File No. CI 20-01

THE QUEEN'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF: **THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C., C. B-3, AS AMENDED, AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M., C. C280, AS AMENDED**

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant

- and -

NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD, NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

Respondents

BRIEF OF THE APPLICANT
DATE OF HEARING: TUESDAY, MARCH 10, 2020 AT 2:00 P.M.
BEFORE JUSTICE EDMOND

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BRIEF OF THE APPLICANT

INDEX

PART I –DOCUMENTS TO BE RELIED UPON

1. Notice of Application

2. Affidavit of Robert L. Dean, affirmed March 9, 2020

3. Consent of Richter Advisory Group Inc., to be filed

PART II – STATUTORY PROVISIONS AND AUTHORITIES TO BE RELIED UPON

TAB

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 Sections 2, 243

2. *The Court of Queen's Bench Act*, C.C.S.M. c. C280, Section 55

3. *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CarswellOnt 2328 (Gen Div.)

4. *Callidus Capital Corp. v. Carcap Inc.*, 2012 ONSC 163

5. *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 ONSC 2781

6. *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 CarswellBC 855

7. *7451190 Manitoba Ltd. v. CWB Maximum Financial Inc.*, 2019 MBCA 95

8. *Affinity Credit Union 2013 v Vortex Drilling Ltd.*, 2017 SKQB 228

9. *Alexander v. 2025610 Ontario Ltd.*, 2012 ONSC 3486

10. *GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co.*, 2011 ONSC 3851

11. *RMB Australia Holdings Ltd. v. Seafield Resources Ltd.*, 2014 ONSC 5205

12. *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, 2001 SCC 92

13. *Malartic Hygrade Gold Mines*, Re, 1966 CarswellOnt 30

14. Court of Queen 's Bench Rules 1.04, 2.03, 3.02, 14.05(2), 16.04, 16.08, 38 and 41

15. Comparison version of model and proposed Receivership Order

PART III – LIST OF POINTS TO BE ARGUED

1. This is an application for the appointment of Richter LLP (**"Richter"**) as receiver (the "**Proposed Receiver**") without security, of all assets, undertakings and properties of the Respondents, pursuant to section 243 of the *Bankruptcy and Insolvency Act (Canada)* (the "**BIA**") and section 55(1) of *The Court Of Queen's Bench Act*.

BIA, Section 243 [TAB 1]

Court of Queen's Bench Act, Section 55(1) [TAB 2]

2. The Nygård Group[1] is a clothing designer, manufacturer, supplier and retailer with its head office and centre of operations in Winnipeg, Manitoba. Its product lines and fashion brands include Peter Nygård Collections, Bianca Nygård, Nygård SLIMS, ALIA, ADX, and TanJay. It employs approximately 1,450 people worldwide, operates 169 retail stores in North America (of which 167 are located in Canada), and supplies other retailers such as Dillard's Inc. (**"Dillard's"**), Costco Wholesale Canada Ltd. and Walmart Canada.

(Affidavit of Robert L. Dean, affirmed March 9, 2020 [Dean Affidavit], para. 5)

3. Each of the Respondents is a borrower or guarantor under a Credit Agreement (the "**Credit Agreement**") entered into in early January 2020 among (i) the Loan Parties (consisting of the Canadian Respondents as guarantors and the United States Respondents as borrowers); (ii); White Oak Commercial Finance LLC (**"White Oak"**), as the administrative agent and collateral agent and a lender and (iii)

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[1] Capitalized terms in this Brief have the same meaning as in the Dean Affidavit, unless otherwise noted.

Second Avenue Capital Partners, LLC ("**Second Avenue**"), as documentation agent and a lender (White Oak and Second Avenue collectively, the "**Lenders**"). This application is being brought by White Oak, with the support of Second Avenue.

(Dean Affidavit, paras. 6, 47)

4. Approximately US$25.87 million was outstanding under the Credit Agreement as of the date that White Oak, on behalf of the Lenders, sent a demand and notice of intention to enforce the security on February 26, 2020. This amount is secured by assets of the Respondents (the "**Collateral**") identified under a number of security instruments, as described in greater detail in the Dean Affidavit. White Oak is the first-ranking secured lender, with the exception of certain cash collateral which is pledged to support the Nygard Group's obligations under and in respect of certain letters of credit with the Bank of Montreal, and certain motor vehicles and office equipment collateral which is pledged to certain motor vehicle or equipment lessors or financiers.

(Dean Affidavit, paras. 18, 49-50)

5. Immediately after entering into the loan arrangements, the Respondents have committed multiple defaults under the Credit Agreement, including stating on several occasions that they do not consider themselves bound by the Credit Agreement or related security instruments. In addition, certain of the corporate Respondents and their principal, Peter Nygård, have been named in a New York class action lawsuit (the "**Lawsuit**") involving allegations of sex trafficking and sexual assault of young girls and women. The Lawsuit has already had a material impact on the viability of the Respondents' business, the most notable effect to date being the loss of Dillard's as the Respondents' major wholesale customer, with a corresponding detrimental impact on the value of the Collateral. Finally, the

Respondents' continually changing liquidity needs are materially in excess of what was negotiated with the Lenders at closing.

(Dean Affidavit, paras. 7-8, 10, 12-13, 72, 74)

6. On February 26, 2020, White Oak delivered to the Nygård Group a demand for repayment and notice of intention to enforce on security pursuant to section 244 of the BIA. Under the Credit Agreement, as a result of the Respondents' defaults, the full amount of the indebtedness has been accelerated and is now due and payable. Moreover, the Lenders are entitled to cease advancing any further funds (although they have provided limited further advances to satisfy the Respondents' immediate and urgent needs).

(Dean Affidavit, paras. 11, 17-18, 94, 120; Exhibit D: Credit Agreement, section 8.02)

7. The Respondents have stated on several occasions that they cannot continue to meet their operational needs without further funding and that without such funding they "will be bankrupt". However, all attempts by the Lenders to work with the Respondents to address the outstanding defaults and arrive at a solution to their liquidity needs have failed. The Lenders have lost their trust and confidence in the Respondents' management and are not prepared to consider advancing further funds without the protection of a court proceeding overseen by the proposed Receiver.

(Dean Affidavit, para. 11, 17, 117-118)

8. The appointment of the proposed Receiver is urgently required to preserve the Property, prevent further devaluation of the Collateral and protect against further prejudice to the Lenders' rights. The value of the Collateral has already eroded and is in serious jeopardy of further erosion, with the Respondents' wholesale business

in freefall. The Lenders have no assurance that the aggregate liquidation value of the Collateral that forms part of the borrowing base will be sufficient to pay the Nygård Group's outstanding indebtedness. Among other factors, a material portion of the Collateral includes inventory bearing the "Nygård" brand, the value of which is in question in light of recent developments. The appointment of a Court Officer will bring much-needed stability to the Respondents' business, which is in the interests of all stakeholders of the business.

(Dean Affidavit, paras. 25-26)

9. It is contemplated that the Proposed Receiver, if appointed, will immediately assess next steps. However, in light of the urgency created by the ongoing jeopardy to the Collateral, the Lenders are only prepared to provide funding for the receivership if the Proposed Receiver is permitted at the same time to immediately begin laying the groundwork for a liquidation strategy, subject to further order of this Court. In the event that liquidation of the Collateral is the required course of action, the Proposed Receiver will already have taken steps to implement the arrangements necessary for the liquidation of the inventory, in accordance with guidelines approved by courts in a number of other recent retail insolvencies, as well as engaging a broker to prepare for liquidation of the real estate assets, and will be able to seek this Court's approval of the strategy on an expedited basis.

(Dean Affidavit, paras. 27-29)

10. The key points to be argued on this application are as follows:

a. Authority to appoint the proposed Receiver: This Court has the authority to appoint the proposed Receiver under section 55(1) of the *Court of Queen's Bench Act* and section 243(1) of the BIA. Under

both statutes, the Court must be satisfied that it is "just" or "convenient" to do so. In reaching this conclusion, the Court must balance all the relevant factors in the particular factual context.

BIA, Section 243(1) [TAB 1]

Court of Queen's Bench Act, Section 55(1) [TAB 2]

b. Appointment of the proposed Receiver is "just" or "convenient":

i. Contractual entitlement: The Lenders have the contractual right to appoint a receiver in the event of default under the Credit Agreement pursuant to section 5.1(a)(i) of the Canadian Security and Pledge Agreement and section 15(3) of the schedule to the Charge and the Debenture therein. This contractual entitlement weighs heavily in the balancing of factors that this Court must conduct in determining whether to grant the requested Order.

(Dean Affidavit, Exhibits D and H)

ii. Events of Default: The Respondents have committed multiple Events of Default since the beginning of January. These defaults began occurring almost immediately following the closing of the Credit Agreement. The Respondents have shown no intention of remedying those defaults. Instead, they have expressly denied on several occasions that the covenants under the Credit Agreement are binding on them, which is itself an Event of Default under the Credit Agreement.

iii. Loss of Confidence: In light of the immediate detrimental effect on the Respondents' business caused by the announcement of the Lawsuit, as well as the continuing defaults by the Respondents and their effective repudiation of their obligations, the Lenders have lost all trust and confidence in the Respondents' management. There are very real threats to the viability of the Respondents' business and the value of the Lenders' Collateral. There is an urgent need for court-supervised oversight to protect the interests of the Lenders and of stakeholders as a whole.

iv. Need for Financial Stability: The appointment of the Proposed Receiver, together with a stay of proceedings, will provide the stability needed for the Lenders to advance further funds in accordance with the term sheet to permit the exploration of available realization options.

c. Authorization of Borrowing and Receiver's Charges: The requested Orders authorizing borrowing by the Proposed Receiver, together with the proposed priority Charges to secure those borrowings and the Receiver's costs and legal fees, are necessary to allow the Proposed Receiver to act and to take the necessary steps to stabilize the business. Such relief is typical of proceedings of this nature and is supported by the Lenders, as the first secured creditors of the Respondents.

d. Jurisdiction: It is appropriate for this proceeding to be commenced in Manitoba and for the requested Order to be granted by this Court

because the centre of operations for the Respondents' business is in Winnipeg. Although aspects of the business are carried on in other jurisdictions such as Ontario and New York, the most substantial connections are to Manitoba. It is contemplated that, if the requested Order is granted, an application by the Proposed Receiver to recognize the Order will be brought in the United States under Chapter 15 of the US Bankruptcy Code to protect the Property of the Respondents located in the United States.

A. Authority to Appoint the Receiver

11. Under section 55(1) of the *Court of Queen's Bench Act*, this court has the power to appoint a receiver or receiver and manager "where it appears to the judge to be just or convenient to do so." Section 55(2) provides that an order under subsection (1) may include "such terms as are considered just".

Court of Queen's Bench Act, Section 55 [TAB 2]

12. The test for appointing a receiver under the authority of section 243 of the BIA is similar. As the opening language of section 243(1) states, the receiver may be appointed on application by a secured creditor, where it is "just or convenient" to do so. The order may authorize the receiver to:

> (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) or take any other action that the court considers advisable.

13. *BIA*, Section 243(c) [TAB 1]Where a notice of intention to enforce security has been issued under section 244(1) of the BIA, section 243(1.1) prohibits the court from making a receivership order until the expiry of ten days following the date that the secured creditor sends the section 244 notice, unless the insolvent person consents to an earlier enforcement or the court considers it appropriate to appoint a receiver before then.

BIA, Section 243(1.1) [TAB 1]

14. White Oak, on behalf of the Lenders, sent the Demand and Section 244 Notice on February 26, 2020. The ten-day standstill period required by section 244(2) expires on Monday, March 9, 2020. To date, the Lenders have not been repaid.

(Dean Affidavit, paras. 18, 94, 120; Exhibit A)

B. Appointment of the Receiver is "Just or Convenient"

15. In determining whether it is "just" or "convenient" to appoint a receiver, the Court should have regard for all the circumstances of the case, including: (i) the nature of the property over which the receiver is to be appointed; (ii) the rights and interests of all parties in relation to the property over which the receiver is to be appointed; and (iii) whether the secured creditor has the right under the security agreement to appoint a receiver privately.

Bank of Nova Scotia v. Freure Village on Clair Creek, 1996 CarswellOnt 2328 (Gen Div.) [*Freure Village*] at para. 10, [TAB 3].

Callidus Capital Corp. v. Carcap Inc., 2012 ONSC 163 [*Callidus*] at para. 41, [TAB 4].

16. The Court must consider and balance the competing interests of the various economic stakeholders.

> *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 ONSC 2781 [*Romspen*] at para. 61, [TAB 5].

(i) The Credit Agreement Entitles White Oak to Appoint a Receiver

17. Section 5.1(a)(i) of the Canadian Security and Pledge Agreement entitles White Oak to appoint a receiver upon an event of default:

> 1.1. Lender's Rights and Remedies.
>
> (a) If any Event of Default shall occur, all of the Secured Obligations shall, become immediately due and payable and the Collateral Agent may, in its discretion, proceed to enforce payment and performance of the Secured Obligations and to exercise any or all of the rights and remedies contained in this Security Agreement, (including, without limitation, the signification and collection of each Grantor's Accounts), or otherwise afforded by law, in equity or otherwise. The Collateral Agent shall have the right to enforce one or more remedies successively or concurrently in accordance with applicable law and the Collateral Agent expressly retains all rights and remedies not inconsistent with the provisions in this Security Agreement. Without limitation, the Collateral Agent may, upon the occurrence of any Event of Default and to the extent permitted by applicable law:
>
> (i) Appoint by instrument in writing a receiver (which term shall include a receiver, manager, receiver-manager or agent) of any Grantor and of all or any part of the Collateral and remove or replace such receiver from time to time or may institute proceedings in any court of competent jurisdiction for the appointment of a receiver. Any such receiver appointed by the Collateral Agent, with respect to responsibility for its acts, shall, to the extent permitted by applicable law, be deemed the agent of the Grantors and not of the Collateral Agent or any other Credit Party. Where the "Collateral Agent" is referred to in this Article V the reference includes, where the context permits, any receiver so appointed and the officers, employees, servants or agents of such receiver; [emphasis added]

(Dean Affidavit, Exhibit E)

18. Section 15(3) of the Debenture also entitles White Oak to appoint a receiver upon an event of default:

> 15. **Remedies** Whenever the security hereby constituted shall have become enforceable, the Mortgagee may proceed to realize the security hereby constituted and to enforce its rights: [...]
>
> (3) by the appointment, by an instrument in writing, of any person or persons, whether an officer or officers or an employee or employees of the Mortgagee or not, as a receiver (which term also includes an interim receiver and a receiver and manager) or receivers of all or any part of the Property, and the Mortgagee may remove any receiver or receivers so appointed and appoint another or others in his or their stead;

(Dean Affidavit, Exhibit I)

19. Where the Lenders have the contractual right to the appointment of a receiver, such appointment is no longer regarded as an extraordinary remedy and the Court's consideration of "just" or "convenient" becomes a determination of whether it is in the interests of all concerned to have a receiver appointed.

> *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 CarswellBC 855 at paras. 50, 55 and 75,[TAB 6].
>
> See also *Freure Village* at paras. 10 and 13 [TAB 3].
>
> *7451190 Manitoba Ltd. v. CWB Maxium Financial Inc.*, 2019 MBCA 95 at para. 26, [TAB 7]
>
> *Callidus* at para. 44 [TAB 4].

(ii) Events of Default

20. The Respondents have committed multiple defaults under the Credit Agreement within a mere two month period after the Credit Agreement and related transactions closed. The Lenders provided the Nygard Group with a first notice of default (the "**First Default Notice**") on January 21, 2020, identifying certain defaults. By the time the Lenders provided the Nygard Group with the Demand and Section

244 Notice on February 26, 2020, the Respondents had committed a number of further defaults.

(Dean Affidavit, paras. 9, 71-74, 79-80, 84, 86-87, 91-92; Exhibit A: Demand and Section 244 Notice)

21. The most significant Events of Default include the following:

a. The Respondents refused to engage a financial advisor acceptable to White Oak for a period of fifteen days, contrary to the requirements of section 6.15 of the Credit Agreement, in the face of multiple requests from White Oak. Specifically, section 6.15 required the Respondents to:

> Engage or continue to engage a financial advisor reasonably acceptable to Agent [i.e. White Oak] on terms and conditions reasonably acceptable to Agent to assist the Loan Parties in connection with the transition to the credit facilities established hereunder.

This default was the basis for the First Default Notice. The requirement to appoint the financial advisor was an important obligation under the Credit Agreement to ensure a smooth transition from the previous financing arrangements with the Respondents' former lender – Bank of Montreal – to the new arrangements with the Lenders under the Credit Agreement.

The Respondents' default forced the Lenders to appoint Richter as their own financial advisor, as contemplated under the section 6.10 of the Credit Agreement.

(Dean Affidavit, paras. 9-10, 80; Exhibit D: Credit Agreement, section 6.15)

b. The Respondents then engaged Baker Tilly HMA LLP as financial advisor without consulting White Oak and without the Lenders' approval, again contrary to section 6.15 of the Credit Agreement.

(Dean Affidavit, para. 79; Exhibit D: Credit Agreement, section 6.15)

c. In the face of the First Default Notice, the Respondents denied that the Credit Agreement is valid, enforceable and binding against it, notwithstanding that it had, on closing, received approximately $28 million in advances under the Credit Agreement and delivered borrowing base certificates under it. These denials were repeated even after the Lenders continued to advance amounts under the Credit Agreement. It is an Event of Default under the Credit Agreement if

> any Loan Party or any Affiliate thereof contests in any manner the validity or enforceability of any provision of any Loan Document; or any Loan Party denies that it has any or further liability or obligation under any provision of any Loan Document, or purports to revoke, terminate or rescind any provision of any Loan Document or seeks to avoid, limit or otherwise adversely affect any Lien purported to be created under any Security Document; ...

(Dean Affidavit, paras. 72-74; Exhibit D: Credit Agreement, section 8.01(j))

d. The Lawsuit was launched in New York on February 13, 2020, naming Mr. Nygård and certain members of the Nygård Group. The Lawsuit was initiated by ten plaintiffs, who allege that Mr. Nygård raped and sexually assaulted multiple children and women and that

the corporate defendants knowingly aided and abetted him in a decades-long sex trafficking scheme. Despite the likely destabilizing effect that the Lawsuit would have on the Respondents' business, they waited to advise White Oak of the Lawsuit until February 19, 2020, nearly one week after its issuance. This delay violated sections 6.03(b) and (d) of the Credit Agreement, which required the Nygård Group to promptly notify the Lenders of any litigation that could reasonably be expected to have a material adverse effect on the business.

(Dean Affidavit, paras. 86-87; Exhibit D: Credit Agreement, sections 6.03(b) and (d))

e. On February 25, 2020, a Federal Bureau of Investigation and New York Police Department task force raided the Nygård Group's New York and California offices in connection with an investigation into sex trafficking. On the same day, the Nygård Group's largest customer, Dillard's, released a public statement that, in light of the serious allegations in the Lawsuit, it had refused current deliveries, cancelled all existing orders and suspended future purchases from the Nygård Group. Dillard's accounted for approximately 67% of the Respondent's third party wholesale business. The termination of this relationship is an event of default under section 7.18 of the Credit Agreement and the loss of the value of the related accounts receivable and inventory volume represents a significant erosion of the Lenders' Collateral.

(Dean Affidavit, paras. 13, 91-92; Exhibit D: Credit Agreement, section 7.18)

22. The Nygård Group has, in fact, not denied that any of the events that are alleged by the Lenders to be Events of Default under the Credit Agreement have occurred. The principal response of the Respondents has not been to promptly address the outstanding defaults and/or to negotiate accommodations with the Lenders in good faith. Instead, the Respondents have repeatedly denied that the Credit Agreement is binding on them (which is itself an Event of Default) and claimed that it did not reflect the terms agreed to by the Loan Parties.

(Dean Affidavit, paras. 8, 54, 72-78)

23. The suggestion is preposterous that the Credit Agreement is somehow "not binding" on the Respondents. It was executed by the Respondents (who are the Loan Parties) by individuals with undisputed signing authority. Moreover, three legal opinions from both Canadian and US counsel reviewed the Credit Agreement and declared it to be valid and binding as against the Loan Parties. These opinions are the complete answer to any assertion that the Credit Agreement is not valid and binding on the Respondents. And if that were not sufficient, the Respondents have accepted tens of millions of dollars in advances under the Credit Agreement.

(Dean Affidavit, paras. 8, 52-54, 73)

24. Any suggestion by the Nygård Group that it was pressured into entering into the "unworkable" Credit Agreement is completely without merit. The Loan Parties are sophisticated commercial parties who have been represented by counsel throughout the period both prior to and after entering into the Credit Agreement. Any pressure experienced by the Nygård Group is a product of its own financial difficulties – which were already in play in the fall of 2019, when the Respondents were in urgent need of refinancing – and not of any acts of the Lenders.

(Dean Affidavit, para. 43, 74-75, 81)

(iii) Loss of Confidence in the Nygård Group

25. On numerous occasions, courts have held that a loss of confidence in the debtor and its management arising from a pattern of defaults supports the appointment of a receiver, even in the face of arguments that such appointment may have significant consequences for a debtor's employees, unsecured creditors and shareholders.

