sup>72</sup> Murad Affidavit, RAR, Tab 1, paras 230

<sup>73</sup> Murad Affidavit, RAR, Tab 1, paras 231-233

<sup>74</sup> Murad Affidavit, RAR, Tab 1, paras 232-233 and 235

<sup>75</sup> Murad Affidavit, RAR, Tab 1, para 234

### PART III – ISSUES, LAW AND ARGUMENT

92. The only issue to be determined in the within matter is whether Crown’s application to appoint a receiver should be granted.

#### THE LAW

##### Appointing a Receiver

93. Under section 243(1) of the *Bankruptcy and Insolvency Act*,<sup>76</sup> a secured creditor may apply for the Court to appoint a receiver if the Court considers it just or convenient to do so. A receiver may be appointed to take possession of the debtor’s assets, inventory or property, to exercise any control that the Court consider advisable over the debtor’s property or business or to take any other action that the Court consider advisable.

94. Likewise, under section 101(1) of the *Courts of Justice Act*,<sup>77</sup> appointment of a receiver may be done by way of an interlocutory order where it appears to the Court that it would be just or convenient to do so.

95. The Court has a well-established set of principles which must be considered in determining whether or not to appoint a receiver.<sup>78</sup>

96. The appointment of a receiver to preserve assets for execution is extraordinary relief. Such an order would prejudice the alleged debtor. Accordingly, such relief should be granted sparingly.<sup>79</sup> The Court must carefully explore whether there are other remedies that could protect the interests of the applicant, and whenever possible, the Court should provide a remedy short of appointing a receiver.<sup>80</sup>

97. Given that appointment of a receiver is effectively execution before judgment, to justify said appointment, there must be strong evidence that the moving party’s right to recovery in

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<sup>76</sup> R.S.C. 1985 c. B-3,

<sup>77</sup> R.S.O. 1990, c. C.43

<sup>78</sup> See *Anderson v. Hunking*, 2010 ONSC 4008 [*Anderson*] (<http://canlii.ca/t/2bml6>), *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)* (1987), 16 C.P.C. 2(d) 130, (Ont. H.C.) [*Ryder*] and *HMW-Bennet & Wright Contractors Ltd. v. BWC Investements Ltd.*, 1991 CarswellSask 42 [*HMW*] (<http://canlii.ca/t/gd2k4>) at paras 25-29

<sup>79</sup> *Anderson* at para 15

<sup>80</sup> *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127 (<http://canlii.ca/t/231hq>) at para 16

serious jeopardy.<sup>81</sup> Essentially, in making this determination, the Court must have regard to all of the circumstances, and in particular, the nature of the property, and the rights, interests and effect on all of the parties involved as well as to their conduct.<sup>82</sup>

98. In addition to the principles articulated herein, in *The 2013-2014 Annotated Bankruptcy and Insolvency Act*,<sup>83</sup> there is a list of factors set out with respect to determine the appropriateness of appointing a receiver. Some of the applicable factors cited include:

- a. “whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;”
- b. “the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;”
- c. “the nature of the property;”
- d. “the apprehended or actual waste of the debtor's assets;”
- e. “the preservation and protection of the property pending judicial resolution;”
- f. “the balance of convenience to the parties;”
- g. “the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;”
- h. “the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;”
- i. “the principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly;”
- j. “the effect of the order on the parties;”
- k. “the conduct of the parties;”
- l. “the cost to the parties;” and
- m. “the likelihood of maximizing return to the parties.”

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<sup>81</sup> *Ryder* at para 6 cited by *HMW* at para 29

<sup>82</sup> *Anderson* at para 15-16

<sup>83</sup> Carswell:Toronto, Ontario 2013-2014 at page 1018

99. The test for appointment of an interlocutory receiver is comparable to the test for granting interlocutory injunctive relief.<sup>84</sup>

### **Ontario Securities Commissions Reporting Obligations**

100. Ontario Security Commission's National Instrument 51-02 ("NI 51-02"),<sup>85</sup> outlines the continuous disclosure obligations mandated for issuers of securities in Ontario.

101. Crown is a publicly traded company and would need to comply with the NI 51-02 in terms of its disclosure and filing obligations including whether there had been any "material changes."

102. When confronted with its SEDAR filing on his cross-examination, Tim was forced to concede that the filing was accurate and that Mill Street was in fact current.

### **APPLICATION TO THE WITHIN MATTER**

103. Bearing in mind the principles and factors discussed herein, the Court must undertake the following three-step analysis – akin to the injunctive relief test,:

- a. Conduct a preliminary assessment of the merits of the case to ensure there is a serious issue to be tried;
- b. Determine if the moving party would suffer "irreparable harm" if the motion is refused
- c. Assess the balance of convenience to determine the harm suffered by the parties if the application were to be granted or refused.

