Court File No. CV-23-00698447-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

CANADIAN WESTERN BANK

Applicant

- and -

INDEX HOLDING GROUP INC., INDEX GROUP OF COMPANIES INC., INDEX INTERNATIONAL INC., INDEX FOODS INC., 2640179 ONTARIO INC., 11030434 CANADA LTD., 2700774 ONTARIO INC., 2700767 ONTARIO INC., 2683960 ONTARIO LTD., 11030418 CANADA INC., 2723710 ONTARIO INC., 2718366 ONTARIO INC., 2737332 ONTARIO INC., 2737334 ONTARIO INC., 2723714 ONTARIO INC., 2723716 ONTARIO INC., 2737338 ONTARIO INC., 2790760 ONTARIO INC., 2775290 ONTARIO INC., 2775296 ONTARIO INC., 421 WHARNCLIFFE LTD. AND 425 WHARNCLIFFE ROAD INC.

Respondents

IN THE MATTER OF AN 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
(RECEIVERSHIP APPLICATION RETURNABLE MAY 8, 2023)

Cassels Brock & Blackwell LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Jeremy Bornstein LSO #: 65425C
Tel: 416.869.5386
jbornstein@cassels.com

Stephanie Fernandes LSO #: 85819M
Tel: 416.860.6481
sfernandes@cassels.com

Lawyers for the Applicant

TO: THE SERVICE LIST

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TABLE OF CONTENTS

PART I - INTRODUCTION

1. Canadian Western Bank ("**CWB**") seeks an Order (the "**Receivership Order**") appointing MNP Ltd. ("**MNP**") as receiver (the "**Receiver**") pursuant to section 243(1) of the *Bankruptcy and Insolvency Act,* RSC 1985, c. B-3, as amended (the "**BIA**") and section 101 of the *Courts of Justice Act*, RSO 1990, c. C 43, as amended (the "**CJA**"), without security, over: (a) all the assets, undertakings and property (collectively, the "**Personal Property**") of Index Holding Group Inc. ("**IHG**" or the "**Borrower**"), Index Group of Companies Inc. ("**IGC**"), Index International Inc. ("**III**"), Index Foods Inc. ("**IFI**"), 2640179 Ontario Inc. ("**2640179**"), 11030434 Canada Ltd. ("**11030434**"), 2700774 Ontario Inc. ("**2707774**"), 2700767 Ontario Inc. ("**2700767**"), 2683960 Ontario Ltd. ("**2683960**"), 11030418 Canada Inc. ("**11030418**"), 2723710 Ontario Inc. ("**2723710**"), 2718366 Ontario Inc. ("**2718366**"), 2737332 Ontario Inc. ("**2737332**"), 2737334 Ontario Inc. ("**2737334**"), 2723714 Ontario Inc. ("**2723714**"), 2723716 Ontario Inc. ("**2723716**"), 2737338 Ontario Inc. ("**2737338**", and together with IGC, III, IFI, 2640179, 11030434, 2700774 Ontario Inc., 2700767, 2683960, 11030418, 2723710, 2718366, 2737332, 2737334, 2723714, 2723716, the "**2020 ELSA Guarantors**"), 2790760 Ontario Inc. ("**2790760**"), 2775290 Ontario Inc. ("**2775290**"), 2775296 Ontario Inc. ("**2775296**"), 421 Wharncliffe Ltd. ("**421 Wharncliffe**" and together with 2790760, 2775290, 2775296, the "**2021 ELSA Guarantors**", and the 2020 ELSA Guarantors together with the 2021 ELSA Guarantors, the "**Corporate Guarantors**", the Corporate Guarantors together with IHG, the "**Index Group**", and together with Muqeet (as defined below), the "**Loan Parties**") and 425 Wharncliffe Road Inc. ("**425 Wharncliffe**", and together with the Loan Parties, the "**Forbearance Parties**", and the Forbearance Parties excluding Muqeet, the "**Respondents**"); and (b)(i) the real property municipally known as 421 Wharncliffe Road South, London, Ontario, and as legally described as PT LT 1, PL29, PTS 1&2, 33R5153 & PT2, 33R5487 S/T 837774 IF ANY, S/T 583284 IF ANY; LONDON/WESTMINSTER (the "**421 Real Property**") and (ii) the real property municipally known as 425 Wharncliffe Road South, London, Ontario, and as legally

described as PT LTS 1 & 2, PL 29, PART 2, 33R2551, S/T 929439, IF ANY, S/T 837774, IF ANY, S/T 583284, IF ANY; LONDON/WESTMINSTER (the "**425 Real Property**", and together with the 421 Real Property, the "**Real Property**" and together with the Personal Property, the "**Property**").