> See, for example, *Affinity Credit Union 2013 v Vortex Drilling Ltd.*, 2017 SKQB 228 at para. 37, [TAB 8]
>
> *Callidus* at para. 51 [TAB 4].
>
> *Alexander v. 2025610 Ontario Ltd.*, 2012 ONSC 3486 at para. 49, [TAB 9]

26. Another factor that militates in favour of the appointment of a receiver is evidence of bad faith, dishonest or other improper conduct by the debtor – for example, by failing to provide complete and accurate financial information as required, making improper payments, or making false claims that the debtor is not bound by certain signed credit documents.

> *Affinity*, above at paras. 33-37 [TAB 8].
>
> *Romspen* at para. 77 [TAB 5].
>
> *Callidus* at para. 52 [TAB 4].
>
> *GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co.*, 2011 ONSC 3851 at para. 22, [TAB 10]

27. Similarly, the appointment of a receiver is appropriate where there is a "serious apprehension about the safety of the assets" or where such appointment is necessary to address a crisis in governance.

Callidus, at para. 43 [TAB 4]

RMB Australia Holdings Ltd. v. Seafield Resources Ltd., 2014 ONSC 5205 at para. 35, [TAB 11]

28. Since the Credit Agreement closed, the Respondents have demonstrated flagrant disregard for the terms of the Credit Agreement and the priority of the Lenders over the Collateral. Not only does the Nygård Group deny the enforceability of the Credit Agreement despite receiving significant advances under it, the Nygård Group does not acknowledge the serious erosion to the Lenders' Collateral resulting from the announcement of the Lawsuit. The Nygård Group's response to the damaging impact of the Lawsuit on its wholesale business is to suggest that it will convey its assets to a new company, without regard for the contractually-protected priority interests of the Lenders in the Collateral, and to insist that it is entitled to obtain further funding from the Lenders for inventory purchases. However, the Nygård Group did not provide any evidence to demonstrate that it would be able to sell such inventory in the wake of the termination of the Dillard's relationship.

(Dean Affidavit, paras. 15, 73-75, 93, 119)

29. The Nygård Group plainly intends to take the benefits from the Credit Agreement (and, in fact, to claim benefits in excess of the Nygård Group's entitlement thereunder), while refusing to assume any of the burdens that the Nygård Group freely agreed to.

30. Moreover, forecasted liquidity requirements have changed on multiple occasions and differ materially from the requirements that were negotiated and settled upon closing of the Credit Agreement. Although Richter has attempted to work with the Nygård Group to understand these changing needs, the Nygård

Group has failed to cooperate, providing Richter with incomplete, inconsistent and/or unreliable information.

(Dean Affidavit, paras. 10-11, 81-84)

31. Despite the multiple unaddressed defaults and the unambiguous rights of the Lenders under the Credit Agreement to cease advancing further funds in the face of those defaults, the Nygård Group has attempted to invoice the Lenders for a total of US$6.4 million to cover alleged "damages" resulting from the Lenders' failure to provide further funding following the Events of Default.

(Dean Affidavit, para. 85)

32. In the face of such egregious behaviour, the Lenders have justifiably lost both trust and confidence in the Nygård Group and its management.

(Dean Affidavit, para. 117)

33. The Respondents have had ample time to assess how to address their financial difficulties and to accurately forecast their liquidity needs. Their difficulties did not begin in early January when the pattern of defaults under the Credit Agreement commenced. The Credit Agreement is the result of an urgent refinancing of the prior credit facility in place with the Bank of Montreal. The Respondents were in default under that facility from as early as the summer of 2019. By late fall 2019, the Bank of Montreal had declined to agree to further forbearance. The terms of the Credit Agreement and the protections for the Lenders (which were freely agreed to by the Respondents) were negotiated in the context of these economic circumstances. Any suggestion by the Respondents that the terms of the Credit Agreement are unreasonable or that their current situation could not have been anticipated has absolutely no basis in fact.

(Dean Affidavit, paras. 43-46)

34. White Oak has made good faith efforts to assist the Nygård Group and to place the relationship on a more stable footing. Even though they were under no obligation to do so, the Lenders have provided further funding to the Nygård Group on several occasions to meet its immediate needs.

(Dean Affidavit, para. 94)

35. White Oak has advised that it is willing to consider negotiating a forbearance agreement with the Nygård Group if the Nygård Group provided a revised 13-week cash flow forecast reflecting all recent developments, including the impact of the Lawsuit on the wholesale business. However, this would be subject to a number of conditions, including (i) an acknowledgement that the Credit Agreement is fully binding; and (ii) a commitment that Peter Nygård will no longer have any involvement in the business.

(Dean Affidavit, paras. 103)

36. The Nygård Group responded by indicating that it was exploring a potential sale of the company (a transaction which has yet to materialize). Despite multiple further requests, the required revised cash flow has not been provided.

(Dean Affidavit, paras. 104-105)

37. Moreover, press reports continue to signal the very real likelihood that the viability of the business is increasingly threatened by loss of additional wholesale customers. As a result, the Collateral supporting the White Oak loans is in serious jeopardy of further erosion. White Oak has formally requested information from both the company and its board of directors regarding these increasing losses. Information regarding the impact on the retail business has also been requested.

These requests have not been honoured, despite the obligation under the Credit Agreement to notify the Lenders of any matter that has resulted in or could reasonably be expected to result in a Material Adverse Effect.

(Dean Affidavit, paras. 16, 93, 95, 100-102; Exhibit D: Credit Agreement, section 6.03)

38. On March 3, 2020, counsel to the Respondents advised White Oak that the total amount owing under the Credit Agreement would be repaid on March 9 or March 10, 2020 and requested that White Oak refrain from taking enforcement proceedings. White Oak indicated that it would not commence such proceedings prior to 5 pm on March 9, provided that:

a. Payment of the full amount reflected in a payout statement, which is estimated to be approximately US$25MM plus expenses, is made by 5:00 pm EST on March 9.

b. The Loan Parties and Peter Nygård consent to the appointment of a receiver in the event that full payment is not made by 5:00 pm EST on March 9.

c. The Loan Parties and Peter Nygård execute a release by March 5, which shall be effective as of the payment being made on March 9.

d. The identity of the investor purchasing the debt is confirmed.

(Dean Affidavit, para. 106-107)

39. The Loan Parties and Peter Nygård did not execute a release by March 5, 2020. Instead the Nygård Group provided: (i) an unexecuted letter of intent with respect to a potential sale of the Nygård Group's U.S. business, including its

relationship with Dillard's, to Perry Ellis International, Inc. ("**Perry Ellis**"); and (ii) a letter of intent to purchase the Nygård Group's indebtedness from Basset Financial Corporation ("**Basset**") which was executed by Basset, NIP and Nygard Inc.

(Dean Affidavit, paras. 109)

40. Both letters of intent noted that the proposed transactions were subject to due diligence. In addition, both transactions were contingent on White Oak agreeing to extend its demand for payment until March 13, 2020 (the proposed closing date) and White Oak continuing to provide sufficient funding to meet the Nygård Group's payroll, rent, utilities, and other essential service obligations until such time. White Oak requested evidence of Basset's ability to pay out the amounts owing to the Lenders, which was not provided.

(Dean Affidavit, para. 110 and 113)

41. Later that day, Perry Ellis sent White Oak a letter directly, noting that it is interested in purchasing certain inventory owned by the Nygård Group as well as the intellectual property related to the Allison Daley clothing brand. Perry Ellis noted that it anticipated it could complete due diligence by March 13, 2020 and indicated it would like to discuss this potential transaction with White Oak. Perry Ellis also clarified that the letter was an initial expression of interest and was not intended to create any binding offer or obligation to purchase these assets.

(Dean Affidavit, para. 111)

42. On March 6, 2020, the Nygård Group sent a partially executed proposed forbearance agreement to White Oak that would require White Oak to forbear from enforcing on its security until March 13, 2020. Among other things, this proposed forbearance agreement: (i) was silent as to whether White Oak would be required to

provide any funding during this forbearance period and (ii) failed to address White Oak's previously communicated preconditions to any forbearance agreement – for instance, a commitment that Mr. Nygård would not long be involved in the business.

(Dean Affidavit, paras. 21, 114-116; Exhibit JJ: Proposed Forbearance Agreement)

43. On March 9, 2020, employees of the Nygård Group denied Richter entry to the Winnipeg head office upon their arrival.

(Dean Affidavit, para. 22)

44. Given the events that have transpired since the closing of the Credit Agreement, including the multiple Events of Default and the Lawsuit, the Lenders no longer have confidence that their interests can be protected outside a court-supervised proceeding or that the value of the Collateral is sufficient to repay the outstanding indebtedness. There are very significant risks that the value of the Collateral has eroded and is continuing to erode. The Respondents have been uncooperative and slow to take any constructive steps to resolve the outstanding defaults. There is an urgent need for intervention to stabilize the business, obtain complete and accurate information regarding the business and its assets and prevent the Respondents' management (currently controlled by Peter Nygård at this critical time) from taking any further steps in violation of the Lenders' rights.

45. The Lender's Collateral consists of a number of different assets across the Respondents' businesses. It is appropriate that any further dealing with the Collateral be conducted under the oversight of the Proposed Receiver. The appointment of the Proposed Receiver will allow the Receiver to take immediate steps to preserve the Property, which will include the implementation of a process to

identify a liquidator for the purpose of liquidating the inventory and the engagement of a broker to sell the real estate assets (subject to further approval of this Court). At the same time, the Proposed Receiver will consider other options for the business that will see the Lenders repaid in the short term. The appointment of the Proposed Receiver is in the best interest of the Nygård Group's stakeholders generally, including its employees, suppliers, customers and secured and unsecured creditors.

(Dean Affidavit, para. 121)

C. Urgent Need for Financing

46. To the best of the Lenders' knowledge, the Respondents have very limited funds available at this time. They are generating little or no wholesale sales and are in arrears with a number of their important vendors. Without further funding, the Respondents have indicated that they cannot meet their ongoing operational needs. They have stated on several occasions that without additional funding, they will be bankrupt.

(Dean Affidavit, para. 118)

47. The Lenders are no longer obliged to provide funding under the terms of the Credit Agreement. Nor do the Lenders intend to consider advancing further funds to the Nygard Group outside a court-supervised proceeding, including the approximately US$1 million that the Lenders anticipate will be requested to meet operational needs during the week of March 8.

(Dean Affidavit, para. 17, 118; Exhibit D: Credit Agreement, section 8.02)

48. White Oak and Second Avenue are prepared to fund the costs of the receivership in accordance with the term sheet agreed upon by the Lenders and the

Proposed Receiver. White Oak therefore requests that the Court grant the Proposed Receiver the power to borrow from White Oak in accordance with a budget to be agreed upon with the receiver. Given that the unreliability of the financial information provided by the Nygård Group and the failure to provide the revised cash flows, it is anticipated that the Proposed Receiver will require a very short amount of time in order to obtain accurate information, evaluate next steps and assess the funding needs for the receivership, including the proposed liquidation strategy that will be developed immediately. Under the requested Order, the Receiver's borrowing is to be secured by a Court-ordered charge (the "**Receiver's Borrowing Charge**"), which is to have priority over all other charges and security interests, except the Receiver's Charge.

(Dean Affidavit, paras. 124-126)

49. The Receiver's Charge securing the fees and expenses of the Receiver and its independent counsel is proposed to rank in priority to all other charges and security interests, except for any security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of a secured creditor who would be materially affected by this Order and who was not given notice of this application.

(Dean Affidavit, para. 127)

50. The proposed financial protections for the Receiver are typical in proceedings of such nature and permitted under subsection 243(6) of the BIA. The Lenders, as the Respondents' principal secured creditors, support this relief.

D. Manitoba is the appropriate jurisdiction for the requested Order

51. Section 243(5) of the BIA provides that the application for the appointment of the receiver under section 243 of the BIA must be brought in the court having jurisdiction in the "judicial district of the locality of the debtor."

BIA, Section 243(5) [TAB 1]

52. Section 2 of the BIA defines "locality of a debtor" as follows:

> ***locality of a debtor*** means the principal place
>
> **(a)** where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,
>
> **(b)** where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or
>
> **(c)** in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated;

BIA, Section 2 [TAB 1]

53. Where a debtor has connections to more than one jurisdiction, the case law indicates that the court will look at the degree of connection between the debtor's business and the jurisdiction. This is consistent with the wording of the provision, which refers to the "principal place". Thus, for example, the Supreme Court of Canada has held that the "locality of a debtor" test requires the Court to consider the jurisdiction which has the most substantial connections to the debtor.

> *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, 2001 SCC 92 at paras. 76-78, [TAB 12]
>
> See also *Malartic Hygrade Gold Mines Ltd.*, Re, 1966 CarswellOnt 30 at paras. 35-39, [TAB 13]

54. Winnipeg, Manitoba is the principal place where the Nygård Group has carried on business during the year immediately preceding the date of the initial bankruptcy event (i.e. 2019) for the purposes of paragraph (a) of the definition.

55. The head office of the Nygard Group is located in Winnipeg, Manitoba. Most of the Nygård Group's operations are based out of the Winnipeg head office, which acts as the "nerve centre" of the business. Substantially all accounting functions, strategic decision making, communications functions, marketing and pricing decisions, new business development initiatives, negotiation of material contracts and leases, IT, retail, services, design and merchandising, and production and distribution functions are managed centrally from the head office in Winnipeg. Of its approximately 1,450 employees, approximately 100 are located in the US, with the remainder in Canada.

(Dean Affidavit, para. 38, 41)

56. In relation to the retail business, 167 of the 169 retail stores operated by the Nygård Group are in Canada, including 9 in Manitoba. The two US stores have accounted in past years for less than 2% of retail store net sales. One of the three distribution centres owned or operated by the Nygård Group is located in Winnipeg.

(Dean Affidavit, para. 34, 36, 38)

57. If the relief requested by White Oak is granted, it is the intention that the Proposed Receiver, as the foreign representative of the Respondents, would seek protection in the U.S. for the Nygård Group under Chapter 15 of the U.S. Bankruptcy Code. The Proposed Receiver intends to file petitions under Chapter 15 on the basis that Winnipeg is the Nygård Group's "centre of main interest" in order to protect the property and assets of the Nygard Group located in the United States.

CONCLUSION

58. For all the reasons set out above, the Lenders submit that the requested Order should be granted.

59. The proposed form of Receivership Order is attached to the Notice of Application herein. A comparison between the model Receivership Order circulated to the profession on December 16, 2019 and the proposed Order in this proceeding is attached at Tab 15 hereto.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of March, 2020.

PITBLADO LLP and
OSLER, HOSKIN & HARCOURT LLP

Per: _____
Catherine E. Howden / Jeremy Dacks
Counsel for the Applicant

TAB 1

BANKRUPTCY AND INSOLVENCY ACT
R.S.C., 1985, c. B-3

2 In this Act, [...]

locality of a debtor means the principal place

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated; (localité)

[...]

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.

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

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

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

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

(3) For the purposes of subsection 248(2), the definition receiver in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

(7) In subsection (6), disbursements does not include payments made in the operation of a business of the insolvent person or bankrupt.

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

(4) This section does not apply where there is a receiver in respect of the insolvent person.

TAB 2

THE COURT OF QUEEN'S BENCH ACT
C.C.S.M. c. C280

55(1) The court may grant a restrictive or mandatory interlocutory injunction or may appoint a receiver or receiver and manager by an interlocutory order where it appears to the judge to be just or convenient to do so.

55(2) An order under subsection (1) may include such terms as are considered just.

TAB 3

1996 CarswellOnt 2328
Ontario Court of Justice (General Division — Commercial List)

Bank of Nova Scotia v. Freure Village on Clair Creek

1996 CarswellOnt 2328, [1996] O.J. No. 5088, 40 C.B.R. (3d) 274

Bank of Nova Scotia v. Freure Village on Clair Creek et al

Blair J.

Judgment: May 31, 1996
Docket: none given

Counsel: *John J. Chapman* and *John R. Varley*, for Bank of Nova Scotia.
J. Gregory Murdoch, for Freure Group (all defendants).
John Lancaster, for Boehmers, a Division of St. Lawrence Cement.
Robb English, for Toronto-Dominion Bank.
William T. Houston, for Canada Trust

***Blair J.*:**

1 There are two companion motions here, namely:

(i) the within motion by the Bank for summary judgment on the covenants on mortgages granted by "Freure Management" and "Freure Village" to the Bank, which mortgages have been guaranteed by Freure Investments; and

(ii) the motion for appointment by the Court of a receiver-manager over five different properties which are the subject matter of the mortgages (four of which properties are apartment/townhouse complexes totalling 286 units and one of which is an as yet undeveloped property).

2 This endorsement pertains to both motions.

The Motion for Summary Judgment

3 Three of the mortgages have matured and have not been repaid. The fourth has not yet matured but, along with the first three, is in default as a result of the failure to pay tax arrears. The total tax arrears outstanding are in excess of $850,000. The Bank is owed in excess of $13,200,000. There is no question that the mortgages are in default. Nor is it contested that the monies are presently due and owing. The Defendants argue, however, that the Bank had agreed to forebear or to stand-still for six months to a year in May, 1995 and therefore submit the monies were not due and owing at the time demand was made and proceedings commenced.

4 There is simply no merit to this defence on the evidence and there is no issue with respect to it which survives the "good hard look at the evidence" which the authorities require the Court to take and which requires a trial for its disposition: see Rule 20.01 and Rule 20.04, *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.); *Irving Ungerman Ltd. v. Galanis* (1993) 4 O.R. (3d) 545 (C.A.).

5 On his cross-examination, Mr. Freure admitted:

(i) that he knew the Bank had not entered into any agreement whereby it had waived its rights under its security or to enforce its security; and

(ii) that he realized the Bank was entitled to make demand, that the individual debtors in the Freure Group owed the money, that they did not have the money to pay and the $13,200,000 indebtedness was "due and owing" (see cross-examination questions 46-54, 88-96, 233-243).

6 As to the guarantees of Freure Investments, an argument was put forward that the Bank changed its position with regard to the accumulation of tax arrears without notice to the guarantor, and accordingly that a triable issues exists in that regard.

7 No such triable issue exists. The guarantee provisions of the mortgage itself permit the Bank to negotiate changes in the security with the principal debtor. Moreover, the principal of the principal debtor and the principal of the guarantor - Mr. Freure - are the same. Finally, the evidence which is relied upon for the change in the Bank's position - an internal Bank memo from the local branch to the credit committee of the Bank in Toronto - is not proof of any such agreement with the debtor or change; it is merely a recitation of various position proposals and a recommendation to the credit committee, which was not followed.

8 Accordingly, summary judgment is granted as sought in accordance with the draft judgment filed today and on which I have placed my fiat. The cost portion of the judgment will bear interest at the *Courts of Justice Act* rate.

Receiver/Manager

9 The more difficult issue for determination is whether or not the Court should appoint a receiver/manager.

10 It is conceded, in effect, that if the loans are in default and not saved from immediate payment by the alleged forbearance agreement - which they are, and are not, respectively - the Bank is entitled to move under its security and appoint a receiver-manager privately. Indeed this is the route which the Defendants - supported by the subsequent creditor on one of the properties (Boehmers, on the Glencairn property) - urge must be taken. The other major creditors, TD Bank and Canada Trust, who are owed approximately $20,000,000 between them, take no position on the motion.

11 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 (Ont. Gen. Div.) at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399 (Ont. Gen. Div.); *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 (Sask. Q.B.) at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]).

12 The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

13 While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

TAB 4

2012 ONSC 163
Ontario Superior Court of Justice [Commercial List]

Callidus Capital Corp. v. Carcap Inc.

2012 CarswellOnt 480, 2012 ONSC 163, 211 A.C.W.S. (3d) 861, 84 C.B.R. (5th) 300

Callidus Capital Corporation (Applicant / Respondent by cross-application) and Carcap Inc. and Car Equity Loans Corp. (Respondents / Applicants by cross-application)

Application under Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 and Section 101 of the Courts of Justice Act, R.S.O. 1990 c. C.43

Kaptor Financial Inc. and Carcap Auto Financing (Applicants by cross-application) and Callidus Capital Corporation (Respondent by cross-application)

Mesbur J.

Heard: December 14, 2011
Judgment: January 5, 2012
Docket: CV-11-00009498-OOCL

Counsel: Harvey G. Chaiton, George Benchetrit for Applicant / Respondent by cross-application
Mel Solmon, Fred Tayar, Colby Linthwaite for Respondents and applicants by cross-application
Robb English for Toronto Dominion Bank
A. Kaufman for Proposed Receiver, BDO Canada Ltd.
Jennifer Imrie for Third Eye Capital

Mesbur J.:

Introduction:

1 I heard this application for the appointment of a receiver and the debtors' cross application for an initial order under the *Companies' Creditors Arrangement Act* [1] (CCAA) on December 14, 2011. At the end of the hearing I made the following endorsement:

> For reasons to follow, an order will go in the following terms:
>
> a) The debtors' cross application for an initial order under the CCAA is dismissed.
>
> b) The application to appoint a Receiver is granted, but will not take effect until 5:00 p.m. on December 20, 2011.
>
> c) If the debtor has obtained alternate financing & has paid the applicant in full by 5:00 p.m. December 20, 2011 then the Receivership Order will not take effect.
>
> d) If the terms of paragraph (3) [i.e. paragraph (c)] above have not occurred then the Receivership order will be with effect as of 5:01 pm December 20/11.
>
> e) If the parties cannot agree on the terms of the Receivership order (following the terms of the Model Order) they may make an appointment to settle the terms of the order.

Receiver?