104. The Court's assessment of whether to appoint a receiver must be done on a holistic basis and considering the specific facts of the within matter.

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<sup>84</sup> *Anderson* at para 15, citing *R.J.R. MacDonald v. Canada (Attorney General)* 1994 CanLII 117 (SCC), [*RJR*] (<http://canlii.ca/t/1frtw>) at paras 83-85

<sup>85</sup> See [https://www.osc.gov.on.ca/documents/en/Securities-Category5/rule\\_20111031\\_51-102\\_unofficial-consolidation-post-ifrs.pdf](https://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20111031_51-102_unofficial-consolidation-post-ifrs.pdf)

### **The Merits of the Case**

105. Crown's entire case is predicated on the allegations that Mill Street is in default of the Credit Agreement as per the notice listing 20 defaults on April 1, 2020.

106. With respect, given the serious nature of the matters at hand, the alleged defaults are trifling, overly-technical and in any event, have been remedied to the extent possible. The alleged defaults fall into 3 main categories<sup>86</sup>:

#### **a. Financial default**

107. Of the 20 alleged defaults, 3 of them alleged late interest payments for the months of August 2019; November 2019 and December 2019.

108. Crown notified Mill Street that the August 2019 **(11i)** interest payment was not received due to the addition of an incorrect number on the wire transfer. Upon being notified of the error, it was immediately corrected and payment was made.<sup>87</sup>

109. With respect to the November **(11l)** and December 2019 **(18a)** interest payments, they were both made in January, 2020 and the short delay was due to an arbitration proceeding that was allowing Mill Street to acquire full ownership interest of its largest subsidiary (GNI). This acquisition had been fully disclosed to Crown.<sup>88</sup>

110. Crown subsequently admitted on its cross-examination that it regarded Mill Street as being current as of December 31 2019 in its SEDAR filing which it filed on March 12 or 13, 2020.<sup>89</sup>

#### **b. Reporting defaults**

111. Of the 20 alleged defaults, 9 of them **(11a-b; 11e-h; 11j; 18d and 18h)**; relate to delayed reporting ranging between 18 and 100 days, and dated back to 2018.

112. The first notice of the reporting defaults was received on April 1, 2020. Each and

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<sup>86</sup> The bracketed/bolded references refer to the references in Crown's "Aide-Memoire", set out Exhibit "A" to the Supplementary Affidavit of Noah Murad, **FRAR**

<sup>87</sup> Murad Affidavit, **RAR**, Tab 1, paras 184 and Exhibit HH

<sup>88</sup> Murad Affidavit, **RAR**, Tab 1, paras 104, 105, 108 and 120 and Exhibits O and P

<sup>89</sup> Cross-examination and Re-examination of Timothy Oldfield at qq. 51 and 108-110

every one of the reports had been provided prior to receiving any notice of default (which itself would have triggered a 30 day cure period).

113. Only one of the reporting defaults require Mill Street to rely upon the cure provision in the Credit Agreement - a request for follow-up information on Mill Street's annual business plan (18d) that was first raised in the April 1, 2020 default letter. This information was provided within the cure period.<sup>90</sup>

### c. Covenants

114. Of the 20 alleged defaults, 8 of them relate to breaches of certain covenants, some of which are extremely technical in nature.

115. For example, Crown alleged that Mill Street had failed to deliver signed compliance certificates by Noah Murad (18g). Prior to the April 1, 2020 Notice of Default, these compliance certificates had never been requested, but all were subsequently provided as a result of the said notice.<sup>91</sup>

116. Crown alleged that Mill Street proceeded with a sale (11c); a financing (11k); and an acquisition (18b) without Crown's written consent.

117. In fact, the evidence detailed above shows that Mill Street specifically advised Crown of each of these events beforehand and received absolutely no objection to these transactions.<sup>92</sup> In fact, with reference to the financing for the acquisition of the minority interest in GNI (11k and 18b), Crown provided a positive reference of Mill Street to the finance company after it chose not to finance the acquisition itself.<sup>93</sup>

118. Crown further alleged that it calculated that Mill Street was out of covenant in connection with the fixed charge covenant ratio (11d); payments and distributions (18c) and fixed charge coverage ratio (18e).

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<sup>90</sup> Supplementary Murad Affidavit, FRAR, para 7 and Exhibit B

<sup>91</sup> Supplementary Murad Affidavit, FRAR, para 7 and Exhibit B

<sup>92</sup> Supplementary Murad Affidavit, FRAR, paras 10 & 13 and Exhibits D and F  
Murad Affidavit, RAR, paras.93-103 and 173; Exhibits O, P and GG

<sup>93</sup> Murad Affidavit, RAR, paras.100 and 102



119. Each of Crown's calculations in these three instances have been disputed and information has been provided to Crown to demonstrate that their calculations are in error.<sup>94</sup> No further dispute has been alleged or pursued by Crown.

