

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

BETWEEN:

**BANK OF MONTREAL**

Applicant

- and -

**11603531 CANADA INC.**

Respondent

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

**FACTUM OF THE APPLICANT  
(Appointment of Receiver)**

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Bank of Montreal**

## PART I - NATURE OF APPLICATION

1. This is an application by Bank of Montreal ("**BMO**") for an order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act* ("**BIA**") and section 101 of the *Courts of Justice Act* appointing MNP Ltd. ("**MNP**") as receiver and manager, without security, of the assets, undertakings and properties of the respondent, 11603531 Canada Inc. ("**116 Canada**").
2. As explained in further detail below, 116 Canada defaulted in the repayment of loans made to it by BMO. A Forbearance Agreement was signed to allow 116 Canada additional time to refinance the Loans, but its' attempts to do so were unsuccessful. The forbearance period has expired. In the Forbearance Agreement, 116 Canada consented to the making of a receivership order.

## PART II - THE FACTS

3. 116 Canada is the owner of a five-storey retail/office building located at 55 Dundas Street East, Toronto (the "**Property**").<sup>1</sup>
4. BMO made two loans (the "**Loans**") to 116 Canada secured by a mortgage over the Property and a General Security Agreement. The loans are payable on demand.<sup>2</sup>

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<sup>1</sup> *Affidavit of Leo Chun sworn September 7, 2023 ("Chun Affidavit"), paragraph 4*

<sup>2</sup> *Chun Affidavit, paragraphs 12, 14 and 16.*

5. As of August 31, 2023, approximately \$7.35 million was outstanding on the Loans.<sup>3</sup>
6. Subject to the payment of realty taxes and other government priority claims, BMO holds the first ranking security over the Property and other assets of 116 Canada.<sup>4</sup>
7. In January 2023, BMO was served with a mareva order made against 116 Canada and other parties. The payments on the Loans stopped. The mareva order was later lifted but the arrears on the Loans were not paid.<sup>5</sup>
8. In January 2023, BMO also received a notice from a bailiff appointed by the City of Toronto to obtain payment of the 2020/21 outstanding taxes on the Property.<sup>6</sup>
9. On April 5, 2023 BMO demanded payment of the Loans and gave notice under s. 244 of the *Bankruptcy and Insolvency Act* of its intention to enforce the Security.<sup>7</sup>
10. The demand for payment was not satisfied.<sup>8</sup>
11. On or about April 25, 2023, BMO and 116 Canada entered into a Forbearance Agreement (the “**Forbearance Agreement**”) under the terms of which BMO agreed to forbear May 31, 2023 from the enforcement of the Security, which date

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<sup>3</sup> *Chun Affidavit, paragraph 15*

<sup>4</sup> *Chun Affidavit, paragraphs 19 and 21*

<sup>5</sup> *Chun Affidavit, paragraphs 22-23*

<sup>6</sup> *Chun Affidavit, Exhibit I*

<sup>7</sup> *Chun Affidavit, paragraph 24*

<sup>8</sup> *Wolf Affidavit, paragraph 24*

was to be extended to June 30, 2023 provided that by May 31, 2023 116 Canada had obtained a term sheet or offer letter to refinance the Loans.<sup>9</sup>

12. In the Forbearance Agreement<sup>10</sup> 116 Canada,
  - (a) acknowledged its liability for the repayment of the Loans;
  - (b) acknowledged the validity and enforceability of the Security;
  - (c) agreed to fully repay the Loans and all other charges, fees, interest and expenses owing to BMO by the conclusion of the forbearance period; and
  - (d) agreed that BMO would be entitled to enforce the Security without further notice upon the conclusion of the forbearance period if the Loans were not repaid;
  
13. In the Forbearance Agreement, 116 Canada consented to the making of a receivership order upon the conclusion of the forbearance period. Section 11.1 of the Forbearance Agreement reads as follows:

11.1 Upon the conclusion of the Forbearance Period, the Bank shall be under no obligation to continue to forbear from any Enforcement Action. Upon the conclusion of the Forbearance Period, the Bank shall be entitled, in its sole discretion, to immediately and without further notice exercise its rights and remedies against the Borrower, the Guarantors and under the Security for repayment of the Loans, including any Enforcement Action. The Borrower and Guarantors agree that they will not oppose any Enforcement Action by the Bank, including, without limitation, any application (a "**Receivership Application**") by the Bank to the Ontario Superior Court of Justice for the appointment of a receiver or receiver and manager in respect of the collateral subject to the Security and the Property. The Borrower and Corporate Guarantor irrevocably

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<sup>9</sup> *Chun Affidavit, paragraphs 25-26*

<sup>10</sup> *Chun Affidavit, paragraph 26 and Exhibit K*

consent to an order appointing a receiver and manager in respect of their assets, undertakings and properties upon the conclusion of the Forbearance Period in the form of the model receivership order established by the Commercial Court users committee and irrevocably waive any requirement for service of the Receivership Application.