40 Callidus brought its receivership application under both section 101 of the *Courts of Justice Act*, and s.47 of the *BIA*. The test to appoint a receiver under the *CJA* requires the court to conclude it would be just and convenient to do so. The court may appoint an interim receiver under s. 47 of the *BIA* if and only if the court is persuaded a receiver is necessary to protect the debtor's estate or the interests of the creditor who sent a notice under s. 244(1) of the *BIA*.

41 The question is whether it is more in the interests of all concerned to have the receiver appointed or not. [6] In order to answer the question the court must consider all the circumstances of the case, particularly:

> a) The effect on the parties of appointing the receiver. This includes potential costs and the likelihood of maximizing return on and preserving the subject property;
>
> b) The parties' conduct; and
>
> c) The nature of the property and the rights and interests of all parties in relation to it. [7]

42 Receivers are considered an "extraordinary" remedy, much in the same way as granting an injunction is considered an extraordinary remedy. The law is clear, however, that an applicant who wishes the court to appoint a receiver need not show irreparable harm if a receiver is not appointed. [8]

43 Many security instruments will specifically contemplate appointing a receiver. The fact that the creditor has a right to appoint a receiver under its security is therefore an important consideration. Generally, a court will appoint a receiver when it is necessary to enforce rights between the parties or to preserve of assets pending judgment. Receivers will also be appointed where there is a serious apprehension about the safety of the assets.

44 Here, of course, the credit facility agreement itself specifically contemplated appointing a receiver. Following the reasoning in *Fruere Village*, the "extraordinary" nature of the remedy is therefore less important here than it might otherwise be.

45 This leads me to consider the interests of all concerned, in order to determine whether the test under either the *Courts of Justice Act or Bankruptcy and Insolvency Act*, or both, has been met.

46 What is the likely effect on the parties of appointing a receiver? From Callidus' point of view, it will allow it to protect its security, and dispose of it in an organized and court-supervised fashion. It proposes to sell the businesses as a going concern, in order to maximize value for all stakeholders. The respondents concede that a possible restructuring plan might be to liquidate, in which case the hope would also be a going concern sale. In this regard, I see no difference in outcome if a receiver is appointed.

47 Callidus has legitimate concerns about the businesses continuing as a going concern while the respondents attempt to restructure. The respondents have stopped purchasing vehicles for lease. They have no money to do so. As a result, the value of Callidus' security is declining.

48 The activities in the TD accounts that led to the Bank's freezing them suggest companies that were out of financial control, operating outside of the normal course of business.

49 The respondents' difficulties with the TD Bank overdraft arose in August of last year. They have been given every opportunity since then to cure their defaults, and have failed to do so.

50 Similarly, the respondents have been in default with Callidus since it demanded payment in mid October of last year, and delivered its notice of intention to enforce its security. Even though Callidus had agreed to forbear, the respondents have failed to honour the terms of the forbearance agreement.

51 Neither Callidus nor TD Bank has faith in the respondents' management. This is a factor that supports appointing a receiver.[9] While the interim executive officer Mr. Willis has brought some stability to the businesses, they cannot operate without further borrowing, and none is available. Without further borrowing, the respondents cannot purchase new inventory for lease, and thus its inventory is declining. What this means is that its lease and loan revenues are also declining, while its debt load to Callidus is increasing. All this suggests to me that appointing a receiver is necessary in order to protect Callidus' security from further erosion.

52 The respondents' past conduct also gives cause for concern if there is no receiver who can manage the businesses and arrange for an orderly sale under the court's supervision.

53 As to the nature of the property, I note that Callidus' security is declining in value. Both secured creditors' rights in it are being eroded. The court must put an end to the continued haemorrhaging of money. Given the respondents' failure to come up with even a rudimentary restructuring plan, it is time for a receiver to take control, and manage the businesses to the extent necessary to result in an orderly liquidation to protect the interests of all stakeholders.

54 At the hearing of the application and cross-application, the respondents urged me to consider only the current situation with the businesses, and look to the future, rather than to problems in the past. Even doing only this, there is no comfort to Callidus. The respondents have repeatedly sought new financing and failed - even after I made the receivership order, but held it in abeyance so they could refinance. Most importantly, nothing prevents the respondents from continuing their efforts to restructure, even though I have appointed a receiver.

CCAA?

55 The respondents took the position that granting an initial order under the CCAA is the proper way to proceed. They point to the fact that Mr. Willis (the interim executive officer) says the businesses are not out of control, are not a disaster, and are good businesses that will not deteriorate if a stay is granted and the companies are allowed to restructure. I disagree.

56 The respondents have no operating capital. They are borrowers in default, with two unwilling lenders who are unprepared to lend more. Under the *CCAA* these lenders have no obligation to advance more funds.[10] Without further advances, the respondents cannot continue to operate without further deterioration in inventory of vehicles and the resulting deterioration in revenue.

57 The respondents ask, what is the harm in letting them reorganize? While that is an interesting question, it is not the test. It seems to me this is nothing more than a last ditch effort on the respondents' part to stave off the inevitable. In *Marine Drive Properties Ltd., Re*[11] the court put a similar situation this way: "to put in bluntly, the Petitioners have sought *CCAA* protection to buy time to continue their attempts to raise new funding ... they need time to 'try to pull something out of the hat.'" Or, as Farley J. put it in *Inducon Development Corp., Re*,[12] "... *CCAA* is designed to be remedial; it is not however designed to be preventative. *CCAA* should not be the last gasp of a dying company; it should be implemented if it is to be implemented, at a stage prior to the death throe."

58 Here, the respondents only brought their application after Callidus had brought its application for a receiver. The respondents knew in November that Callidus intended to seek a receiver. They waited until they had been served with the receivership application before launching their own effort to restructure. As a result, the cross-application for *CCAA* relief seems more a defensive tactic than a *bona fide* attempt to restructure. The respondents have no restructuring plan. They have no outline of a plan. They do not have even a "germ of a plan". Again, as the court said in *Inducon*:

> [W]hile it is desirable to have a formalized plan when applying, it must be recognized as a practical matter that there may be many instances where only an outline is possible. I think it inappropriate, absent most unusual and rare circumstances, not to have a plan outline at a minimum, in which case then I would think that there would be requisite for the germ of a plan.

TAB 5

2014 ONSC 2781
Ontario Superior Court of Justice [Commercial List]

Romspen Investment Corp. v. 6711162 Canada Inc.

2014 CarswellOnt 5836, 2014 ONSC 2781, 13 C.B.R. (6th) 136,
240 A.C.W.S. (3d) 646, 2 P.P.S.A.C. (4th) 332, 35 C.L.R. (4th) 167

Romspen Investment Corporation, Applicant and 6711162 Canada Inc., 1794247 Ontario Inc., 1387267 Ontario Inc., 1564168 Ontario Inc., 2033387 Ontario Inc., Hugel Lofts Ltd., Altaf Soorty and Zoran Cocov, Respondents

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of 6711162 Canada Inc., and Those Other Companies Listed in Schedule "A" Hereto

D.M. Brown J.

Heard: May 2, 2014
Judgment: May 5, 2014 *
Docket: CV-14-10470-00CL, CV-14-10529-00CL

Proceedings: additional reasons at *Romspen Investment Corp. v. 6711162 Canada Inc.* (2014), 2014 CarswellOnt 7939, 2014 ONSC 3480, D.M. Brown J. (Ont. S.C.J. [Commercial List])

Counsel: S. Jackson for Romspen Investment Corporation
D. Magisano, S. Puddister for Respondents / CCAA Applicants, 6711162 Canada Inc., 1794247 Ontario Inc., 1387267 Ontario Inc., 1564168 Ontario Inc., 2033387 Ontario Inc., Hugel Lofts Ltd. and Casino R.V. Resorts Inc.
A. Bouchelev for Altaf Soorty and Zoran Cocov
E. Tingley for Pezzack Financial Services Inc.

D.M. Brown J.:

I. Competing applications for the appointment of a receiver and the making of an initial order under the Companies' Creditors Arrangement Act

1 Romspen Investment Corporation ("Romspen") lent money to 6711162 Canada Inc. ("671") and certain related companies. That loan has matured and has not been repaid. Romspen applies for the appointment of a receiver under section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, together with the appointment of a construction lien trustee pursuant to section 68 of the *Construction Lien Act*, R.S.O. 1990, c. C.30.

2 6711162 Canada Inc. and certain related companies opposed the appointment of a receiver and, instead, they have applied for an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. Romspen opposed the making of a *CCAA* initial order.

3 The key business issue at stake in these competing applications is who gets to control the development and/or realization of a partially-completed residential condominium project in Midland, Ontario — a court-appointed receiver or the current owners and management of one of the CCAA Applicants, Hugel Lofts Limited?

4 For the reasons set out below, I grant the application for the appointment of a receiver and construction lien trustee, and I dismiss the application for an initial order under the *CCAA*.

circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager. [1]

60 The CCAA Applicants seek the making of an initial order under *CCAA* s. 11.02. In broad terms, the purpose of the *CCAA* is to permit a debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. As pointed out by the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*:

> There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. [2]

61 Both an order appointing a receiver and an initial order under the *CCAA* are highly discretionary in nature, requiring a court to consider and balance the competing interests of the various economic stakeholders. As a result, the specific factors taken into account by a court are very circumstance-oriented. In the case of land development companies, some courts have identified several of the factors which might influence a decision about whether to grant an initial order under the *CCAA*. For example, in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, the British Columbia Court of Appeal stated:

> 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. [3]

62 More recently, C. Campbell J., in *Dondeb Inc., Re*, after quoting the above passage from *Cliffs Over Maple Bay*, stated:

> Similarly, in *Octagon Properties Group Ltd.*, [2009] A.J. No. 936, 2009 CarswellAlta 1325 (Q.B.), paragraph 17, Kent, J. made the following comments:
>
> > 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.
>
> A similar result occurred in *Shire International Real Estate Investments Ltd.*, [2010] A.J. No. 143, 2010 CarswellAlta 234, even after an initial order had been granted.

a plan to the other unsecured creditors, but according to Soorty most of the unsecured debt consists of shareholders loans from Cocov and himself. Reduced to its essence, the plan seems to be no more than asking the court to impose on Romspen an extension of the term of the Loan beyond its 2-year term and to allow management to continue operating as they have in the past. In other words, the CCAA Applicants do not propose the compromise of debt or the liquidation of part of their businesses — they want to carry on just as they have in the past.

73 I accept the evidence of Romspen about the unfairness of such an approach. Romspen stated that it had "absolutely no confidence" in the ability of Soorty and Cocov to manage the affairs of the CCAA Applicants during any stay period, pointing to them letting the first general contractor on the Midland Condo Project, Dineen, place liens on it, and allowing subsequent contractors to do so as well. Roitman also deposed about Soorty and Cocov:

> They have evidently been unable to manage their mutual partnership relationship. Moreover, notwithstanding their purported ability according to the Soorty affidavit to refinance their obligations to Romspen with other assets they control, they have had over 12 months to make those arrangements and have failed to do so. Had they done so, Romspen would have extended the facility.
>
> There is no plan acceptable to Romspen short of immediate payment in full. The plan proposed by the Debtors, apart from the priming of Rompsen's security and the multi-layered professional expenses associated with a CCAA, in circumstances where there is no operating business, amounts to little more than what Messrs. Soorty and Cocov have been unable to do over the past 12 months.

74 Two other questions arise as part of this higher level analysis. First, the RE Appraisal recited that management had told the appraiser that "all units were completely presold by the previous owner" and "many of the previous buyers show strong interest in coming back". If that in fact was the case, why have Soorty and Cocov been unable to attract replacement financing for the Midland Condo Project? Second, the CCAA Applicants emphasized the significant equity available in the other Midland properties, as well as the Ramara and Cambridge properties, arguing that Romspen should hang in for the duration of the Midland Condo Project because it was fully secured. Perhaps the more appropriate question to pose is why the CCAA Applicants are not prepared to realize on some of the equity in those other properties to pay out Romspen now, given that the Loan matured well over half a year ago? The answer appears to be that they want the *CCAA* initial order to secure for them a compelled extension of the term of the Romspen Loan at minimal cost. I do not regard that as a proper use of the *CCAA* process in the circumstances.

75 Other questions arise when one turns to the specifics of the general plan proposed by the CCAA Applicants. It is apparent that the proposed DIP financing would be wholly inadequate to complete the construction of the Midland Condo Project. Where will the other funds come from? The suggestion by the CCAA Applicants that National Bank and Harbour Mortgage may serve as sources for such financing simply is not borne out by the specifics contained in the respective Discussion Paper and Term Sheet. Put another way, I see no credible evidence before the Court to suggest that that the CCAA Applicants are anywhere close to finding sources to fund the costs to complete the construction of the Midland Condo Project, let alone to resolve the existing lien claims which one would expect would be one of the necessary first steps to get this project back up and running.

76 Further, the 30-day Cash Flow statement filed in support of the short-term plan to build model suites rested heavily on the receipt of the HST Refund, yet the CCAA Applicants placed no evidence before the Court from CRA which would indicate that such a refund would be received within the next 30 days.

77 Finally, I would have very strong reservations about leaving the court-supervised completion of the Midland Condo Project in the hands of Soorty and Cocov, even with a Monitor present. As I mentioned earlier, their allegations that their signatures had been forged on the First Supplement were without foundation and most seriously undermined their credibility. Also, Soorty exaggerated his evidence on other important issues, such as the actual purposes of the funds being sought from National Bank and Harbour Mortgage, as well as his initial characterization of Sierra Construction having offered a "guaranteed" cost to complete.

78 For these reasons, I dismiss the application by the CCAA Applicants for an initial order under the *CCAA*, and I grant the application of Romspen for the appointment of SF Partners Inc. as receiver and construction lien trustee.

TAB 6

2010 BCSC 477
British Columbia Supreme Court [In Chambers]

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.

2010 CarswellBC 855, 2010 BCSC 477, [2010] B.C.W.L.D. 4567, [2010] B.C.W.L.D. 4568, [2010] B.C.J. No. 635, 67 C.B.R. (5th) 97, 91 C.P.C. (6th) 171

Textron Financial Canada Limited (Plaintiff) and Chetwynd Motels Ltd., Northern Hotels Limited Partnership, Northern Hotels GP Ltd., Pomeroy Enterprises Ltd., 711970 Alberta Ltd., William Robert Pomeroy and Carrie Langstroth (Defendants)

Willcock J.

Heard: February 10, 2010
Judgment: April 9, 2010
Docket: Vancouver S100268

Counsel: W.E.J. Skelly, B. La Borie for Plaintiff
A. Brown for Defendants

Willcock J.:

Introduction

1 Textron Financial Canada Limited ("Textron") applies pursuant to Rules 12, 44, 51A and 57 of the *Rules of Court*, the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and the *Personal Property Security Act*, R.S.B.C. 1996, c. 359, for an order appointing a receiver/manager of all of the assets, undertakings and properties of Chetwynd Motels Ltd. ("Chetwynd") and Northern Hotels Limited Partnership ("NHLP"), and certain property of the other defendants located at 5200 North Access Road, Chetwynd British Columbia, on District Lot 398 of Peace River District Plans 9830, 13879 and 27449 (the "Lands"). In particular Textron seeks an order empowering the receiver to sell an 87-suite hotel known as Pomeroy Inn Chetwynd (the "Hotel") built on the Lands.

Background

2 Textron is a commercial lender. Chetwynd, Northern Hotels GP Ltd. ("Northern Hotels"), Pomeroy Enterprises Ltd. ("Pomeroy") and 711970 Alberta Ltd. ("711970") are companies incorporated in Alberta. Chetwynd, Northern Hotels and Pomeroy are extraprovincially registered in British Columbia. NHLP is an Alberta limited partnership, extraprovincially registered in British Columbia.

3 Chetwynd and NHLP built, own and operate the Hotel.

4 Textron lent money to Chetwynd for the development and construction of the Hotel on the following terms, set out in a loan agreement dated January 31, 2007 (the "Loan Agreement"):

(a) Textron provided a construction short-term loan facility of up to the principal amount of $7,500,000;

(b) interest accrued on the principal amount outstanding at the Bank of Canada 30-day banker acceptance rate plus 2.85%; and

46 The resignation of the defendant's board and its recent delisting from the TSX exchange evidenced a need to ensure that the defendant's assets are preserved for the plaintiff's benefit;

47 There were concerns with respect to the financial statements of the defendant; and

48 The defendant did not indicate what steps were being taken to address the prospects for early repayment of the defendant's indebtedness.

49 The respondent proposed to pay all the outstanding principal of the debt in four equal monthly instalments over a short period and consented to the immediate appointment of a receiver in the event of default in making such payments. The position of the defendant was that there was no evidence of jeopardy to the plaintiff's security.

50 Mr. Justice Masuhara held:

> There are a number of factors that figure in the determination of whether it is appropriate to appoint a receiver. In *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999), at p. 130, a list of such factors is set out as follows:
>
> > 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, particularly where the appointment of a receiver is authorized by the security documentation;
> >
> > b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of 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 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 which should be granted cautiously and sparingly;
> >
> > j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
> >
> > k) the effect of the order upon the parties;
> >
> > l) the conduct of the parties;
> >
> > m) the length of time that a receiver may be in place;
> >
> > n) the cost to the parties;
> >
> > o) the likelihood of maximizing return to the parties;
> >
> > p) the goal of facilitating the duties of the receiver.

51 Weighing these factors, Masuhara J. dismissed the application for the appointment of a receiver. The Court enjoined the defendant from disposing of assets, ordered the defendant repay the principal and non-default interest on a schedule, to provide financial statements to the plaintiff and to deliver certain shares as security for the debt. Upon default in payment, a receiver would immediately be appointed on the terms of the application. Leave was given to renew the application for appointment of a receiver in the event of any material adverse change in circumstances.

52 The criteria described in *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999) ("Bennett") set out by Masuhara J. have been applied in Alberta subsequent to the decision in *Citibank Canada* to which Burnyeat J. referred in *United Saving*. In *Paragon*, the Court of Queen's Bench considered an appeal from an *ex parte* order appointing a receiver. Upon concluding that the *ex parte* order ought not to have been issued the Court went on to consider the appointment of a receiver *de novo*. At para. 27 the Court outlined the factors that may be considered on an application (those set out in Bennett) and then added, at paras. 28 and 31:

> In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry: *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088(Ont. Gen. Div. [Commercial List]), paragraph 12.
>
> . . . . .
>
> The balance of convenience in these circumstances rests with *Paragon*, which is owed nearly $3 million. There is no plan to repay any of this indebtedness, and no persuasive evidence that the appointment would cause undue hardship to the defendants. As stated by Ground J. in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*, [1995] O.J. No. 144 (Ont. Gen. Div. [Commercial List]) at paragraph 31, the appointment of a receiver always causes some hardship to a debtor who loses control of its assets and risks their sale. Undue hardship that would prevent the appointment of a receiver must be more than this usual unfortunate consequence. Here, any proposed sale of an asset by the receiver must be brought before the court for approval and its propriety and necessity will be fully canvassed on its merits.

53 The Alberta Court of Appeal has more recently applied the criteria described in Bennett and commented on the extent to which there should be consideration of the hardship arising from the appointment of a receiver. In *BG International*, at para. 17, the Court held:

> [T]he chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) at para. 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.
>
> This quotation does not reflect the law of Alberta. Under the *Judicature Act*, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

54 In restating the rule that the onus rests upon the applicant in every case to discharge the burden of establishing that the balance of convenience favours the appointment of a receiver, the Alberta Court of Appeal appears now to have rejected the presumption described by McDonald J. in *Citibank Canada*.

55 In light of these authorities, I conclude that the statutory requirement that the appointment of a receiver be just and convenient does not permit or require me to begin my assessment of the material with the presumption that the plaintiff is

entitled to a court-appointed receiver unless the defendant can demonstrate a compelling commercial or other reason why the order should not be made. Of the considered judgments on the issue from this Court, I prefer the approach taken by Masuhara J. in *Maple Trade Finance*. That approach permits the court, when it is appropriate to do so, to place considerable weight upon the fact that the creditor has the right to instrument-appoint a receiver. It also permits the court to engage in that analysis described by Taylor J. in [*Cal Glass* when considering whether the applicant has established that it is appropriate and necessary for the court to lend its aid to a party who may appoint a receiver without a court order.

Order for Sale Before Judgment

56 Section 15 of *The Law and Equity Act* describes the jurisdiction to grant an order for sale before judgment:

> 15 The court may, before or after judgment in a proceeding
>
> (a) by a mortgagee, for the foreclosure of the equity of redemption in mortgaged property, or
>
> (b) by a vendor of land, where a claim for the cancellation of the agreement is made, with or without a claim for the forfeiture of money paid on account of the purchase price,
>
> on the application of a person who has an interest in the property or land, direct a sale of the property or land on the terms the court considers just.

57 A party foreclosing on a mortgage must afford the borrower an opportunity to redeem the property in all but exceptional circumstances. In *Bank of Nova Scotia v. Mrazek* (1985), 64 B.C.L.R. 282 (B.C. C.A.), the Court considered an appeal from an order granting the foreclosing bank immediate and exclusive right to sell a mortgagor's property, with the proviso that the order would not be entered for one month and the mortgagor would have the right to redeem the property prior to court approval of the sale. The Court, referring to *Devany v. Brackpool* (1981), 31 B.C.L.R. 256 (B.C. S.C. [In Chambers]) and *Canlan Investment Corp. v. Gibbons* (1983), 42 B.C.L.R. 199 (B.C. S.C.), held that the law is clear that an immediate order for sale or an immediate order absolute can only be made on proof by the mortgagee of exceptional circumstances, because the mortgagor loses the right to redeem and is personally liable for the shortfall, if any, on the sale. The court will look to the amount of the shortfall, whether the asset is wasting and whether the market is worsening, among other factors, in determining whether the circumstances are exceptional.