120. It is further submitted that there is no evidence on this application that Crown's calculations are correct that any default exists. Respectfully, Crown's position on these three defaults is essentially because they allege there is a default, there is automatically a default.

121. The only default that Mill Street has been unable to cure relates to its concentration of assets within GNI (**18f**) which has exceeded the permitted 50% ratio. However, Mill Street disputes that this is truly a default.

122. While Crown acknowledges that this default has existed throughout the entire loan, it only raised the default for the first time in its April 1, 2020 Notice of Default which was in conflict with their earlier advice that it would not be regarded as a default.<sup>95</sup>

123. Notwithstanding this fact, Crown allowed Mill Street to make several acquisitions within the GNI asset that did not have to be acquired within that asset base but could have been acquired separate and apart from GNI, thereby avoiding the excess concentration covenant.<sup>96</sup>

124. Mill Streets' evidence was that they did not believe that Crown was relying upon this covenant as demonstrated by the fact that they had never been in compliance with this covenant and yet were being provided with an award and continual praise throughout 2018 and 2019 instead of demands to correct this excess concentration.

125. It is submitted that Mill Streets' reliance upon the non-observance of this concentration covenant was reasonable and Crown's sudden reversal of its position has been performed in bad faith.

126. Crown has not specifically disputed any of Mill Street's evidence and chose not to cross-examine Noah Murad on his affidavits.

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<sup>94</sup> Supplementary Murad Affidavit, FRAR, paras 10 and 15 and Exhibit C

<sup>95</sup> Murad Affidavit, RAR, paras 196-200

<sup>96</sup> Supplementary Murad Affidavit, FRAR, paras 16 and 17

**Irreparable Harm**

127. In assessing the irreparable harm which may arise from either granting or denying the application, “irreparable” refers to the nature of the harm rather than the magnitude.<sup>97</sup> Further, evidence of the harm must be clear and not speculative.<sup>98</sup>

128. Frankly, there is no irreparable harm to Crown if a receiver is not appointed.

129. Mill Street continues to operate and is a viable and successful company.

130. Mill Street’s assets are not physical in nature, but rather they are the ownership of shares of its portfolio companies. There is no risk that these shares are suddenly going to be stripped of value or otherwise transferred to the detriment of Crown.

131. Crown has received all interest payments to date and there is no reason to suggest that Crown will not receive its interest payments in the interim until the loan is repaid.

132. Similarly, there are no allegations to suggest that Mill Street is incapable of managing its operations. To the contrary, given that Crown expressed its satisfaction with Mill Street’s acumen throughout the majority of the Credit Agreement, was even discussing transaction by which the parties would work together and have Mill Street manage some of Crown’s portfolio and given that Crown deferred to Mill Street in managing its portfolio during the course of the Credit Agreement, clearly Crown has confidence in Mill Street’s abilities to maintain its own operations.

**Balance of Convenience**

133. The balance of convenience weighs heavily in favour of maintaining the *status quo* wherein the loan is kept current and Mill Street continues to abide by its reporting obligations.

134. Allowing the *status quo* to be maintained will achieve the goals of both parties in that it will allow Crown to be paid out in reasonable period of time while allowing Mill Street to continue to operate without any risk to its assets as well as without the additional unnecessary costs that the appointment of a receiver would entail.

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<sup>97</sup> *Anderson* at para 15(e)

<sup>98</sup> *Anderson* at para 15(e)

**PART IV - ORDER REQUESTED**

135. Mill Street respectfully seeks an Order dismissing Crown's application, with costs of this applicable payable to Mill Street on a substantial indemnity basis.

**ALL OF WHICH IS RESPECTUALLY  
SUBMITTED BY:**



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Micheal Simaan/Rahul Gandotra  
Counsel for the Respondent

## SCHEDULE "A"

1. *Anderson v. Hunking*, 2010 ONSC 4008
2. *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)* (1987), 16 C.P.C. 2(d) 130, (Ont. H.C.)
3. *HMW-Bennet & Wright Contractors Ltd. v. BWC Investements Ltd.*, 1991 CarswellSask 42 (Sask. Q.B.)
4. *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127
5. *R.J.R. MacDonald v. Canada (Attorney General)* 1994 CanLII 117 (SCC)

**SCHEDULE "B"**

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

**PART XI**

**Secured Creditors and Receivers**

**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***

**Interlocutory Orders**

**Injunctions and receivers**

**101 (1)** In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

CROWN CAPITAL PRIVATE CREDIT FUND, L.P.  
by its general partner, CROWN CAPITAL PRIVATE  
CREDIT MANAGEMENT INC.

Applicant

- and -

MILL STREET & CO. INC.

Respondent

Court File No: CV-20-00639312-00CL

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

Proceeding commenced at Toronto

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**AMENDED FACTUM OF THE RESPONDENT**

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CREDIT MANAGEMENT INC.

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- and -

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