14. 116 Canada obtained a Discussion Paper from Royal Bank of Canada but the Loans were not repaid by June 30, 2023. BMO agreed to extend the forbearance period to August 31, 2023, but the Loans were still not repaid.<sup>11</sup>
15. 116 Canada requested a further extension of the forbearance period but BMO did not grant the extension. In an August 25, 2023 email, the principal of 116 Canada stated: “We are requesting the extension for one last time to get this resolved by October 31, 2023 should we fail to do so we will not request any more extensions and let the bank initiate the security over the property.”<sup>12</sup>
16. This application was issued and the return date fixed for November 14, 2023 to give 116 Canada the additional time that it had requested in the August 25 email.
17. As at August 16, 2023, there were outstanding realty taxes, interest and penalties dating back to 2020 totalling \$503,078.45 owing on the Property.<sup>13</sup>

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<sup>11</sup> *Chun Affidavit, paragraph 28*

<sup>12</sup> *Chun Affidavit, paragraph 31*

<sup>13</sup> *Chun Affidavit, paragraph 33 and Exhibit Q*

18. BMO has lost confidence in 116 Canada and its ability or willingness to repay the Loans.<sup>14</sup>
19. The Security grants to BMO the right to appoint a receiver on default.<sup>15</sup>
20. BMO wishes to proceed with the enforcement of the Security by the appointment of receiver and manager by the Court. A receivership conducted under the court's supervision will facilitate the realization of the Property in a stabilized environment and will ensure that the Property is realized upon and administered in accordance with the rights of BMO and other parties.<sup>16</sup>
21. MNP is a licensed trustee in bankruptcy and is prepared to act as receiver and manager if so appointed.<sup>17</sup>

### **PART III - LAW AND ARGUMENT**

#### *The Test*

22. On application by a secured creditor, the Court may appoint a receiver where it is "just or convenient" to do so.<sup>18</sup>

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<sup>14</sup> *Chun Affidavit, paragraph 35*

<sup>15</sup> *Chun Affidavit, paragraph 37*

<sup>16</sup> *Chun Affidavit, paragraphs 38-39*

<sup>17</sup> *Chun Affidavit, paragraph 40*

<sup>18</sup> *Bankruptcy and Insolvency Act, R.S.C. 1985 c. B-3, Section 243; Courts of Justice Act, R.S.O. 1990, c. C-43, Section 10; Bank of Montreal v. Carnival National Leasing Limited, 2011 ONSC 1007 (CanLII), paragraph 23.*

BMO's contractual rights in its security should be given effect

23. In making a determination about whether it is just or convenient to appoint a receiver, the Court must have regard to all of the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto. These include the rights of the secured creditor pursuant to its security.<sup>19</sup>
24. While the appointment of a receiver is generally an extraordinary equitable remedy, the Courts do not regard the remedy as extraordinary where the relevant security document permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties.<sup>20</sup>
25. The appointment of a receiver becomes even less extraordinary when dealing with a default under a mortgage.<sup>21</sup>
26. If the security held by the secured creditor seeking the appointment of a receiver by the Court provides for the appointment of a receiver, the issue is essentially whether it is preferable to have a court-appointed receiver rather than a privately appointed receiver.<sup>22</sup>

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<sup>19</sup> *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CanLII 8258 (ON SC), paragraph 10

<sup>20</sup> *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 (CanLII), paragraph 27; *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023 (CanLII), paragraph 42

<sup>21</sup> *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953, at paras 43-44

<sup>22</sup> *Bank of Montreal v. Carnival National Leasing Limited*, *supra*, paragraph 36

*Proof of irreparable harm or risk of dissipation is not required*

27. To obtain the appointment of a receiver and manager, there is no requirement that the secured creditor demonstrate irreparable harm or that there is an actual and immediate danger of assets being dissipated.<sup>23</sup>

*The appointment of a receiver is just and convenient*

28. For the following reasons it is just and convenient for a receiver to be appointed by the court:

- (a) No principal payments have been made on the Loans since January 2023.
- (b) As each day passes, the realty tax arrears continue to increase;
- (c) the stay of proceedings will permit the Property to be realized in an orderly manner in a stabilized environment;
- (d) the Security grants to BMO the right to appoint a receiver upon default;
- (e) 116 Canada consented to an Order appointing a receiver in the Forbearance Agreement;
- (f) BMO has lost confidence in 116 Canada and its principals.

**PART IV - ORDER REQUESTED**

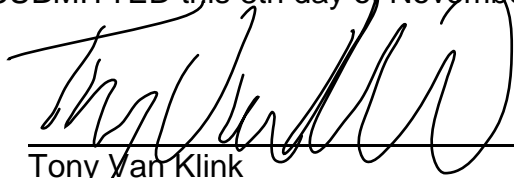
29. BMO respectfully requests an order appointing MNP as receiver and manager on the terms of the model receivership order for use on the Commercial List.

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<sup>23</sup> *Bank of Montreal v. Carnival National Leasing Limited, supra, paragraphs 25 and 28-29*



ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of November, 2023.

A handwritten signature in black ink, appearing to read 'Tony Van Klink', written over a horizontal line.

Tony Van Klink  
MILLER THOMSON LLP

Lawyer for the Applicant,  
Bank of Montreal

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

1. *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CanLII 8258 (ON SC).
2. *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 (CanLII).
3. *Bank of Montreal v. Carnival National Leasing Limited* (2001), ONSC 1007 (CanLII).
4. *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023 (CanLII).
5. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953.

**SCHEDULE “B”  
RELEVANT STATUTES**

**Bankruptcy and Insolvency Act, R.S.C. 1985 c. B-3, Section 243(1).**

Court may appoint receiver

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

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

. . .

**Courts of Justice Act, R.S.O. 1990, c. C-43, Section 101.**

Injunctions and receivers

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

**Terms**

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

BANK OF MONTREAL      and      11603531 CANADA INC.  
Applicant                      Respondent

Court File No: CV-23-00705867-0000

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COMMERCIAL LIST**

Proceeding commenced at TORONTO

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(APPOINTMENT OF RECEIVER)**

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