58 In *Devany*, the petitioners sought an immediate order for sale without having obtained judgment or an order *nisi* of foreclosure. They took the position that the *Rules of Court* permit an application for sale of secured property before or after judgment. In response to the concern that the respondents would lose their right to redeem, the petitioners took the position that the respondents could seek an order permitting them to redeem the property at the hearing of the application to approve the sale. Mr. Justice Taylor said the following at p. 258 in describing the applicant's position:

> That would, of course, tend to defeat a fundamental rule of law which has become very well established in England and in this province in proceedings for the realization of mortgage security. The equitable principle on which the courts have long proceeded is that a mortgagor in default shall not lose his land without first having a clear opportunity to redeem.

59 With respect to the suggestion that redemption be considered at the application to approve a sale, Taylor J. held (at p. 259): "I think it would leave the mortgagors in a state of uncertainty as to how and when they may redeem which significantly impairs their equity of redemption." Assuming, for the purposes of argument, that an order for sale could be granted before an order *nisi* of foreclosure, he held:

> But I am satisfied that the granting of an order for sale at that stage would be as much a matter of discretion as the granting of an order for sale after decree nisi and I do not accept the proposition that a mortgagee who thus obtained an order for sale in lieu of a decree nisi would be relieved of the normal obligation to account and the setting of a period within which the mortgagor may redeem.

70 In *First Pacific*, Esson J.A. describes the appropriate role of a receiver appointed under a debenture. He considers the application for sale at p. 153:

> What seems often to be lost sight of is that there is no necessary connection between the appointment of a receiver-manager and the remedy of a sale; and that it is the plaintiff, i.e. the debenture holder, not the receiver manager who seeks the remedy. It is the plaintiff who has the right and opportunity to prosecute the action and it is the plaintiff who, if judgment is granted in his favour, is given the remedy of sale. The order for sale before judgment is an extraordinary remedy which should be granted only in special circumstances.

71 At p. 154 he added:

> In many cases, orders have been made giving to the receiver-manager at the outset power to offer assets for sale subject to court approval. The power to make such an order as a matter of course is, in my view, doubtful. There is power to make such an order in an application expressly raising the issue whether there should be a sale before judgment. Such a power is given by Rule 43(2) upon a finding by the court that "there eventually must be a sale". The power under s. 16 of the *Law and Equity Act* to order a sale before judgment may apply in some debenture holders' actions. There may be other sources of jurisdiction but I know of none that authorizes an order for sale before judgment as a matter of course.

72 In *Vista Homes*, McLachlin J. (as she then was), considered an application brought by a court-appointed receiver with a power to sell assets for an order for conduct of sale of a property held in joint tenancy by the debtor and another company. The application was dismissed as premature. The court held at p. 294:

> The creditor at whose instance the receiver manager was appointed is not entitled to realize on the debt which it alleges to be owing before judgment by having the receiver manager sell the alleged debtor's property. It follows that there should not be a sale before judgment unless special circumstances are made out: *First Pac. Credit Union*
>
> [citation omitted].

73 In *Astor Hotel*, the Court appointed a receiver under a debenture on September 18, 1985 and granted the receiver exclusive conduct of sale effective November 10, 1985. On the application for leave to appeal that order it was argued that the order for conduct of sale should not have been made without an accounting of the debt and a redemption period. The application for leave was dismissed on the basis that the chambers judge, by delaying the power of sale for two months had implicitly recognized and afforded to the debtor a redemption period. Taggart J.A. cited, apparently with approval *First Pacific, Vista Homes, Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97, 123 D.L.R. (3d) 394 (Ont. H.C.); *Royal Bank v. Camex Canada Corp.* (1985), 63 B.C.L.R. 125 (B.C. S.C.); and *South West Marine Estates Ltd. v. Bank of British Columbia* (1985), 65 B.C.L.R. 328 (B.C. C.A.). The latter two cases were cited as authority for the proposition that "the trend is to treat the issues arising in mortgage foreclosure proceedings and in debenture holders' actions in similar ways".

74 In considering the plaintiff's application I bear in mind that there may be advantages to all parties in giving a receiver the conduct of sale of real property, Among those are the factors considered in by Burnyeat J. in *United Saving*, at paras. 32-34, in granting the receiver power to offer the hotel for sale in that case.

Discussion

Appointment of a Receiver

75 The parties in this case stipulated in their contracts that the plaintiff would be entitled to appoint a receiver or to apply for a court-appointed receiver in the event of default. The relief sought by the plaintiff is not, therefore, extraordinary.

76 The defendants owe a significant sum of money to the plaintiff and have not reduced the principal debt since inception of the loan. There does not appear to be a dispute with respect to the amount of the debt. Nor does there appear to be a dispute that the defendants are in default.

TAB 7

2019 MBCA 95
Manitoba Court of Appeal

7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al

2019 CarswellMan 772, 2019 MBCA 95, 310 A.C.W.S. (3d) 243

IN THE MATTER OF: A Final Order for the Appointment of MNP Ltd. as Receiver and Manager

CWB MAXIUM FINANCIAL INC. (Applicant / Respondent) and 6934235 MANITOBA LTD. carrying on business as WHITE CROSS PHARMACY WOLSELEY and 7085797 MANITOBA INC. (Respondents / Respondents) and 7451190 MANITOBA LTD. (Respondent / Appellant)

Mainella J.A., In Chambers

Heard: August 6, 2019
Judgment: September 19, 2019
Docket: AI19-30-09213

Counsel: J.L. Sinclair, for Appellant
C.E. Howden, E.N. Blouw, for Respondent, CWB Maxium Financial Inc.
No one for Respondents, 6934235 Manitoba Ltd. c.o.b. as White Cross Pharmacy Wolseley and 7085797 Manitoba Inc.

Mainella J.A., In Chambers:

Introduction

1 7451190 Manitoba Ltd. (the company) seeks to challenge an order made pursuant to section 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the *BIA*) and section 55 of *The Court of Queen's Bench Act*, CCSM c C280, appointing a receiver/manager over the assets, undertakings and properties of it and the other respondents. The receivership order was entered on the same day it was pronounced, December 20, 2018.

2 An appeal of the receivership order was commenced on January 14, 2019. In chambers proceedings before me, the applicant raised several objections with the appeal:

(1) the company did not have an appeal as of right, rather, it requires leave to appeal that should be refused;

(2) the appeal was statute barred as it was not filed within 10 days of the order or decision appealed from; and

(3) the company could not be represented in this Court by its director who is not licenced to practice law in Manitoba.

3 Previously, I decided that the company could not be represented by its director (see *7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al*, 2019 MBCA 28 (Man. C.A.)). The company has now retained legal counsel to represent it on the proceedings related to the appeal.

4 The remaining questions for me to decide are:

(1) whether the nature of the company's appeal of the receivership order requires leave or is of right pursuant to section 193 of the *BIA*;

(2) if the company requires leave to appeal, should leave to appeal be granted; and

18 The appointment of a receiver does not bring into play the value of the "property involved" for the purposes of section 193(c) of the *BIA*. As Blair JA explained in , *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282 (Ont. C.A.), "an order appointing a receiver does not bring into play the value of the property; it simply appoints an officer of the court to preserve and monetize those assets, subject to court approval" (at para 17) (see also, *Farm Credit Canada v. West-Kana Farms Ltd.*, 2014 BCCA 501 (B.C. C.A.) at paras 21-22; and, *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225 (Ont. C.A.) at para 59).

19 For section 193(c) of the *BIA* to apply, the "appeal must directly involve property exceeding $10,000 in value" (*Enroute Imports Inc., Re*, 2016 ONCA 247 (Ont. C.A.) at para 5). The direct involvement of property occurs when the evidentiary record provides a basis that the order being challenged has "some element of a final determination of the economic interests of a claimant in the debtor" (*2403177 Ontario Inc.* at paras 61-62; *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611 (Ont. C.A.) at paras 23-27; and *Forjay Management Ltd. v. Peeverconn Properties Inc.*, 2018 BCCA 188 (B.C. C.A.) at paras 52-54). That is not the situation here. The company suffered no loss by the appointment of the receiver, nor has any other party had a gain.

20 Accordingly, the company's challenge to the receivership order requires leave to appeal being granted in accordance with section 193(e) of the *BIA*.

Should Leave to Appeal be Granted?

21 The parties agree, as do I, that the test for leave to appeal being granted under section 193(e) of the *BIA* was discussed thoroughly by Cameron JA in *PricewaterhouseCoopers Inc v. Ramdath*, 2018 MBCA 71 (Man. C.A.) at paras 14-24 (Hereinafter *Ramdath #2*). The criteria to consider in deciding whether to grant leave to appeal under section 193(e) of the *BIA* are:

1. The proposed appeal raises an issue of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole.

2. The issue raised is of significance to the action itself.

3. The proposed appeal is prima facie meritorious.

4. Whether the proposed appeal will unduly hinder the progress of the bankruptcy/insolvency proceeding.

22 Notwithstanding these criteria, the Court retains a residual discretion to grant leave to appeal where the refusal to do so would result in an injustice.

23 The company's proposed appeal turns on the issues of the necessity of making the receivership order and doing so on short notice. The company says that the remedy of the appointment of a receiver was unnecessary; the pharmacy is a healthy business. Rather, the applicant triggered the receivership for a tactical purpose simply because it did not want to resolve the dispute over the $206,000 advance with Mr. D. Jorgenson. Further, the judge erred by not giving the company proper time to resist the appointment of a receiver or to use the case management process of the Court.

24 I am not persuaded by the company's arguments in favour of leave to appeal being granted.

25 The proposed appeal does not raise an issue of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole. As was the situation in *Ramdath #2* and, in large part, *Pine Tree Resorts Inc.*, there is no precedential significance to this case that will affect others or the law generally. In his succinct reasons, the judge simply applied well-settled law as to the appointment of a receiver and the granting of an adjournment to the distinct facts of this case.

26 In terms of the second criteria (significance of the issue to the action itself), as was explained in *Pine Tree Resorts Inc.*, this factor often will be of "lesser assistance" (at para 30) in deciding the question of leave. In this case, while the company says the issues it raises are of significance to the action itself, the fact of the matter is that the loan agreements gave the applicant the

contractual right to appoint a private receiver once default occurred, which the company admits was deliberate and for reasons other than insolvency. The extraordinary nature of a receivership order being granted becomes of less concern in a situation, such as here, where the creditor has a contractual right to the remedy of a private receiver upon default and the occurrence of a default is unchallenged (see, *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List])) at para 13).

27 If anything, a court-appointed receiver is to the company's benefit, as opposed to a private receiver, as the process is more transparent and a court-appointed receiver is a fiduciary acting as an officer of the court (see *Gidda* at para 16). In my view, the issues raised by the company are of no significance to the action itself.

28 On the question of the arguable merit of the company's proposed appeal, it is important to begin by recognising that the appointment of a receiver is a matter of discretion (see *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53 (S.C.C.) at para 47). Such a decision will therefore be afforded significant deference on appeal, absent a misdirection in law or fact, or a decision that is so clearly wrong as to amount to an injustice (see, *Homestead Properties (Canada) Ltd. v. Sekhri*, 2007 MBCA 61 (Man. C.A.) at para 13; and *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127 (Alta. C.A.) at para 6). Similar deference will be afforded to a decision whether to adjourn a matter (see , *Viterra Inc v. McIvor*, 2019 MBCA 22 (Man. C.A.) at para 4).

29 Promptness and timeliness are considerations on an application for the appointment of a receiver (see *Lemare Lake Logging Ltd.* at paras 45, 75). Appeal courts must be sensitive to the reality that time is a luxury that a judge, considering whether to appoint a receiver, does not typically have.

30 The record before the judge highlighted the importance of his acting quickly. It was undisputed that all of the respondents were in default of the loan agreements and that nothing would be paid to the applicant until the dispute over the $206,000 advance was resolved. That was a conscious choice of Mr. D. Jorgenson; not, as previously mentioned, because of insolvency, but because of his complaint as to the conduct of the applicant and former officers and directors of the company. He was not hiding the fact he was attempting to leverage the total indebtedness to resolve the dispute over the $206,000 advance which was only approximately 10 per cent of what was owed to the applicant.

31 None of the reasons Mr. D. Jorgenson proposed to the judge to delay deciding whether to appoint a receiver bears on the uncontested facts. There is nothing before me that satisfies me that there is prima facie merit that the judge erred in law or fact or reached an unjust result in refusing the adjournment, or that he should not have appointed a receiver to preserve and protect the property when there was, as he put it, clearly a "serious breakdown" in the relationship between the parties.

32 Finally, on the last consideration, it strikes me that the uncertainty and delay of the proposed appeal will unduly hinder the progress of the bankruptcy/insolvency proceeding. Insolvency litigation is fluid. It is well recognised that delays can prejudice the ability of the receiver to carry out the realisation process (see *2403177 Ontario Inc.* at para 64). While the dispute over the $206,000 advance has not been resolved, the pharmacy is now operating in accordance with the loan obligations owed to the applicant. The receiver is carrying out its mandate without objection of the parties. If leave to appeal is granted, the receivership process will be halted because of the automatic statutory stay (see section 195 of the *BIA*). The status quo should not be upset in my view, particularly given the weakness of the case the company has put forward in seeking leave to appeal.

33 When I consider the relevant criteria as a whole, taking into account the entire context, I am not satisfied that it is appropriate to grant the company leave to appeal the receivership order.

34 In the circumstances, I do not see that result as an unjust one. The company had a legal, and far more proportional, alternative to challenge the disputed indebtedness than the brinksmanship Mr. D. Jorgenson engaged in. The company could have sued the applicant over the $206,000 advance as opposed to walking away from all of its loan obligations. If it had done so, the receivership would not have occurred and the costs to all of the parties would have been reduced.

35 Also, while, to date, no unfairness has arisen because of the appointment of a receiver, I am mindful of the fact that the termination of any possible appeal by the company of the appointment of the receiver by my order will not leave it without

TAB 8

2017 SKQB 228
Saskatchewan Court of Queen's Bench

Affinity Credit Union 2013 v. Vortex Drilling Ltd.

2017 CarswellSask 399, 2017 SKQB 228, 282 A.C.W.S. (3d) 773, 50 C.B.R. (6th) 220, 7 P.P.S.A.C. (4th) 195

AFFINITY CREDIT UNION 2013 (PLAINTIFF) and VORTEX DRILLING LTD. (DEFENDANT)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, RSC 1985, c C-36, AS AMENDED

IN THE MATTER OF THE SASKATCHEWAN BUSINESS CORPORATIONS ACT, RSS 1978, c B-10

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF VORTEX DRILLING LTD.

B. Scherman J.

Judgment: July 24, 2017
Docket: Saskatoon QBG 783/17, 1030/17

Counsel: Jeffrey M. Lee, Q.C., Paul D. Olfert, for Affinity Credit Union and Radius Credit Union
Mary I.A. Buttery, Jared Enns, for Vortex Drilling
Ian A. Sutherland, Jordan F. Richards, for Receiver
Brent Warga, for Interim Receiver
P. Koliaskis, for Proposed Monitor

B. Scherman J.:

Introduction

1 Affinity Credit Union 2013 [Affinity], a secured lender to Vortex Drilling Ltd. [Vortex], is owed in excess of $8,350,000 and has applied for the appointment of a Receiver of all of the assets and properties of Vortex under s. 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] and s. 64 of *The Personal Property Security Act, 1993*, SS 1993, c P-6.2 [*PPSA*].

2 Vortex has applied under s. 11.02(a) of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*], for an initial order granting various relief including a stay of all proceedings against Vortex for a period of time to permit it to pursue a successful arrangement or reorganization.

3 Vortex is insolvent. The other statutory requirements to permit Affinity to pursue the appointment of a Receiver under the *BIA* and for Vortex to seek an initial order and stay under the *CCAA* have been met or established.

4 Affinity has since early 2015 accommodated financial difficulties being faced by Vortex and agreed, under the terms of various agreements, to interest only payments for periods of time in return for various undertakings of Vortex. It says Vortex has breached those undertakings, has ceased making even interest payments and since April of 2017 has been in default under the terms of its credit agreements. Affinity has demanded payment in full of the indebtedness owed to it, and Vortex has failed to pay what it is contractually obligated to pay.

5 Vortex is in the business of drilling oil wells. It says that its financial difficulties are the direct result of the significant drop in the price of oil that occurred in 2014 and has continued to date. This has caused a related reduction in the demand

vi. The argument advanced at paragraph 20(e) of the Vortex brief that "it is believed that it is highly likely that Vortex will secure a contract for its third Rig" is based on an expressed "belief" in paragraph 20 of the Twietmeyer affidavit without Twietmeyer having provided any basis for such belief other than reference to efforts on the part of a Messrs. Geysen and Rae. If there is relevant evidence on efforts and prospects for future work it should be given by these individuals rather than in the second-hand, hearsay manner here attempted. Reduced to its essence this is speculation and argument, not evidence.

30 An applicant seeking relief under the *CCAA* should be placing before the Court the best evidence available. Section 11.02(3) of the *CCAA* requires the applicant to satisfy the Court that circumstances exist that make the order sought appropriate. It is a concern to me that I have a number of affidavits from Ms. Twietmeyer but no affidavit on this application from Mr. Geysen, who is the President and General Manager of Vortex, and thus presumably the responsible person within the company who has the requisite personal knowledge.

31 Counsel for Vortex argues that I should have similar or enhanced concerns with respect to the affidavit evidence filed on behalf of Affinity and says I need to consider Ms. Spencer's affidavits with great care. I do not find reason for overall concern. While Ms. Spencer has expressed opinions or beliefs with regard to the impact on the viability of Vortex given Mr. Big Eagle is no longer on the Board or the Chief Executive Officer of Vortex, I have not relied on that evidence for the decisions I have made.

32 Ms. Spencer's affidavits make it clear that she has had day-to-day responsibility for administration of Affinity's account relating to Vortex and that she has conducted a detailed review of the books, records, files and correspondence of Affinity relating to that account. To the extent to which she provides factual evidence based upon the knowledge of the books, records, files and correspondence of Affinity, I find the factual evidence provided by Ms. Spencer in her affidavits to be appropriate and reliable. To the extent to which she engaged in measures of speculation, argument or providing evidence that she did not have personal knowledge of, I have not relied on such evidence.

ii. Good Faith Considerations in CCAA Applications

33 I find on the basis of the evidence before me that there have been elements of bad faith in Vortex's dealings with Affinity. Vortex had, arising from both the nature of their relationship and by virtue of express contractual provisions, an obligation to provide complete and accurate financial information to Affinity and to not hide or misrepresent matters relevant to their relationship. Good faith of the applicant is a baseline consideration for a Court when considering *CCAA* applications.

34 As of June 20, 2017, with Affinity's receivership application before this Court, but adjourned while the parties were negotiating a potential forbearance agreement, Vortex represented to Radius Credit Union (a member of the Affinity lending syndicate and independently providing an operating line of credit to Vortex) it had no accounts payable. This it did by writing cheques purporting to pay various accounts payable, but then holding those cheques totalling some $235,548 and not delivering them to the payees. This accounting fiction that accounts payable had been paid was used by Vortex to access, under the Radius margining formula, some $121,000 in operating credits that would not have been available had the facts been accurately disclosed. I find this to be a breach of Vortex's contractual covenants to Affinity to provide honest and accurate financial information to Affinity notwithstanding that the misrepresentation was made to Radius in the first instance. Given the circumstances and Affinity's concerns with respect to Vortex's financial position, this action was a failure to act in good faith. It only came to light by reason of investigations by the Interim Receiver.

35 In a June 30, 2016 revision to the Credit Agreement, which allowed Vortex's request to pay interest only from July through November, Vortex agreed that any financial settlement with one Harvey Turcotte would be funded from outside sources and not from Vortex's cash flow. Notwithstanding this agreement, in February of 2017 Vortex made a payment of $525,000 to Harvey Turcotte from its cash flow in breach of this agreement. This fact was not disclosed by Vortex to Affinity and only came to light by reason of investigations by the Interim Receiver. This I find to be a failure on the part of Vortex to act in good faith.

iii. Is CCAA Relief Appropriate or the Appointment of a Receiver Just and Convenient?

36 On the basis of the totality of the evidence before me, I have concluded that it is not appropriate to make an initial order nor grant a stay of proceedings as requested by Vortex in its *CCAA* application. For reasons that overlap, I find it is just and convenient that a Receiver be appointed. I am assisted in these findings by the information provided in the Interim Receiver's reports. In particular I note the Interim Receiver's statements in his July 18, 2017 report, that:

a. Vortex is not contemplating any debt payment to be made to Affinity during the period July 17, 2017 to September 24, 2017 (para. 39); and

b. "Vortex would not have been able to manage its cash flow needs from ongoing operations without the injection of the July 7, 2017 payroll funded by the Interim Receiver." (para. 41).

37 Vortex bears the burden of satisfying me that the relief they seek is appropriate in the circumstances. I am fully alive to the consequences that appointing a receiver may have upon Vortex's employees, unsecured creditors, shareholders and business associates. However, the evidence satisfies me that:

a. The prospect of Vortex finding a lender to refinance it, at the level required to satisfy all of the indebtedness to Affinity and other creditors without significant equity injections by the shareholders, is remote or non-existent.

b. The shareholders of Vortex have demonstrated over the last 2 $^{1}/_{2}$ years that they are not prepared to invest further monies in Vortex. While Vortex says it has interest from other lenders in refinancing it, Vortex has chosen not to share with Affinity and the Court the details of such refinancing proposals. In the circumstances I am unable to give weight to suggestions that there are real prospects of refinancing that do not involve either substantial write-off of current indebtedness or the injection of significant additional equity.

c. Vortex has long known that Affinity wanted additional capital injection to the company. Vortex has, given the accommodations Affinity provided over the last two years, had ample opportunity to pursue alternate financing. At a minimum they have since May 1, 2017 had the knowledge that the need for alternate financing was immediate.

d. Two years of financial statements of Vortex establishes that, given the day rates for drilling rigs and the work available, it is unviable at its current debt levels. To the extent Vortex has been able to generate revenue, that revenue has barely covered, and during some periods not covered, the variable costs of operating those rigs, much less making a contribution to fixed costs. Vortex is currently in breach of its statutory obligation to pay employee withholdings to Canada Revenue Agency.

e. While Vortex argues that the economic prospects are improving, there is no credible evidence provided to support that argument. Rather the evidence is that since 2014 the day rate paid for drilling rigs has been reduced to less than one half of their previous levels and even at these rates Vortex is unable to find work that does more than partially utilize its rigs.

f. Oil prices remain below $50.00 per barrel, and Vortex has provided no evidence to support a conclusion that drill utilization rates or daily charges can or will improve beyond the rates experienced over the last 2 $^{1}/_{2}$ years. No statistical evidence has been provided that establishes the number of rigs available in Western Canada and their current utilization rates nor economic forecasts or analysis that demonstrates that those utilization rates or the presently available day rates for such rigs will increase.

g. If alternate or takeout financing is not available, then the only other justification for an initial order and stay would be to provide time to Vortex to negotiate a compromise agreement between Vortex and its creditors, secured and unsecured. Affinity is the only secured creditor, and it has made it clear that it is not prepared to compromise its debts. Affinity cannot be criticized for such a position. Indeed the members of Affinity would have good reason to criticize Affinity management were they to compromise a debt which it has reasonable prospects to fully recover.

h. Affinity's position is that they have lost confidence in and no longer trust Vortex. This position is reasonable given that Vortex has repeatedly over the last two years failed to meet its commitments to make balloon payments or to resume regular payments coupled with the concerns with respect to Vortex's good faith discussed above.

i. While Vortex argues Affinity is not only fully secured, but has a significant cushion of security such that Affinity would suffer no prejudice by permitting Vortex to pursue *CCAA* relief, that argument is but one of many considerations to weigh. It does not weigh heavily given the absence of admissible and credible evidence as to the value of Affinity's security and my common sense conclusion, given the utilization rates and day rates available to Vortex, that the present value of these rigs is a matter of significant uncertainty.

j. Continued operation of the rigs carries with it the consequence that to some greater or lesser extent the value of the rigs will continue to physically depreciate independent from market forces related to the depressed state of the Western Canadian oil industry or that may result from the introduction of new technologies in drilling rigs and practices.

k. If Vortex were granted *CCAA* protection, Affinity would effectively bears the risks and costs associated with that action since, with the exception of the relatively insignificant dollar amount owed to unsecured creditors (some $193,000), Affinity is the only creditor. If Vortex were given *CCAA* protection then, under the usual DIP financing protocols of *CCAA* protection, costs arising from the continuing operation of Vortex that are in excess of its revenue, including the costs of the Monitor and its legal counsel, will effectively be borne by the security Affinity holds. The Pre-Filing Report of the Proposed Monitor contemplates approval of up to $1,000,000 in DIP financing for the proposed 13-week cash flow period which includes $500,000 in professional fees. Such DIP financing would, of course, assume a super priority position over the secured financing of Affinity. Thus the risks associated with *CCAA* protection are effectively borne by Affinity and the unsecured lenders if the security cushion suggested by Vortex turns out not to exist.

38 The contractual agreement between Affinity and Vortex clearly contemplated loans payable on demand, with specified principal and interest payments before demand. Affinity has provided significant relief from the contractual terms over a two-year period. In a practical sense, Affinity has already effectively provided Vortex with much of the remedial opportunity contemplated by the *CCAA*. Vortex has had the benefit of two years of debt repayment accommodations and forbearance and the opportunity to seek alternate financing. During this period Vortex has failed to honour undertakings it gave in exchange of the deferral relief provided. Affinity is contractually entitled, following its demand, to either seize and sell the rigs or to have a Receiver appointed. Having regard to the relevant factors I outlined in paragraph 19 above, I conclude that it is just and convenient to appoint a Receiver as sought by Affinity.

iv. Other Considerations

39 Affinity argued that there was a concluded agreement in which Vortex had agreed to consent to the appointment of a Receiver. Vortex disputes that such an agreement was concluded and took exception to evidence Affinity wished to rely on as being without prejudice communications. In light of the conclusions I have reached above, I do not find it necessary to address these arguments and the related argument relating to settlement privilege. My decision is made without regard to the evidence and argument submitted surrounding these issues.

Conclusion

40 For the reasons set forth above:

a. I dismiss Vortex's application for relief under the *CCAA*.

b. I order that Deloitte Restructuring Inc. be appointed Receiver of Vortex effective immediately.

c. I contemplate that the form of that order will be substantially in the form of the draft order filed by counsel for Affinity on July 6, 2017. However, at the hearing of the applications counsel for Affinity and Vortex asked that the final form of the order not be settled until after counsel had reviewed my decision and had discussion on the final form of order. I ask

TAB 9

2012 ONSC 3486
Ontario Superior Court of Justice [Commercial List]

Alexander v. 2025610 Ontario Ltd.

2012 CarswellOnt 17884, 2012 ONSC 3486, [2012] O.J. No. 2721

RE: Keith Alexander, Arthur Barkin, Marshall Barkin, Harvey Frisch, Eric Grossman, Robert Grossman, Stanley Grossman, Tom Koffler, Avi Ritter, Mark Simon, Judith Sporn, Stephen Stark, Michael Steinberg, John Uster, Steven Warsh and David Yarmus (Applicants) and 2025610 Ontario Limited, Kaptor Financial Inc. and Insignia Trading Inc. (Respondents)

D.M. Brown J.

Heard: June 8, 2012
Judgment: June 18, 2012
Docket: CV-12-9732-00CL

Counsel: J. Larry, for Applicants
A. O'Brien, for Respondents
W. Jaskiewicz, for Bibby International Trade Finance
R. English, for Toronto Dominion Bank
D. Stewart, for SF Partnership LLP

D.M. Brown J.:

I. Application for the appointment of a receiver

1 Eric Inspektor and his family control and manage a group of companies called the "Kaptor Group". That Group included the respondents, 2025610 Ontario Limited, Kaptor Financial Inc. and Insignia Trading Inc. It used to include CarCap Inc. and Car Equity Loans Corp, but those companies were placed into receivership last December and their assets sold pursuant to court order this past March.

2 The applicants invested money in 2025610 Ontario Limited ("202") and Kaptor Financial Inc. ("KFI"). Neither is engaged in active business. [1] The respondent, Insignia Trading Inc., carries on business as the distributor of household merchandise, and it looked, in part, to 202 and KFI for funds to finance its operations.

3 The applicants seek the appointment of a receiver over all the respondents alleging, in the case of 202 and KFI, defaults under loan agreements, and in the case of all three respondents breaches of an April 17, 2012 Forbearance Agreement. The respondents opposed the appointment of a receiver.

4 For the reasons set out below, I grant the application.

II. Evidence

A. Overview

5 According to Robert Grossman, who filed the affidavit on behalf of the applicants, KFI financed the operations of the CarCap Companies, which are now in receivership. The applicants were amongst the persons who invested money in KFI. Mr. Grossman deposed that KFI owes the applicants about $8 million which now is in default.

44 The applicants gave notice of this proceeding to the secured creditors of 202, KFI and Insignia. Some secured creditors were parties related to the Inspektor family; they opposed the application. Their interests are identical to those of the respondents. As to the arm's-length secured creditors, two appeared on the return of the application - Bibby Financial Services (Canada) Inc. and Toronto-Dominion Bank - and neither opposed the appointment of a receiver.

45 In the present case the applicants loaned monies to KFI, obtained security for their loans, KFI defaulted on the loans, demand was made, and the applicants enjoyed the right under their security to apply for the appointment of a receiver. So, too, the applicants loaned money to 202, default occurred and demand was made, although the applicants do not hold security which entitles them to the appointment of a receiver.

46 However, as Mr. Inspektor's January, 2012 proposal to the applicants and other investors demonstrated, the "Kaptor Group", including KFI, 202 and Insignia, were highly inter-related companies run as a group. The April Forbearance Agreement signified that the respondents realized that if they were to secure the forbearance of significant creditors, they would have to provide transparency to the creditor/applicants about the affairs of the remaining operating company, Insignia, to which both 202 and KFI had provided funds, and provide the creditors with sufficient comfort to justify their forbearance by exposing the business of Insignia to a possible receivership if the respondents did not live up to their promises of transparency. I reiterate: those were heavy terms, but reasonable in the circumstances and ones freely entered into by the respondents with the benefit of independent legal advice.

47 The respondents did not live up to their promises. They failed to make the May 18 payment of $10,000 to the Monitor. That was a breach of section 2 of the Forbearance Agreement. That breach triggered the rights of the applicants under the Side Letter, including the right to rely on the respondents' consents to the appointment of a receiver.

48 In addition, the respondents' unjustifiable delays in providing the Monitor with online access to their bank accounts and adding the Monitor as a signatory to the 202 and KFI accounts, when coupled with the self-dealing withdrawals the Inspektors undertook during the period of delay, constituted material breaches of sections 6 and 9 of the Forbearance Agreement. The late technical cures of those breaches made by the respondents did not cure the actual damage caused by the breaches. As a result, I regard those breaches as entitling the applicants to invoke the terms of the Side Letter for the appointment of a receiver over all three respondents.

49 Moreover, I regard that conduct, against the backdrop of all three respondents agreeing to the obligations contained in the Forbearance Agreement, as making it just and convenient to appoint a receiver over the three respondents under section 101 of the *Courts of Justice Act*. The respondents, by their conduct, turned their backs on their obligations under the Forbearance Agreement, thereby disentitling themselves to the benefit of the forbearance afforded by the applicants. The applicants understandably have lost confidence in the respondents' willingness to comply with the terms of the Forbearance Agreement and want the benefit of a court-appointed receiver to obtain timely directions and approvals in the realization process for the benefit of all creditors. [4]

50 With the benefit of independent legal advice the respondents provided consents in escrow for the appointment of a receiver. I regard it just and convenient to appoint a receiver to make good the consents given by the respondents.

51 Although the applicants did not loan monies to Insignia, that company owes KFI somewhere between $2 million and $8 million. Although Insignia owes a secured creditor, Bibby, about $270,000, as confirmed by Bibby's counsel at the hearing, a very significant receivable remains due and owing to KFI. A receivership of KFI inevitably will result in calls on Insignia to repay those loans. No doubt that degree of inter-connectedness between the two companies underlay the inclusion of Insignia in the Forbearance Agreement and Side Letter. Insignia appears to be insolvent on a balance sheet and operating basis. Its inclusion in the receivership therefore is justified not only by the terms of the Forbearance Agreement and Side Letter, but also by commercial practicality.

52 Accordingly, I grant the application to appoint Soberman Inc. as Receiver of 202, KFI and Insignia.

TAB 10

2011 ONSC 3851
Ontario Superior Court of Justice

GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co.

2011 CarswellOnt 5743, 2011 ONSC 3851, [2011] O.J. No. 2954, 204 A.C.W.S. (3d) 291, 81 C.B.R. (5th) 47

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

GE Commercial Distribution Finance Canada and GE Capital Canada Finance Inc. (Applicants)
and Sandy Cove Marine Company Limited and 2038278 Ontario Limited (Respondents)

Morawetz J.

Heard: June 10, 2011
Judgment: June 20, 2011
Docket: CV-11-9219-00CL

Counsel: Christopher J. Staples for Applicants
John Barzo for Respondents
I. Aversa for Bank of Montreal

Morawetz J.:

1 On June 10, 2011, I released the following endorsement:

> Receivership order granted. Boat sales to continue in a manner consistent with recent practice. Parties to re-attend June 20, 2011 at 9:30 a.m. for directions regarding receivership generally. Receiver to provide recommendations at that time regarding ongoing operations. Reasons in respect of this decision will be provided on or prior to June 20, 2011.

2 GE Commercial Distribution Finance Canada ("GE Commercial") and GE Capital Canada Finance Inc. ("YMCF") (collectively, "GE") brought an application seeking an order appointing Grant Thornton Limited as receiver of the properties, assets and undertakings (the "Property") of Sandy Cove Marine Company Limited ("Sandy Cove") and 2038278 Ontario Limited ("203") (collectively, the "Debtors"), under s. 243(1) of the *Bankruptcy and Insolvency Act* (the "BIA") and s. 101 of the *Courts of Justice Act*.

3 GE and YMCF are secured floor plan lenders to the Debtors, which are related corporations operating in Innisfil and North Bay, Ontario. GE has made demand under its Loan Facility and delivered s. 244 BIA notices, for failure by Sandy Cove to remit to GE payments due on the sale of inventory. At the time of the application, GE was owed an aggregate of U.S. $4.7 million and CAN $1.2 million. The ten-day notice period referenced in s. 244 of the BIA has long passed.

4 GE is not willing to provide further floor plan financing to the Debtors and seeks to repossess both its floor plan collateral and GSA security through sales from the dealership sites.

5 Pursuant to the Loan Agreements, inventory financing advanced by GE to the Debtors is repayable in the amount of such advance immediately upon the sale of the respective inventory or collateral for which the advance was made.

6 Pursuant to a cross default addendum, Sandy Cove and 203 agreed with GE that any default under the Sandy Cove Loan Agreement or the 203 Loan Agreement would constitute a default under the other Loan Agreement.

parties in relation thereto. See *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]). In that decision, Blair J. (as he then was) dealt with a situation in which the bank held security that permitted the appointment of a private receiver or an application to court to have a court-appointed receiver. He summarized the legal principles at para. 10 of the decision, which included the following:

> ...the fact that the moving party has a right under security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the court is necessary to enable the receiver-manager to carry out its work and duties more efficiently... it is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed.

22 In this case, GE is a secured creditor. It has a right to enforce its security. The conduct of the debtor with its repeated practice of SOTs, is such that it is quite understandable that GE has lost confidence in the Debtors. It is also understandable that GE would want the benefit of a court-appointed receiver, if for no other reason than to obtain timely directions and approvals in the realization process. Such direction may also be helpful insofar as there is a second secured party, Bank of Montreal ("BMO"). BMO took no position on the receivership application, but it does have a continuing interest in this matter.

23 The conduct of the Debtors directly led to the default and the receivership application. In my view, the Debtors are in no position to argue against the choice of remedy selected by GE. In my view, having reviewed the record, I am satisfied that it is both just and convenient to appoint a receiver.

24 The application is granted and Grant Thornton Limited is appointed Receiver.

25 There are outstanding issues to consider. Accordingly, pending a re-attendance on June 20, 2011 for further directions, boat sales are to continue in a manner consistent with recent practice. The Receiver is to provide recommendations on June 20, 2011 regarding ongoing operations in the receivership.

Application granted.

TAB 11

2014 ONSC 5205
Ontario Superior Court of Justice [Commercial List]

RMB Australia Holdings Ltd. v. Seafield Resources Ltd.

2014 CarswellOnt 12419, 2014 ONSC 5205, 18 C.B.R. (6th) 300, 244 A.C.W.S. (3d) 841

RMB Australia Holdings Limited, Applicant and Seafield Resources Ltd., Respondent

Newbould J.

Heard: September 9, 2014
Judgment: September 10, 2014
Docket: CV-14-10686-00CL

Counsel: Maria Konyukhova, Yannick Katirai for Applicant
Wael Rostom for KPMG

Newbould J.:

1 On September 9, 2014 I granted a receiving order for brief reasons to follow. These are my reasons.

2 The applicant ("RMB") is an Australian company with its head office is in Sydney, New South Wales. RMB is the lender to the respondent ("Seafield") under a Facility Agreement and is a first ranking secured creditor of Seafield.

3 Seafield is an Ontario corporation with its head office in Toronto and is a reporting issuer listed on the Toronto Stock Exchange. It is an exploration and pre-development-stage mining company focused on acquiring, exploring and developing properties for gold mining. Seafield directly or indirectly owns mining properties or interests in Colombia, Mexico and Ontario.

4 Although Seafield was served with the material on this application, neither it nor its counsel appeared to contest the application.

5 Seafield wholly owns Minera Seafield S.A.S., a corporation existing under the laws of Colombia with its head office in Medellín, Colombia. Minera owns a number of mining titles and surface rights in Colombia, through which it controls three main mineral exploration and mining development properties. One of the properties is a 124 hectare parcel of land subject to a mineral exploitation contract granted by the Colombian Ministry of Mines (the Miraflores Property).

6 Aside from a small underground mine operated by local artisanal miners, the Columbian properties are non-operational and do not generate revenue for Seafield. Minera relies solely on Seafield for funding to, among other things: (a) continue acquiring mineral property interests; (b) perform the work necessary to discover economically recoverable reserves; (c) conduct technical studies and potentially develop a mining operation; and (d) perform the technical, environmental and social work necessary under Colombian law to maintain the Properties in good standing.

7 On February 21, 2013, Seafield as borrower, Minera as guarantor and RMB as lender and RMB's agent entered into the Facility Agreement. Pursuant to the Facility Agreement, RMB made a $16.5 million secured term credit facility available to Seafield. The Facility Agreement provided that the proceeds of the Loan must be used for: (a) the funding of work programs in accordance with approved budgets to complete a bankable feasibility study for a project to exploit the Miraflores Property and for corporate expenditures; (b) to fund certain agreed corporate working capital expenditures; and (c) to pay certain expenses associated with the preparation, negotiation, completion and implementation of the Facility Agreement and related documents.

creditor seeking a court appointed receiver — and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not.

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

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

30 The applicant submits, and I accept, that in the circumstances of this case, the appointment of a receiver is necessary to stabilize the corporate governance of Minera, as Seafield's wholly-owned subsidiary and its major asset.

31 RMB does not believe that Minera will be able to obtain interim financing during the pendency of creditor protection proceedings, and RMB has concerns that those assets may deteriorate in value due to lack of care and maintenance.

32 Failure to obtain additional financing for Seafield and Minera may result in significant deterioration in the value of Seafield and Minera to the detriment of all of their stakeholders. The evidence of the applicant is that among other things, it appears that the *Consulta Previa*, a mandatory, non-binding public consultation process mandated by Colombian law that involves indigenous communities located in or around natural resource projects, has not been completed. Failure to complete that process in a timely manner could lead to the potential revocation or loss of Minera's title and interests.

33 Moreover, if further funding is not obtained by Minera, it is also likely that employees of Minera will eventually resign. These employees are necessary for, among other things, ongoing care, maintenance and safeguarding of the properties and assets of Minera, facilitating due diligence inquiries by prospective purchasers or financiers, and maintaining favourable relations with the surrounding community.

34 RMB has lost confidence in the board of directors of Seafield. The details of the negotiations and the threats made by the Seafield directors, namely Messrs. Pirie and Prins, would appear to justify the loss of confidence by RMB in Seafield. RMB is not prepared to fund Seafield on the terms being demanded by Seafield's board and without changes to Seafield's governance structure.

35 Notwithstanding that RMB has replaced Minera's board and CEO in accordance with its rights in connection with the Loan and Colombian law, Minera's CEO has refused to relinquish control of Minera or its books and records, including its corporate minute book, stalling RMB's efforts to take corporate control of Minera and creating a deadlock in its corporate governance. Moreover, Minera's CEO, without authorization from the new board of directors, has commenced creditor protection proceedings in Colombia which RMB believes may be detrimental to the value of Minera's assets and all of its and Seafield's stakeholders.

36 RMB is prepared to advance funds to the receiver for purposes of funding the receivership and Minera's liability through inter-company loans. The receiver will be entitled to exercise all shareholder rights that Seafield has. The receiver will be able to flow funds that it has borrowed from RMB to Minera to enable Minera to meet its obligations as they come due, thereby preserving enterprise value.

37 In these circumstances, I find that it is just and convenient for KPMG to be appointed the receiver of the assets of Seafield.

Application granted

TAB 12

2001 SCC 92, 2001 CSC 92
Supreme Court of Canada

Eagle River International Ltd, Re

2001 CarswellQue 2725, 2001 CarswellQue 2726, 2001 SCC 92, 2001 CSC 92, [2001] 3 S.C.R. 978, [2001] S.C.J. No. 90, 110 A.C.W.S. (3d) 596, 207 D.L.R. (4th) 385, 280 N.R. 155, 30 C.B.R. (4th) 105, J.E. 2002-93, REJB 2001-27203

Azco Mining Inc., Appellant v. Sam Lévy & Associés Inc., Respondent

McLachlin C.J.C., L'Heureux-Dubé, Iacobucci, Major, Binnie, Arbour, LeBel JJ.

Heard: May 15, 2001
Judgment: December 20, 2001
Docket: 27876

Proceedings: affirming [2000] R.J.Q. 392 (C.A. Que.); affirming [1999] R.J.Q. 1497 (C.S. Que.)

Counsel: *Yves Martineau*, for Appellant
Jean-Philippe Gervais, for Respondent

***Binnie J.*:**

1 The long arm of the Quebec Superior Court sitting in Bankruptcy reached out to the appellant in Vancouver, British Columbia, in respect of a claim for shares and warrants and other debts allegedly due to the bankrupt which the trustee in bankruptcy values in excess of $4.5 million. The appellant protested that the dispute, which involves the financing of an African gold mine, has nothing to do with Quebec. It argues that the claim of the respondent trustee in bankruptcy is an ordinary civil claim that rests entirely on agreements that are to be interpreted according to the laws of British Columbia. For this and other reasons of convenience and efficiency, the appellant says, the claim ought to proceed in British Columbia. The bankruptcy court and the Quebec Court of Appeal rejected these submissions and, in my view, the further appeal to this Court ought also to be dismissed.

I. Facts

2 The appellant Azco Mining Inc. ("Azco"), a company incorporated under the laws of Delaware, offered venture capital services from its office in Vancouver, British Columbia. In 1996 it was introduced to Eagle River International Limited and Eagle River Exchange and Financial Services Inc. (hereinafter collectively referred to as "Eagle"), with offices in Gatineau, Quebec. Eagle was in the process of trying to develop promising gold mining properties in a 500 square mile area of Mali, West Africa. A deal was struck whereby Eagle would continue to use its expertise to bring the mines to production through subsidiary companies in Mali, and Azco would provide the financing. The parties reduced their agreement to a series of documents, each of which contained what the appellant contends is a choice of forum clause and the respondent argues is no more than a choice of law clause, as follows:

> **June 7, 1996 financing agreement**
>
> 28. The agreement shall be governed by the law of British Columbia.
>
> **June 12, 1996 management agreement**

68 The implementation of these public policies might be expected to take priority over private "choice of forum" agreements where the two come into conflict, as indeed Robert J.A. concluded in the Quebec Court of Appeal. A similar position is expressed in Fletcher, I.F., *Insolvency in Private International Law* (Oxford: Clarendon Press 1999) at p. 47, fn. 73:

> [P]rivate contractual arrangements between parties cannot prevail over the exercise of bankruptcy jurisdiction, which belongs to the realm of public policy, serving a wider spread of interests including, ultimately, those of society at large.

In the United States, however, there is a competing body of judicial opinion that a trustee in bankruptcy who sues on an agreement containing a forum selection clause should, as a general rule, be bound by that clause to the same extent as the parties thereto: see *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (U.S. C.A. 3rd Cir., 1983); *Diaz Contracting Inc., Re*, 817 F.2d 1047 (U.S. C.A. 3rd Cir., 1987), and *Hays & Co. v. Merrill Lynch*, 885 F.2d 1149 (U.S. C.A. 3rd Cir., 1989).

69 In my view, for the reasons previously mentioned, the choice of forum clause would be a significant factor under s. 187(7) but not, in the context of the public policies expressed in the Act, a controlling factor.

70 In light of my conclusion that the appellant does not have the benefit of a "choice of forum" clause, I need not undertake the exercise of considering whether in this case there is any conflict between private choice and public interest, and if so, how "choice of forum" considerations should be balanced in this case against the *Amchem*, supra, and public interest factors within the framework of s. 187(7) of the Act.

71 The bottom line is that the appellant is unable to show that the motions judge committed any error of law in declining to transfer the proceeding to Vancouver.

(iii) Error of Principle

72 The appellant, relying on *Amchem*, supra, argues that this dispute has its most real and substantial connection to British Columbia, and that the motions judge erred in principle in ignoring relevant factors in coming to the opposite conclusion.

73 Again, with respect, I do not think this position is sustainable on the law or the facts.

74 In the first place, as stated, the *Amchem* approach has to be applied here with full regard to the context of Canadian bankruptcy legislation. This appeal involves the allocation of a particular bankruptcy matter within a single national bankruptcy scheme created by the Act. As shown in *Holt Cargo Systems*, supra, consideration of the allocation of a matter having different aspects (e.g. maritime law and bankruptcy law), as between Canadian courts and foreign courts operating under quite different legislative or other schemes, may raise different problems.

75 Secondly, *Amchem* and its progeny involved private litigation. Here, as explained in *Holt Cargo Systems*, supra, there is the important public interest aspect mentioned above. The Court looks not only at the *Amchem* factors, but must strive to give effect to Parliament's intent to create an economical and efficient national system for the administration of bankrupt estates, as evidenced in the Act.

76 It is in the public interest to facilitate the speedy resolution of the fallout from a financial collapse. This, as noted in *Holt Cargo Systems* was not present in the *Amchem* fact situation. In fact, there are stronger policy considerations here than in *Holt Cargo Systems*. That case dealt with a choice between a maritime law action in Halifax for the determination of claims of *secured* creditors that had already proceeded to default judgment and, as an alternative, the exercise of jurisdiction by the Quebec Superior Court sitting in Bankruptcy acting at the behest of the bankruptcy court in Belgium in a matter that was still in its early stages of organization. In those circumstances the Federal Court of Canada declined to stay the maritime law action, and its exercise of discretion was upheld by the Federal Court of Appeal and by this Court.

77 In the present case, we are confronted with a federal statute that *prima facie* establishes one command centre or "single control" (*Stewart* , supra, at p. 349) for all proceedings related to the bankruptcy (s. 183(1)). Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings,

and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" to send the trustee scurrying to multiple jurisdictions. Parliament was of the view that a substantial connection sufficient to ground bankruptcy proceedings in a particular district or division is provided by proof of facts within the statutory definition of "locality of the debtor" in s. 2(1). The trustee in that locality is mandated to "recuperate" the assets, and related proceedings are to be controlled by the bankruptcy court of that jurisdiction. The Act is concerned with the economy of winding up the bankrupt estate, even at the price of inflicting additional cost on its creditors and debtors.

78 The "balancing test" advocated by the appellant based on the *Amchem* factors and general principles of private international law fails to take these important public policies into account. The Quebec Superior Court sitting in Bankruptcy is, in a very real sense, sitting as a national court.

79 Finally, in point of fact, even if the principles of private international law did apply without modification for the bankruptcy context, it is difficult to discern any connection at all between the dispute and Vancouver except that Eagle signed some agreements with a choice of law clause directed to the laws of that jurisdiction. The links between the appellant and Vancouver are not particularly strong. It has, amongst other offices, a Vancouver address, but the bulk of the activities at issue here occurred outside British Columbia. Its key employee, Mr. Ryan Modesto, resides in the United States. The management services agreement of June 12, 1996 recites that Azco's corporate office is in Arizona. Azco's press release of September 17, 1996, announcing this project to the world, was issued in Arizona. Moreover there is no juridical advantage to the appellant in proceeding under the same bankruptcy regime in Vancouver as in Hull. In either case, the law of British Columbia may be applied. Vancouver may be marginally more convenient for the appellant and some of its witnesses, but that is all that can be said for it. The trustee, for its part, complains that if the appeal succeeds, it would, on the same reasoning, be required to bring other actions (unrelated to Azco) in Chicoutimi, Toronto, Halifax, Winnipeg, Charlottetown and Calgary. The trial judge has much factual support for his decision to retain the case in Hull.

80 I do not wish to be taken, however, as squeezing the life out of s. 187(7). While the facts in this case do not show "sufficient cause" to make the transfer to British Columbia, other cases may arise of course where the transfer is justifiable. Even in *Stewart* , supra, which established the "single control" paradigm, Anglin J. went out of his way to say that the case probably should have been heard in P.E.I. The claimants' problem in that case is that they failed to seek leave from the court in British Columbia before launching their case in P.E.I. Just before the "single control" passage previously cited, Anglin J. says (at p. 349):

> I decline to assume that upon its being shewn to the Supreme Court of British Columbia that the questions as to the existence of the trust alleged by the plaintiffs and the earmarking of certain property held by the liquidator as trust assets can be best inquired into in Prince Edward Island — as from what is now before us would seem to be the case — an order of transfer will not be made, preceded or accompanied by the necessary leave under s. 22.

And Brodeur J. said this (at p. 352):

> In this case it looks to me as if the ends of justice would be better served by having the question raised in this proceeding disposed of by the courts of Prince Edward Island. However, it was the duty of the respondents to have the leave of the court of British Columbia which they did not secure.

81 The point is that it was up to Azco to demonstrate "sufficient cause" on the facts of *this* case, and it failed to do so.

V. Conclusion

82 I would dismiss the appeal with costs.

Appeal dismissed.

Pourvoi rejeté.

TAB 13

1966 CarswellOnt 30
Ontario Supreme Court, In Bankruptcy

Malartic Hygrade Gold Mines Ltd., Re

1966 CarswellOnt 30, 10 C.B.R. (N.S.) 34

Re Malartic Hygrade Gold Mines Limited; Lionel Berube Inc. v. Minaco Equipment Limited

McDermott J.

Judgment: October 27, 1966

Counsel: *F. E. Armstrong*, for applicant.
R. R. Kennedy, for respondent.

Annotation

An application for review under s. 144(5) may be founded on other admissible evidence than that which might have been before the court on the original hearing and new evidence merely corroborative of what was heard at the trial is not admissible: *Re Bryant Isard & Co.; Kent's Claim* (1922), 3 C.B.R. 534, 23 O.W.N. 215, 3 Can. Abr. (2nd) 713; *Re Barter; Trustee v. Dupont et Frere* (1923), 3 C.B.R. 677, (sub nom. *Raymond v. Dupont et Frere)* 23 O.W.N. 661, 3 Can. Abr. (2nd) 2314. As His Lordship pointed out, by reference to the case of *Re Trenwith*, [1933] O.W.N. 639, 15 C.B.R. 107, 3 Can. Abr. (2nd) 470, if an application is made to review, rescind or vary orders made, the court should not be asked to re-hear on the same material or on evidence merely corroborative of that given at the hearing. Any application under this section should be brought on new evidence of a substantial nature: See also *Re Capital Trust Corpn.; Lamarre v. Dolan Estate* (1943), 24 C.B.R. 207, 3 Can. Abr. (2nd) 2320. Considering, that an appeal against the receiving order made in Ontario on 1st March 1966, was dismissed by the Court of Appeal of that province, it is difficult to understand why an application was made under ss. 138(1) and 144(5) on quite similar material without new evidence.

It appears logical that when considering whether a receiving order should be made in one province or the other, the governing criterion should be the interest of the creditors and possibly also the convenience of the debtor: *Re Rotenberg (Janet Frocks)* (1941), 22 C.B.R. 433, 3 Can. Abr. (2nd) 473.

It appears quite obvious that the court was, to some extent, influenced by the fact that the bankruptcy proceedings in the Province of Quebec were not prosecuted with all due despatch. As a rule, where two petitions are being filed against the same debtor, the court usually makes a receiving order on the first petition filed. An exception is made, however, where the first petition is not duly prosecuted. In the case of *Re Stimson & Co.* (1931), 12 C.B.R. 149, 3 Can. Abr. (2nd) 346, a petition was filed but not duly prosecuted. The second petition was then filed and prosecuted with due despatch. The court made a receiving order on the second petition.

Considering all the circumstances, the learned bankruptcy judge came undoubtedly to the only possible solution. The question to be determined in the end was "where could the bankruptcy proceedings be carried on most effectively and expeditiously having primarily regard to the benefit of the creditors?" On this basis, it was obvious that Ontario was the forum where the bankruptcy proceedings should be continued.

McDermott J.:

1 This is an application heard on 4th October 1966, with respect to which the decision was reserved, which application was originally launched on behalf of Lionel Berube Inc., a creditor, under ss. 138(1) and 144(5) of the Bankruptcy Act, on 24th

(*k*) 'locality of a debtor' means the principal place

(i) where the debtor has carried on business during the year immediately preceding his bankruptcy;

(ii) where the debtor has resided during the year immediately preceding his bankruptcy;

(iii) in cases not coming within subparagraph (i) or (ii), where the greater portion of the property of such debtor is situate.

35 The facts as disclosed by the material before me indicate that the head office of the debtor company is in Toronto, Ontario; the company was incorporated under the laws of the Province of Ontario; the books of the company are located in Toronto, in the Province of Ontario; the auditors of the company are located in the said city of Toronto; the questionnaire signed and sworn the 18th March 1966, by Paul Henderson, the president, and in the examination before the official receiver, held on 21st March 1966 the president, Paul Henderson, swears that he is personally a resident of Toronto, that the debtor has one property only located at Val d'Or in the Province of Quebec, that the share register of the company is held at the Guaranty Trust Company of Canada, of which the head office is located at Toronto, Ontario, and the questionnaire indicates that the last audited statement of the company was drawn up on 30th September 1964. All of these papers were filed at Toronto, partly on 3rd March 1966, and the balance on 6th April 1966. The affidavit of Claude Allard, para. 8, sworn 24th March 1966, indicates that the debtor discontinued operations in the year 1964.

36 In his affidavit of 28th February 1966, William S. Miller, the secretary-treasurer of Minaco Equipment Limited, swears that the debtor has carried on business, during the year immediately preceding its bankruptcy, in the said city of Toronto, and that the majority of the creditors in value reside or carry on business in the Province of Ontario. In para. 8 of his affidavit, he swears that it is his belief "that it would be to the best interest of the creditors herein to place the administration of the estate of the debtor in the hands of a trustee appointed by This Honourable Court".

37 The Clarkson Company Limited of the city of Toronto was, by the receiving order of 1st March 1966, appointed trustee of the estate of the said bankrupt and has already had a meeting of creditors on Thursday 24th March 1966. This company has offices both in the Province of Ontario and the Province of Quebec and would seem to be the most suitable trustee, under all the circumstances, rather than having the affairs of the bankrupt company carried on from Rouyn, Quebec, where the trustee appointed under the order of Drouin J. of 9th March 1966 is located.

38 Looking at the list of creditors attached to the notice of the Clarkson Company Limited, as trustee, sent out on 9th March 1966, it is indicated that the secured creditor is the Guaranty Trust Company of Canada at 366 Bay Street, Toronto 1, Ontario, for $200,000; the preferred creditors, totalling $9,536.60, are mostly from the Province of Quebec, but are taxing authorities, namely city of Toronto business tax; Workmen's Compensation Board for the Province of Quebec; Debuisson School Commission, Abitibi East in the Province of Quebec; and Department of National Resources, City Hall, city of Quebec. As to the unsecured creditors on the list totalling $136,636.40, $67,068.02 are Ontario creditors and the balance those carrying on business in Quebec, and, in the aggregate, these appear to be almost evenly divided.

39 The "locality" of the debtor seems to be fully satisfied by the administration of the bankrupt estate being carried out in Ontario, so far as s. 2(*k*)(i) and (ii) are concerned; and as to subpara. (iii), this refers only to cases which do *not* come within subparas. (i) and (ii), so that, in any event, if the actual physical asset of the company, being the mine in Val d'Or, comes under subpara. (iii), then this applies *only* to cases which do *not* come within subparas. (i) and (ii), and would not be the guiding factor, under all the circumstances.

40 Counsel for the applicant submits that all the delays resulting from Quebec applications were those of the bankrupt debtor, and were not caused by Lionel Berube Inc. I cannot fail to find that Lionel Berube Inc. was responsible for part of the delay, particularly at a time when it was most important that they should act promptly.

41 My attention is also drawn by counsel for the applicant to s. 145 of the Bankruptcy Act which provides that any order made by the Bankruptcy Court shall be enforced in courts elsewhere in Canada, having bankruptcy jurisdiction, and of this I

TAB 14

COURT OF QUEEN'S BENCH RULES

Man. Reg. 553/88

1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

1.04(1.1) In applying these rules in a proceeding, the court is to make orders and give directions that are proportionate to the following:

(a) the nature of the proceeding;

(b) the amount that is probably at issue in the proceeding;

(c) the complexity of the issues involved in the proceeding;

(d) the likely expense of the proceeding to the parties.

1.04(2) Where matters are not provided for in these rules, the practice shall be determined by analogy to them.

1.04(3) Where a party to a proceeding is not represented by a lawyer but acts in person in accordance with subrule 15.01(2) or (3), anything these rules require or permit a lawyer to do shall or may be done by the party.

[...]

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

[...]

3.02(1) The court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

3.02(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

3.02(3) A time prescribed by these rules for serving or filing a document may be extended or abridged by consent in writing.

[...]

14.05(1) The originating process for the commencement of an application is a notice of application (Form 14B or such other form prescribed by these Rules).

14.05(2) A proceeding may be commenced by application,

(a) where authorized by these rules;

(b) where a statute authorizes an application, appeal or motion to the court and does not require the commencement of an action;

(c) where the relief claimed is for,

(i) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust,

(ii) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible,

(iii) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation,

(iv) the determination of rights which depend upon the interpretation of a deed, will, agreement, contract or other instrument, or upon the interpretation of a statute, order in council, order, rule, regulation, by-law or resolution,

(v) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges, or

(vi) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust; or

(d) in respect of any matter where it is unlikely there will be any material facts in dispute.

14.05(3) Where the relief claimed in a proceeding includes an injunction, declaration or the appointment of a receiver, the proceedings shall be commenced by action; but the court may also grant such relief where it is ancillary to relief claimed in a proceeding properly commenced by application.

[...]

16.04(1) Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service the court may make an order for substituted service or, where necessary in the interest of justice, may dispense with service.

16.04(1.1) Subrule (1) does not apply when service must be made in accordance with the Hague Service Convention.

16.04(2) In an order for substituted service, the court shall specify when service in accordance with the order is effective.

16.04(3) Where an order is made dispensing with service of a document, the document shall be deemed to have been served on the date the order is signed, for the purpose of the computation of time under these rules.

16.08(1) Where a document has been served in an unauthorized or irregular manner, the court may make an order validating the service where the court is satisfied that,

(a) the document came to the notice of the person to be served; or

(b) the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

16.08(2) Subrule (1) does not apply when service must be made in accordance with the Hague Service Convention.

[...]

38.01 This Rule applies to all proceedings under rule 14.05 which are commenced by a notice of application.

38.02 A notice of application (Form 14B) shall be issued and filed as provided by rule 14.05, before it is served; and may be issued and filed in any administrative centre.

38.03 All applications shall be made to a judge.

38.04(1) The applicant shall name in the notice of application as the place of hearing the judicial centre in which the applicant proposes the application to be heard.

38.04(2) The notice of application must name as the hearing date any date on which a judge sits to hear applications.

[...]

38.05(1) The notice of application shall be served on all parties and, where it is uncertain whether anyone else should be served, the applicant may, without notice, make a motion to a judge for an order for directions.

38.05(2) Where it appears to the judge hearing the application that the notice of application ought to be served on a person who has not been served, the judge may,

(a) dismiss the application or dismiss it only against the person who was not served;

(b) adjourn the application and direct that the notice of application be served on the person; or

(c) direct that any order made on the application be served on the person.

38.05(3) Unless the court abridges the time for service, where an application is made on notice, the notice of application must be served at least 14 days before the date on which the application is to be heard.

[...]

38.05.1(1) The applicant may amend a notice of application

(a) on filing the written consent of all parties and, if a person is to be added as a party, with the written consent of that person;

(b) at any time on requisition to correct clerical errors; or

(c) with leave of the court.

38.05.1(2) The court may grant leave on motion at any stage of an application to amend a notice of application on such terms as are just, unless prejudice would result that could not be compensated by costs or an adjournment.

38.05.1(3) Rules 26.04 and 26.05 apply, with necessary changes, to amendments to a notice of application.

38.06(1) Where a notice of application is issued in a centre other than the judicial centre in which it is to be heard, the registrar shall forthwith forward the court file to the judicial centre named as the place of hearing.

38.06(2) Rule 14.08, excepting subrule (1) thereof, applies with necessary modification to the transfer of an application.

38.07(1) Subject to subrule (2), where a notice of application has been served under subrule 38.05(3) and it transpires that the application is to be contested, the judge shall adjourn the application and the applicant may obtain a hearing date.

38.07(2) In case of urgency or where otherwise appropriate, the judge may proceed to hear the application.

38.07(3) Where the application is to be contested, the applicant shall, at the time of obtaining a hearing date, file in the judicial centre in which the application is to be heard and serve on all other parties, a brief consisting of

(a) a list of any documents, specifically identified, including filing date, filed in court to be relied on by the applicant, unless the court orders that copies of all documents be filed as part of the brief;

(b) a list of any cases and statutory provisions to be relied on by the applicant; and

(c) a list of the points to be argued.

38.07(4) A respondent party who has been served with a brief under subrule (3) shall file in the judicial centre in which the application is to be heard and serve on all other parties, a brief consisting of:

(a) a list of any documents described in clause (3)(a), not included in the applicant's brief and to be relied on by the respondent; and

(b) a list of items described in clauses (3)(b) and (c), not included in the applicant's brief, to be relied on by the respondent.

38.07(5) A judge may, either before or at the hearing of the application waive or vary the requirements of this rule where there is insufficient time to comply or where, due to the nature of the application, a brief is not justified.

38.07.1(1) Subject to subrules (2) to (4), preliminary steps in an application must be completed in accordance with the following schedule:

(a) the applicant must file and serve all supporting affidavits within 30 days after the notice of application was filed;

(b) the respondent must file and serve all supporting affidavits within 30 days after service of the applicant's affidavits or the expiry of the deadline for doing so, whichever is earlier;

(c) the applicant must file and serve any affidavits in response to affidavits filed by the respondent within 20 days after service of the respondent's affidavits;

(d) cross-examination on affidavits must be completed by all parties within 20 days after the service of all affidavits or the expiry of the deadline for doing so, whichever is earlier;

(e) the applicant may file and serve any additional brief within ten days after cross-examinations on affidavits have been completed or the expiry of the deadline for doing so, whichever is earlier;

(f) the respondent must file and serve a brief within 20 days after the applicant serves an additional brief or the expiry of the deadline for doing so, whichever is earlier.

38.07.1(2) The parties may establish their own schedule by filing a written agreement that sets out specific deadlines for completing preliminary steps in the application.

38.07.1(3) If a party objects to the schedule under subrule (1) but is unable to reach a scheduling agreement with the other party, the party may bring a motion to a judge to establish a schedule for completion of the preliminary steps in the application.

38.07.1(4) The parties may amend a schedule established under subrule (1), (2) or (3) by filing a written agreement that sets out new deadlines for completing preliminary steps in the application.

38.07.1(5) No agreement may permit the filing of materials less than seven days before the hearing of the application.

38.07.1(6) If a party has failed to comply with a schedule established under this rule, a judge may do one or more of the following:

(a) strike out the application, if the offending party is the applicant;

(b) adjourn the hearing of the application;

(c) order costs against the offending party;

(d) direct the hearing to proceed on the scheduled date without allowing the offending party to

(i) file or rely on any affidavit, transcript or brief that was not filed or served in accordance with the schedule, or

(ii) conduct a cross-examination on an affidavit after the expiry of the scheduled deadline for cross-examinations to occur;

(e) make any other order or give any other direction that he or she considers appropriate in the circumstances.

38.07.1(7) The sanctions set out in subrule (6) may be imposed

(a) on motion to a judge; or

(b) by the judge presiding at the hearing of the application.

38.07.1(8) This rule does not apply to urgent applications.

38.08(1) If all the parties to an application consent and the court permits, an application may be heard by telephone, video conference or other means of communication.

38.08(2) If not all the parties consent, the court may, on motion, make an order directing the manner in which the application is to be heard.

38.08(3) The motion under subrule (2) to determine the manner of hearing an application may be held

(a) without the necessity of filing a notice of motion or evidence; and

(b) by telephone, video conference or other means of communication.

38.08(4) Where an application under subrule (1) or a motion under clause (3)(b) is to proceed by telephone, video conference or other means of communication, the applicant or the moving party, as the case may be, shall make the necessary arrangements and give notice of those arrangements, including the date, time and manner of hearing, to the other parties and to the court.

38.09 On hearing an application, a judge may,

(a) allow or dismiss the application or adjourn the hearing, with or without terms; or

(b) where satisfied that there is a substantial dispute of fact, direct that the application proceed to trial or direct the trial of a particular issue or issues and, in either case, give such directions and impose such terms as may be just, subject to which the proceeding shall thereafter be treated as an action.

38.10(1) A person affected by an order made without notice, or a person who has failed to appear on an application due to accident, mistake or insufficient notice, may, by notice of motion filed, served and made returnable promptly after the order first came to the person's notice, move to set aside or vary the order.

38.10(2) Where practicable, a motion under subrule (1) shall be made to the judge who made the order.

38.11(1) Where a party makes an application by filing a Notice of Application (Form 14B) in accordance with this rule and has not served the Notice of Application, the party may abandon the application by filing a Notice of Abandonment of Application (Form 38A) and an affidavit deposing that the Notice of Application has not been served.

38.11(2) Where a party makes an application by filing and serving a Notice of Application (Form 14B) in accordance with this rule, the party may abandon the application

(a) by serving a Notice of Abandonment of Application on the parties who were served with the Notice of Application; and

(b) by filing the Notice of Abandonment of Application along with proof of service of the Notice of Abandonment of Application.

38.11(3) Where a party files and serves a Notice of Application (Form 14B) and does not appear at the hearing of the application, the party is deemed to have abandoned the application, unless the court orders otherwise.

38.11(4) Where an application is abandoned by a Notice of Abandonment of Application under subrule (2) or is deemed to be abandoned under subrule (3), a party on whom the Notice of Application (Form 14B) is served is entitled to the costs of the application, unless the court orders otherwise.

38.12(1) The court may on motion dismiss an application for delay.

38.12(2) On hearing a motion under this rule, the court may consider,

(a) whether the applicant has unreasonably delayed in obtaining a date for a hearing of a contested application;

(b) whether there is a reasonable justification for any delay;

(c) any prejudice to the respondent; and

(d) any other relevant factor.

38.12(3) The dismissal of an application for delay is not a defence to a subsequent application unless the order dismissing the application provides otherwise.

38.12(4) Where an applicant's application has been dismissed for delay with costs, and another application involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest before payment of the costs of the dismissed application, the court may order a stay of the subsequent application until the costs of the dismissed application have been paid.

[...]

41.01 In rules 41.02 to 41.06, "receiver" means a receiver or receiver and manager.

41.02 The appointment of a receiver under section 55 of The Court of Queen's Bench Act may be obtained on motion to a judge,

(a) by a party to a proceeding; and

(b) in a situation of urgency and with leave of the judge, by a person who undertakes to commence proceedings forthwith.

41.03 An order appointing a receiver shall,

(a) name the person appointed or refer that issue in accordance with Rule 54;

(b) specify the amount and terms of the security, if any, to be furnished by the receiver for the proper performance of duties, or refer that issue in accordance with Rule 54;

(c) state whether the receiver is also appointed as manager and, if necessary, define the scope of managerial powers; and

(d) contain such directions and impose such terms as are just.

41.04 An order appointing a receiver may refer the conduct of all or part of the receivership in accordance with Rule 54.

41.05 A receiver may obtain directions at any time on motion to a judge, unless there has been a reference of the conduct of the receivership, in which case the motion shall be made to the master who has conduct of the reference.

41.06 A receiver may be discharged only by the order of a judge.

TAB 15

SCHEDULE A

File No: CI 20-01

THE QUEEN'S BENCH
Winnipeg Centre

IN THE MATTER OF: **THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C., C. B-3, AS AMENDED, AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M., C. C280, AS AMENDED**

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant

- and -

NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

Respondents

RECEIVERSHIP ORDER

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File No: CI 20-01

THE QUEEN'S BENCH
Winnipeg Centre

THE HONOURABLE MR.	)	**TUESDAY, THE 10TH**
JUSTICE J.G. EDMOND	)	**DAY OF MARCH, 2020**

IN THE MATTER OF: **THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C., C. B-3, AS AMENDED, AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M., C. C280, AS AMENDED**

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant

- and -

NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD, NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

Respondents

RECEIVERSHIP ORDER

THIS APPLICATION made by the Applicant for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") and section 55 *of The Court of Queen's Bench Act*, C.C.S.M. c. C280 (the "**QBA**") appointing Richter Advisory Group Inc. as receiver ("**Richter**" or, in such capacity, the "**Receiver**") without security, of all of the assets, undertakings and properties of Nygård Holdings (USA) Limited, Nygard Inc., Fashion Ventures, Inc., Nygard NY Retail, LLC, 4093879 Canada Ltd., 4093887 Canada Ltd., Nygard International Partnership, Nygard Properties Ltd. and Nygard Enterprises Ltd. (collectively and any of them, the "**Debtors**")

acquired for, or used in relation to a business carried on by, the Debtors, was heard this day at the Law Courts Building, 408 York Avenue, Winnipeg, Manitoba.

ON READING the affidavit of Robert L. Dean affirmed March 9, 2020 and the Exhibits thereto (the "**Affidavit**") and the Brief of Law of the Applicant, and on hearing the submissions of counsel for the Applicant and counsel for the Debtors, no one else appearing although duly served as appears from the Affidavit of Service of Chantale DeBlois sworn March 9, 2020, filed herein, and on reading the consent of Richter to act as Receiver:

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application is hereby abridged and validated so that this application is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. THIS COURT ORDERS that pursuant to section 243(1) of the BIA and section 55 of the QBA, Richter is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtors acquired for, or used in relation to a business carried on by the Debtors (the "**Business**"), including all proceeds thereof (the "**Property**").

3. THIS COURT ORDERS that, subject to further Order of this Court, and subject to the exercise of overriding powers pursuant to paragraph 6 hereof, the Debtors shall remain in possession and control of the Property, and the Receiver shall not be or be deemed to be in possession and control of the Property save and except as specifically provided for herein or pursuant to steps actually taken by the Receiver with respect to the Property under the permissive powers granted to the Receiver pursuant to paragraph 6 of this Order.

4. THIS COURT ORDERS that:

(a) subject to paragraph 6(d) hereof, the Debtors' central cash management system and other accounts, as described in paragraphs 59 through 66 of the Affidavit (the "**Cash Management System**") shall continue to be

utilized at the direction of the Receiver on behalf of the Debtors (without any liability in respect thereof) and any bank or institution (each, a "Bank") providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Receiver on behalf of the Debtors (without any liability in respect thereof and as authorized by this Order) or the Receiver of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, and shall be entitled to provide the Cash Management System without any liability in respect thereof to any person other than the Receiver on behalf of the Debtors (without any liability in respect thereof and as authorized by this Order) or the Receiver, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unstayed and unaffected creditor with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System; and

(b) changes to the Cash Management System or to the operation of any Bank account thereunder shall be made only at the direction of and upon instruction from the Receiver and, for greater certainty, a Bank shall not accept or act upon the direction or instruction of the Debtors in relation thereto.

RECEIVER'S POWERS

5. THIS COURT ORDERS that the Receiver is hereby authorized and directed to:

(a) remit to the Debtors from Receiver's borrowings such funding as the Receiver may from time to time approve for the purposes of the Business in accordance with the provisions of the Receiver Term Sheet attached as Appendix "B" to this Receivership Order;

(b) market and pursue all offers for sales of the Business or Property, in whole or in part, which may include: (i) advertising and soliciting offers in respect of the Property, the Business or any part or parts thereof and negotiating

such terms and conditions of sale as the Receiver in its discretion may deem appropriate; (ii) soliciting proposals from third party liquidators; and (iii) engaging a real estate broker with respect to the sale of the Debtors' real property, subject to prior approval of this Court being obtained before any sale (except as permitted by paragraph 6(m)(i) below; and

(c) remit to the Lenders (as defined in the Affidavit), on behalf of the Debtors (without any liability in respect thereof), any and all proceeds from Property in repayment of amounts outstanding in respect of the Credit Agreement (as defined in the Affidavit).

RECEIVER'S PERMISSIVE POWERS

6. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, subject at all times to paragraph 5 above, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable (provided that any disbursements made in connection with this paragraph 6 are made in accordance with the terms of this Receivership Order and the Receiver Term Sheet):

(a) to take possession of and exercise control over the Property;

(b) to receive, preserve, protect and maintain control of the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate, and carry on the business of the Debtors, including the powers to enter into any agreements (including any amendments and modifications thereto), incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtors;

(d) take control of any and all accounts of the Debtors, including accounts with Banks, and take all required acts with any Bank to facilitate the control of

such accounts, including changing signing authority on such accounts to such persons as the Receiver, it its sole discretion, deems appropriate, or, if deemed necessary by the Receiver, open one or more new accounts with any financial institution in the Receiver's Name ("**Receiver's Accounts**") and receive third party funds into the Receiver's Accounts, transfer into the Receiver's Accounts such funds of the Debtors as the Receiver, in its sole discretion, deems necessary or appropriate to assist with the exercise of the Receiver's powers and duties set out herein, or to make payments on behalf of the Debtors as the Receiver, in its sole discretion, deems necessary or appropriate; provided, however, that (i) in each case such action shall be without any liability of the Receiver in respect thereof; and (ii) the monies standing to the credit of the Receiver's Accounts from time to time shall be held by the Receiver to be dealt with as permitted by this Order or any other Orders of this Court;

(e) to engage consultants, contractors, appraisers, agents, experts, auditors, accountants, managers, assistants, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

(f) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtors or any part or parts thereof;

(g) to consult with the Applicant from time to time and to provide such information to the Applicant as may be reasonably requested by the Applicant;

(h) to exercise all remedies available to the Debtors for the collection of monies including, without limitation, to enforce any security held by the Debtors;

(i) to remit to the Debtors funding from the Receiver's borrowings to continue to operate the Business in accordance with the Receiver Term Sheet;

(j) to settle, extend or compromise any indebtedness owing to or by the Debtors;

(k) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property or the Business, whether in the Receiver's name or in the name and on behalf of the Debtors, for any purpose pursuant to this Order or otherwise authorized by the Court;

(l) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtors, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(m) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding $250.000, provided that the aggregate consideration for all such transactions does not exceed $1,000,000; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case notice under subsection 59(10) of *The Personal Property Security Act* (Manitoba), subsection 134(1) of *The Real Property Act* (Manitoba) or any similar federal or provincial legislation shall not be required;

(n) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(o) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the

Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(p) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

(q) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtors;

(r) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtors, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtors;

(s) to exercise any shareholder, partnership, joint venture or other rights which the Debtors may have;

(t) to serve as a "foreign representative" of the Debtors in any proceeding outside of Canada; and

(u) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtors, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

7. THIS COURT ORDERS that the Debtors, all of their current and former directors, officers, employees, agents, advisors, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf, and all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's

possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

8. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtors, including the Cash Management System, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 8 or in paragraph 9 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

9. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall forthwith provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require, including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

10. THIS COURT ORDERS that the Receiver shall provide each of the relevant landlords with notice of the Receiver's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant

landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Receiver's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Receiver, or by further Order of this Court upon application by the Receiver on at least two (2) days notice to such landlord and any such secured creditors.

NO PROCEEDINGS AGAINST THE RECEIVER

11. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTORS OR THE PROPERTY

12. THIS COURT ORDERS that no Proceeding against or in respect of the Debtors or the Property (including for greater certainty, any Property located on third-party premises) or any assets located on premises belonging to or leased by the Debtors shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or the Property or any assets located on premises belonging to or leased by the Debtors are hereby stayed and suspended pending further Order of this Court provided; however, that nothing in this Order shall affect a Regulatory Body's investigation in respect of the Debtors or an action, suit or proceeding that is taken in respect of one or more of the Debtors by or before the Regulatory Body, other than the enforcement of a payment order by the Regulatory Body of the Court. "**Regulatory Body**" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province.

13. THIS COURT ORDERS that notwithstanding paragraph 12 of this Order, nothing contained in this Order shall prevent or stay the continuation of the proceeding of *Jane Does Nos. 1-10 v. Nygard et al.*, No. 20-cv-01288 (ER) against certain Debtors in the United States District Court for the Southern District of New York (the "**Jane Doe Proceeding**") through and including the entry of final judgment therein, provided that this Order shall prevent and stay in all respects the enforcement of any judgment therein against any of the Debtors. For the avoidance of doubt, (i) the Receiver shall be under no

obligation whatsoever to take any actions or steps with respect to the Jane Doe Proceeding, including but not limited to defending against such proceeding, and (ii) the Receiver shall have no liability whatsoever in respect of the Jane Doe Proceeding.

NO EXERCISE OF RIGHTS OR REMEDIES

14. THIS COURT ORDERS that all rights and remedies against the Debtors, the Receiver, or affecting the Property (for certainty, including any rights and remedies of the plaintiffs as judgment creditors in the Jane Doe Proceeding, if applicable), are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which the Debtors is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien, provided that no further steps shall be taken.

NO INTERFERENCE WITH THE RECEIVER

15. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

16. THIS COURT ORDERS that all Persons having oral or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtors are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the applicable Debtor's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or

charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

EMPLOYEES

17. THIS COURT ORDERS that all employees of the Debtors shall remain the employees of the applicable Debtor(s) until such time as the Receiver, on the Debtors' behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

PIPEDA

18. THIS COURT ORDERS that pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

19. THIS COURT ORDERS that in addition to paragraph 6 hereof, nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might

cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act, The Environment Act (Manitoba), The Water Resources Conservation Act (Manitoba), The Contaminated Sites Remediation Act (Manitoba), The Dangerous Goods Handling and Transportation Act (Manitoba), The Public Health Act (Manitoba) or The Workplace Safety and Health Act (Manitoba)* or any similar federal or provincial legislation and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

20. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, including, for greater certainty, if applicable, in the Receiver's capacity as "foreign representative", save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

21. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise (each, an "**Encumbrance**"), in favour of any Person, except for any Encumbrance in favour of a

secured creditor who would be materially affected by this Order and who was not given notice of this application, and subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

22. THIS COURT ORDERS that the Receiver and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of this Court, but nothing herein shall fetter this Court's discretion to refer such matters to a Master of this Court.

23. THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements and applicable taxes, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

24. THIS COURT ORDERS that the Receiver is at liberty and is hereby empowered to borrow from the Applicant, pursuant to and in accordance with the terms of the Receiver Term Sheet and the budget (the "**Budget**") contemplated therein, such monies from time to time as it may consider necessary or desirable for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including, without limitation, payment of expenses contemplated in the Budget by the Receiver on behalf of the Debtors (without any liability in respect thereof and as authorized by this Order) or the Receiver, subject to the terms of the Receiver Term Sheet (including the Budget). The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all Encumbrances in favour of any Person, but subordinate in priority to (i) any Encumbrance in favour of a secured creditor who would be materially affected by this Order and who was not given notice of this application, (ii) the Receiver's Charge, and (iii) the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

25. THIS COURT ORDERS that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

26. THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

27. THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

28. THIS COURT ORDERS that notwithstanding any other provision of this Order, but subject to the terms of the Receiver Term Sheet, the lenders thereunder may cease making advances and the facility provided for under the Receiver Term Sheet shall be deemed to have expired.

SERVICE AND NOTICE

29. THIS COURT ORDERS that the Applicant and the Receiver be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Debtors' creditors or other interested parties at their respective addresses as last shown on the records of the Debtors and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

30. THIS COURT ORDERS that counsel for the Receiver shall prepare and keep a current list ("**Service List**") containing the name and contact information (which may include the address, telephone number and facsimile number or e-mail address) for service to: the Applicant, the Receiver; and each creditor or other interested party who has sent a request in writing, to counsel for the Receiver to be added to the Service List. The Service List shall indicate whether each person on the Service List has elected to be served by e-mail or facsimile, and failing such election the Service List shall indicate service by e-mail. The Service List shall be posted on the website of the Receiver at the address indicated in paragraph 31 herein. For greater certainty, creditors and other interested persons who have received notice of this Order and who do not send in a

request, in writing, to counsel for the Receiver to be added to the Service List shall not be required to be further served in this proceeding. Service shall be deemed valid and sufficient if completed in the manner elected.

31. THIS COURT ORDERS that the Applicant, the Receiver, and all parties on the Service List may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' e-mail addresses as recorded on the Service List from time to time, which service shall be deemed valid and sufficient, and the Receiver shall post a copy of any and all such materials on its website at ●

GENERAL

32. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

33. THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtors.

34. THIS COURT ORDERS that this Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Receiver in any foreign proceeding, or to assist the Receiver and its agents in carrying out the terms of this Order.

35. THIS COURT ORDERS that the Receiver is hereby directed, as "foreign representative" of the Debtors, to apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *United States Bankruptcy Code*, 11 U.S.C. 101-1330, as amended.

36. THIS COURT ORDERS that the Receiver shall be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a

representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

37. THIS COURT ORDERS that the Applicant shall have its costs of this Application, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a solicitor client basis to be paid by the Receiver from the Debtors' estate with such priority and at such time as this Court may determine.

38. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

March 10, 2020

_____
J.

I, JEREMY DACKS, OF THE FIRM OF OSLER, HOSKIN & HARCOURT LLP, HEREBY CERTIFY THAT I HAVE RECEIVED THE CONSENTS AS TO FORM OF THE FOLLOWING PARTIES:

AS DIRECTED BY THE HONOURABLE JUSTICE J.G. EDMOND

SCHEDULE "A"
RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

1. THIS IS TO CERTIFY that Richter Advisory Group Inc., the receiver (the "**Receiver**") of the assets, undertakings and properties of Nygård Holdings (USA) Limited, Nygård Inc., Fashion Ventures, Inc., Nygård NY Retail, LLC, 4093879 Canada Ltd., 4093887 Canada Ltd., Nygård International Partnership, Nygård Properties Ltd., and Nygård Enterprises Ltd. (collectively, the "**Debtors**") acquired for, or used in relation to a business carried on by the Debtors, including all proceeds thereof (collectively, the "**Property**") appointed by Order of the Court of Queen's Bench of Manitoba (the "**Court**") dated the ___ day of _____, 2020 (the "**Order**") made in an action having Court file number CI-_____, has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of $_____, being part of the total principal sum of $_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated in accordance with Receiver Term Sheet attached as Appendix "B" to the Receivership Order made March 10, 2020.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable in accordance with the Receiver Term Sheet.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued

by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal or corporate liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 2020.

RICHTER ADVISORY GROUP INC., solely in its capacity as Receiver of the assets, undertakings and properties of **NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD, NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP** and not in its personal or corporate capacity

Per: _____

Name:

Title:

SCHEDULE "B"
RECEIVER TERM SHEET

File No: CI 20-01

THE QUEEN'S BENCH

Winnipeg Centre

IN THE MATTER OF:	**THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C., C. B-3, AS AMENDED, AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M., C. C280, AS AMENDED**
~~IN THE MATTER OF:~~	~~THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE BANKRUPTCY AND INSOLVENCY ACT R.S.C. 1985, c. B-3 AS AMENDED~~

~~THE HONOURABLE ———) WEEKDAY, THE #~~

~~)~~

~~JUSTICE ———) DAY OF MONTH, 20YR~~

BETWEEN:

~~[APPLICANT'S NAME]~~

WHITE OAK COMMERCIAL FINANCE, LLC

Applicant

- and -

NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP.

Respondents

RECEIVERSHIP ORDER

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File No: CI 20-01

THE QUEEN'S BENCH

Winnipeg Centre

THE HONOURABLE MR.	)	**TUESDAY, THE 10TH**
JUSTICE J.G. EDMOND	)	**DAY OF MARCH, 2020**

IN THE MATTER OF: **THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C., C. B-3, AS AMENDED, AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M., C. C280, AS AMENDED**

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC

Applicant~~,~~

- and -

~~[RESPONDENT'S NAME]~~

~~Respondent.~~

~~1~~

NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD, NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

Respondents

RECEIVERSHIP ORDER
~~(appointing Receiver)~~

~~1 A receivership proceeding may be commenced by action or by application. This model order is drafted on the basis that the receivership proceeding is commenced by way of an application.~~

THIS APPLICATION made by the Applicant[2] for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") and section 55 *of The Court of Queen's Bench Act*, C.C.S.M. c. C280 (the "**QBA**") appointing [RECEIVER'S NAME]Richter Advisory Group Inc. as receiver [and manager] ("**Richter**" or, in such capacitiesy, the "**Receiver**") without security, of all of the assets, undertakings and properties of [DEBTOR'S NAME] (Nygård Holdings (USA) Limited, Nygard Inc., Fashion Ventures, Inc., Nygard NY Retail, LLC, 4093879 Canada Ltd., 4093887 Canada Ltd., Nygard International Partnership, Nygard Properties Ltd. and Nygard Enterprises Ltd. (collectively and any of them, the "**Debtors**") acquired for, or used in relation to a business carried on by, the Debtors, was heard this day at the Law Courts Building, 408 York Avenue, Winnipeg, Manitoba.

ON READING the affidavit of [NAME] sworn [DATE]Robert L. Dean affirmed March 9, 2020 and the Exhibits thereto (the "**Affidavit**") and the Brief of Law of the Applicant, and on hearing the submissions of counsel for [NAMES]the Applicant and counsel for the Debtors, no one else appearing for [NAME][3] although duly served as appears from the aAffidavit of sService of [NAME]Chantale DeBlois sworn [DATE]March 9, 2020, filed herein, and on reading the consent of [RECEIVER'S NAME]Richter to act as the Receiver,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application is hereby abridged and validated[4] so that this Aapplication is properly returnable today and hereby dispenses with further service thereof.[5]

APPOINTMENT

[2] Section 243(1) of the BIA provides that the Court may appoint a receiver "on application by a secured creditor".

[3] Include names of secured creditors or other persons who must be served before certain relief in this model Order may be granted. See, for example, BIA Section 243(6).

[4] If service is effected in a manner other than as authorized by the Manitoba *Court of Queen's Bench Rules*, an order validating irregular service is required pursuant to Rule 16.08 of the *Court of Queen's bench Rules* and may be granted in appropriate circumstances.

[5] Where a party is located outside of Manitoba consider service issues, including whether service pursuant to the Hague Service Convention is required.

2. THIS COURT ORDERS that pursuant to section 243(1) of the BIA, ~~[RECEIVER'S NAME]~~ and section 55 of the QBA, Richter is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtors acquired for, or used in relation to a business carried on by the ~~Debtor~~Debtors (the "**Business**"), including all proceeds thereof (the ~~"~~"**Property**~~"~~").[6]

3. THIS COURT ORDERS that, subject to further Order of this Court, and subject to the exercise of overriding powers pursuant to paragraph 6 hereof, the Debtors shall remain in possession and control of the Property, and the Receiver shall not be or be deemed to be in possession and control of the Property save and except as specifically provided for herein or pursuant to steps actually taken by the Receiver with respect to the Property under the permissive powers granted to the Receiver pursuant to paragraph 6 of this Order.

4. THIS COURT ORDERS that:

(a) subject to paragraph 6(d) hereof, the Debtors' central cash management system and other accounts, as described in paragraphs 59 through 66 of the Affidavit (the "**Cash Management System**") shall continue to be utilized at the direction of the Receiver on behalf of the Debtors (without any liability in respect thereof) and any bank or institution (each, a "Bank") providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Receiver on behalf of the Debtors (without any liability in respect thereof and as authorized by this Order) or the Receiver of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, and shall be entitled to provide the Cash Management System without any liability in respect thereof to any person other than the Receiver on behalf of the Debtors (without any liability in respect thereof and as authorized by this Order) or the Receiver, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the

[6] ~~Court-appointed receivers may be appointed pursuant to any number of statutes. If this Order is made pursuant to additional statutes and an appeal is brought pursuant to this Order, counsel should consider the applicable appeal period.~~

Cash Management System, an unstayed and unaffected creditor with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System; and

(b) changes to the Cash Management System or to the operation of any Bank account thereunder shall be made only at the direction of and upon instruction from the Receiver and, for greater certainty, a Bank shall not accept or act upon the direction or instruction of the Debtors in relation thereto.

RECEIVER'S POWERS

5. THIS COURT ORDERS that the Receiver is hereby authorized and directed to:

(a) remit to the Debtors from Receiver's borrowings such funding as the Receiver may from time to time approve for the purposes of the Business in accordance with the provisions of the Receiver Term Sheet attached as Appendix "B" to this Receivership Order;

(b) market and pursue all offers for sales of the Business or Property, in whole or in part, which may include: (i) advertising and soliciting offers in respect of the Property, the Business or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate; (ii) soliciting proposals from third party liquidators; and (iii) engaging a real estate broker with respect to the sale of the Debtors' real property, subject to prior approval of this Court being obtained before any sale (except as permitted by paragraph 6(l)(i) below; and

(c) remit to the Lenders (as defined in the Affidavit), on behalf of the Debtors (without any liability in respect thereof), any and all proceeds from Property in repayment of amounts outstanding in respect of the Credit Agreement (as defined in the Affidavit).

RECEIVER'S PERMISSIVE POWERS

6. ~~3.~~ THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, subject at all times to paragraph 5 above, to act at once in

respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable (provided that any disbursements made in connection with this paragraph 6 are made in accordance with the terms of this Receivership Order and the Receiver Term Sheet):[7]

(a) to take possession of and exercise control over ~~the Property and any and all proceeds, receipts and disbursements arising out of or from~~ the Property;

(b) to receive, preserve, ~~and~~ protect and maintain control of the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate, and carry on the business of the Debtors, including the powers to enter into any agreements (including any amendments and modifications thereto), incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtors;

(d) take control of any and all accounts of the Debtors, including accounts with Banks, and take all required acts with any Bank to facilitate the control of such accounts, including changing signing authority on such accounts to such persons as the Receiver, it its sole discretion, deems appropriate, or, if deemed necessary by the Receiver, open one or more new accounts with any financial institution in the Receiver's Name ("**Receiver's Accounts**") and receive third party funds into the Receiver's Accounts, transfer into the Receiver's Accounts such funds of the Debtors as the Receiver, in its sole discretion, deems necessary or appropriate to assist

[7] ~~Counsel should consider whether all of the powers sought in Paragraph 3 are appropriate on an initial basis, particularly if the application is brought without notice. Counsel should also consider whether there is sufficient evidence for granting such powers on an initial basis. If not proceeding under the BIA, counsel should consider whether all of the powers granted under Paragraph 3 may be ordered.~~

with the exercise of the Receiver's powers and duties set out herein, or to make payments on behalf of the Debtors as the Receiver, in its sole discretion, deems necessary or appropriate; provided, however, that (i) in each case such action shall be without any liability of the Receiver in respect thereof; and (ii) the monies standing to the credit of the Receiver's Accounts from time to time shall be held by the Receiver to be dealt with as permitted by this Order or any other Orders of this Court;

(e) ~~(d)~~ to engage consultants, contractors, appraisers, agents, experts, auditors, accountants, managers, assistants, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

(f) ~~(e)~~ to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtors or any part or parts thereof;

(g) to consult with the Applicant from time to time and to provide such information to the Applicant as may be reasonably requested by the Applicant;

(h) ~~(f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and~~ to exercise all remedies available to the Debtors for the collection of ~~the Debtor in collecting such~~ monies, including, without limitation, to enforce any security held by the Debtors;

(i) to remit to the Debtors funding from the Receiver's borrowings to continue to operate the Business in accordance with the Receiver Term Sheet;

(j) ~~(g)~~ to settle, extend or compromise any indebtedness owing to or by the Debtors;

(k) ~~(h)~~ to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property or the Business, whether in the Receiver's

name or in the name and on behalf of the Debtors, for any purpose pursuant to this Order;

~~(i) to undertake environmental or workplace safety and health assessments of the Property and operations of the Debtor;~~ or otherwise authorized by the Court;

(l) ~~(j)~~ to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtors, the Property or the Receiver, and to settle or compromise any such proceedings.[8] The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

~~(k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;~~

(m) ~~(l)~~ to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding $~~_____~~250,000, provided that the aggregate consideration for all such transactions does not exceed $~~_____~~1,000,000; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

~~[8] This model order does not include specific authority permitting the Receiver to either file an assignment in bankruptcy on behalf of the Debtor, or to consent to the making of a bankruptcy order against the Debtor. A bankruptcy may have the effect of altering the priorities among creditors, and therefore the specific authority of the Court should be sought if the Receiver wishes to take one of these steps.~~

and in each such case notice under subsection 59(10) of *The Personal Property Security Act* (Manitoba), ~~[or section~~subsection 134(1) of *The Real Property Act* (Manitoba)~~, as the case may be,]~~[9] or any similar federal or provincial legislation shall not be required;

(n) ~~(m)~~ to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(o) ~~(n)~~ to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(p) ~~(o)~~ to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

(q) ~~(p)~~ to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtors;

(r) ~~(q)~~ to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtors, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtors;

(s) ~~(r)~~ to exercise any shareholder, partnership, joint venture or other rights which the Debtors may have;

(t) to serve as a "foreign representative" of the Debtors in any proceeding outside of Canada; and

[9] ~~If the Receiver will be dealing with assets in other provinces, consider adding references to applicable statutes in other provinces. If this is done, those statutes must be reviewed to ensure that the Receiver is exempt from or can be exempted from such notice periods, and further that the Manitoba Court has the jurisdiction to grant such an exemption.~~

(u) ~~(s)~~ to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtors, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

7. ~~4.~~ THIS COURT ORDERS that ~~(i)~~ the Debtors, ~~(ii)~~ all of ~~its~~their current and former directors, officers, employees, agents, advisors, accountants, legal counsel and shareholders, and all other persons acting on ~~its~~their instructions or behalf, and ~~(iii)~~ all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

8. ~~5.~~ THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the ~~Debtor~~Debtors, including the Cash Management System, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph ~~5~~8 or in paragraph ~~6~~9 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

9. ~~6.~~ THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent

service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall forthwith provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require, including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

10. ~~7.~~ THIS COURT ORDERS that the Receiver shall provide each of the relevant landlords with notice of the Receiver's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Receiver's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Receiver, or by further Order of this Court upon application by the Receiver on at least two (2) days notice to such landlord and any such secured creditors.

NO PROCEEDINGS AGAINST THE RECEIVER

11. ~~8.~~ THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTORS OR THE PROPERTY

12. ~~9.~~ THIS COURT ORDERS that no Proceeding against or in respect of the Debtors or the Property (including for greater certainty, any Property located on third-party premises) or any assets located on premises belonging to or leased by the Debtors shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the

Debtors or the Property or any assets located on premises belonging to or leased by the Debtors are hereby stayed and suspended pending further Order of this Court provided; however, that nothing in this Order shall affect a Regulatory Body's investigation in respect of the Debtors or an action, suit or proceeding that is taken in respect of one or more of the Debtors by or before the Regulatory Body, other than the enforcement of a payment order by the Regulatory Body of the Court. "**Regulatory Body**" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province.

13. THIS COURT ORDERS that notwithstanding paragraph 12 of this Order, nothing contained in this Order shall prevent or stay the continuation of the proceeding of *Jane Does Nos. 1-10 v. Nygard et al.*, No. 20-cv-01288 (ER) against certain Debtors in the United States District Court for the Southern District of New York (the "**Jane Doe Proceeding**") through and including the entry of final judgment therein, provided that this Order shall prevent and stay in all respects the enforcement of any judgment therein against any of the Debtors. For the avoidance of doubt, (i) the Receiver shall be under no obligation whatsoever to take any actions or steps with respect to the Jane Doe Proceeding, including but not limited to defending against such proceeding, and (ii) the Receiver shall have no liability whatsoever in respect of the Jane Doe Proceeding.

NO EXERCISE OF RIGHTS OR REMEDIES

14. ~~10.~~ THIS COURT ORDERS that all rights and remedies against the Debtors, the Receiver, or affecting the Property (for certainty, including any rights and remedies of the plaintiffs as judgment creditors in the Jane Doe Proceeding, if applicable), are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which the Debtors is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien, provided that no further steps shall be taken.

NO INTERFERENCE WITH THE RECEIVER

15. ~~11.~~ THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

16. ~~12.~~ THIS COURT ORDERS that all Persons having oral or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtors are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the applicable Debtor's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

~~**RECEIVER TO HOLD FUNDS**~~

~~13. THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the **"Post Receivership Accounts"**) and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.~~

EMPLOYEES

17. ~~14.~~ THIS COURT ORDERS that all employees of the Debtors shall remain the employees of the applicable Debtor(s) until such time as the Receiver, on the ~~Debtor's~~Debtors' behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

PIPEDA

18. ~~15.~~ THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

19. ~~16.~~ THIS COURT ORDERS that in addition to paragraph 6 hereof, nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection,

conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act, The Environment Act (Manitoba), The Water Resources Conservation Act (Manitoba), The Contaminated Sites Remediation Act (Manitoba), The Dangerous Goods Handling and Transportation Act (Manitoba), The Public Health Act (Manitoba) or The Workplace Safety and Health Act (Manitoba)*, or any similar federal or provincial legislation and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

20. ~~17.~~ THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, including, for greater certainty, if applicable, in the Receiver's capacity as "foreign representative", save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

21. ~~18.~~ THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise (each, an "**Encumbrance**"), in favour of any Person, ~~but~~except for any Encumbrance in favour of a secured creditor who would be materially affected by this

Order and who was not given notice of this application, and subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.[10]

[A1]: ~~Why are we limiting the type of trusts?~~

22. ~~19.~~ THIS COURT ORDERS that the Receiver and its legal counsel shall pass ~~its~~their accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of this Court, but nothing herein shall fetter this Court's discretion to refer such matters to a Master of this ~~Honourable~~ Court.

23. ~~20.~~ THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements and applicable taxes, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

24. ~~21.~~ THIS COURT ORDERS that the Receiver ~~be~~is at liberty and ~~it~~ is hereby empowered to borrow ~~by way of a revolving credit or otherwise~~from the Applicant, pursuant to and in accordance with the terms of the Receiver Term Sheet and the budget (the "**Budget**") contemplated therein, such monies from time to time as it may consider necessary or desirable~~, provided that the outstanding principal amount does not exceed $_____ (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange,~~ for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including ~~interim expenditures~~, without limitation, payment of expenses contemplated in the Budget by the Receiver on behalf of the Debtors (without any liability in respect thereof and as authorized by this Order) or the Receiver, subject to the terms of the Receiver Term Sheet (including the Budget). The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the ~~"~~"**Receiver~~"~~'s Borrowings Charge**~~""~~") as security for the payment of the monies borrowed, together with interest and charges

[10] ~~Note that subsection 243(6) of the BIA provides that the Court may not make such an order "unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations".~~

thereon, in priority to all ~~security interests, trusts, liens, charges and encumbrances, statutory or otherwise,~~Encumbrances in favour of any Person, but subordinate in priority to (i) any Encumbrance in favour of a secured creditor who would be materially affected by this Order and who was not given notice of this application, (ii) the Receiver's Charge, and (iii) the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

25. ~~22.~~ THIS COURT ORDERS that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

26. ~~23.~~ THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

27. ~~24.~~ THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

28. THIS COURT ORDERS that notwithstanding any other provision of this Order, but subject to the terms of the Receiver Term Sheet, the lenders thereunder may cease making advances and the facility provided for under the Receiver Term Sheet shall be deemed to have expired.

SERVICE AND NOTICE

29. ~~25.~~ THIS COURT ORDERS that the Applicant and the Receiver be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery~~, facsimile~~ or electronic transmission to the Debtors'~~s~~ creditors or other interested parties at their respective addresses as last shown on the records of the Debtors and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

30. ~~26.~~ THIS COURT ORDERS that counsel for the Receiver shall prepare and keep a current ~~a service~~ list (~~"~~**Service List**~~"~~) containing the name and contact information (which may include the address, telephone number and facsimile number or e-mail address) for service to: the Applicant~~,~~, the Receiver; and each creditor or other interested ~~Person~~party who has sent a request~~,~~ in writing, to counsel for the Receiver to be added to the Service List. The Service List shall indicate whether each ~~P~~person on the Service List has elected to be served by e-mail or facsimile, and failing such election the Service List shall indicate service by e-mail. The Service List shall be posted on the website of the Receiver at the address indicated in paragraph ~~[27]~~31 herein. For greater certainty, creditors and other interested ~~P~~persons who have received notice of this Order and who do not send in a request, in writing, to counsel for the Receiver to be added to the Service List~~,~~ shall not be required to be further served in ~~these proceedings~~this proceeding. Service shall be deemed valid and sufficient if completed in the manner elected.

31. ~~27.~~ THIS COURT ORDERS that the Applicant, the Receiver, and ~~any~~all part~~y~~ies on the Service List may serve any court materials in these proceedings by ~~facsimile or by~~ e-mailing a PDF or other electronic copy of such materials to counsels~~' email~~' e-mail addresses as recorded on the Service List from time to time, which service shall be deemed valid and sufficient, and the Receiver ~~may~~shall post a copy of any ~~or~~and all such materials on its website at ~~www.[ ] Service shall be deemed valid and sufficient if sent in this manner.~~.

GENERAL

32. ~~28.~~ THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

33. ~~29.~~ THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtors.

34. ~~30.~~ THIS COURT ~~HEREBY REQUESTS~~ORDERS that this Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make

such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Receiver in any foreign proceeding, or to assist the Receiver and its agents in carrying out the terms of this Order.

35. ~~31.~~ THIS COURT ORDERS that the Receiver is hereby directed, as "foreign representative" of the Debtors, to apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *United States Bankruptcy Code*, 11 U.S.C. 101-1330, as amended.

36. THIS COURT ORDERS that the Receiver shall be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

37. ~~32.~~ THIS COURT ORDERS that the Applicant shall have its costs of this ~~motion~~Application, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a solicitor~~-~~ client basis[11] to be paid by the Receiver from the ~~Debtor's~~Debtors' estate with such priority and at such time as this Court may determine.

38. ~~33.~~ THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

~~[DATE]~~

March 10, 2020

J.

~~[11] Counsel should note that costs remain in the discretion of the Court~~

I, [NAME]JEREMY DACKS, OF THE FIRM OF [NAME]OSLER, HOSKIN & HARCOURT LLP, HEREBY CERTIFY THAT I HAVE RECEIVED THE CONSENTS AS TO FORM OF THE FOLLOWING PARTIES: [INSERT]

AS DIRECTED BY THE HONOURABLE [INSERT]JUSTICE J. G. EDMOND

SCHEDULE "A"
RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

1. THIS IS TO CERTIFY that [RECEIVER'S NAME]Richter Advisory Group Inc., the receiver (the "**Receiver**") of the assets, undertakings and properties [DEBTOR'S NAME]of Nygård Holdings (USA) Limited, Nygård Inc., Fashion Ventures, Inc., Nygård NY Retail, LLC, 4093879 Canada Ltd., 4093887 Canada Ltd., Nygård International Partnership, Nygård Properties Ltd., and Nygård Enterprises Ltd. (collectively, the "**Debtors**") acquired for, or used in relation to a business carried on by the Debtors, including all proceeds thereof (collectively, the "**Property**") appointed by Order of Thethe Court of Queen's Bench, Winnipeg Centre of Manitoba (the "**Court**") dated the ___ day of _____, 20__20 (the "**Order**") made in an action having Court file number CI-_____, has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of $_____, being part of the total principal sum of $_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to timein accordance with Receiver Term Sheet attached as Appendix "B" to the Receivership Order made March 10, 2020.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable ~~at~~in accordance with the ~~main office of the Lender at ***, ***~~Receiver Term Sheet.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal or corporate liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of ~~_____~~ _____, 20~~__~~20.

~~[RECEIVER'S NAME]~~**RICHTER ADVISORY GROUP INC.**, solely in its capacity as Receiver of the ~~Property,~~assets, undertakings and properties of **NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD, NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP** and not in its personal or corporate capacity

Per: _____

Name:

Title:

SCHEDULE "B"
RECEIVER TERM SHEET