2. The Property includes, among other things:

(a) assets relating to the business of five Popeye's Louisiana Kitchen ("**Popeye's**") and two Denny's restaurant franchises located in southern Ontario,

(b) assets relating to partially constructed franchise restaurants,

(c) the 425 Real Property consisting of a 0.81 acre parcel of land with a 4,022 square foot one-storey commercial premises leased to a tenant located at 425 Wharncliffe Road South in London, Ontario, and

(d) the 421 Real Property consisting of a 0.45 acre vacant lot initially planned to develop a one-storey commercial building to be used as a franchise restaurant located at 421 Wharncliffe Road South in London, Ontario.[1]

3. As of April 11, 2023, the amount owing in respect of the Facilities (as defined below) was $8,141,405.08 (including legal fees and disbursements to March 31, 2023), plus interest and expenses continuing to accrue from and after April 12, 2023, and legal fees and disbursements continuing to accrue from and after April 1, 2023 (the "**Indebtedness**").[2]

[1] Affidavit of Tyson Hartwell sworn April 27, 2023, Tab 2 of the Application Record ("**Hartwell Affidavit**") at para 4.
[2] Hartwell Affidavit at para 3.

4. The Respondents have and continue to fail to pay principal, interest, and other amounts due and owing pursuant to the Facility Agreements (as defined below) with IHG as borrower and CWB as lender and the Indebtedness remains outstanding.[3]

5. CWB delivered demand letters and notices of intention to enforce security pursuant to the BIA (the "**Index NITEs**") to each entity in the Index Group on January 18, 2023, as described in more detail below. Following delivery of the Index NITEs, at the Respondents' request, CWB entered into a Forbearance Agreement (as defined below) with the Forbearance Parties whereby CWB agreed to forbear enforcing its rights and remedies under the Facility Agreements and the related security, subject to the terms of such Forbearance Agreement.[4]

6. Pursuant to the Forbearance Agreement, the Respondents executed an irrevocable consent to the appointment of a receiver over the Property (the "**Consent**") on February 15, 2023.[5]

7. Multiple defaults have occurred under the Forbearance Agreement.[6]

8. With the occurrence of those termination events under the Forbearance Agreement (the "**Forbearance Termination Events**"), the Consent (and CWB seeking the appointment of a receiver) is effective and binding on the Respondents and not subject to any conditions.[7]

9. It is just and convenient in the circumstances to appoint a receiver over the Property with the power to market and sell the Property for the benefit of CWB and the other creditors.

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[3] Hartwell Affidavit at para 2.
[4] Hartwell Affidavit at para 5.
[5] Hartwell Affidavit at para 5.
[6] Hartwell Affidavit at para 46.
[7] Hartwell Affidavit at para 66.

PART II - SUMMARY OF FACTS

Loan and Security

10. IHG is a holding company and is the borrower under the Facility Agreements. The Respondents (other than 425 Wharncliffe) are entities within a restaurant development and operations group (the "**Index Group**") that are directly responsible for the development, financing and operations of Popeye's and Denny's franchise restaurants.

11. 425 Wharncliffe (which is a Forbearance Party) is a holding company and the registered owner of the 425 Real Property.

12. As of April 11, 2023, the amount owing in respect of the Facility Agreements (as defined below) was $8,141,405.08 (including legal fees and disbursements to March 31, 2023), plus interest and expenses continuing to accrue from and after April 12, 2023, and legal fees and disbursements continuing to accrue from and after April 1, 2023 (the "**Indebtedness**").[8]

13. Pursuant to the terms of certain commitment letters, CWB entered into the Facility Agreements as follows:

(a) on June 23, 2020, CWB and IHG entered into an equipment loan and security agreement (as amended, the "**2020 ELSA**") pursuant to which CWB made available to IHG five committed non-revolving loan facilities and in connection therewith made advances in the aggregate maximum principal amount of $7,129,758 (the "**2020 ELSA Facility**");

[8] Hartwell Affidavit at para 3.

(b) on November 16, 2021, CWB and IHG entered into a second equipment loan and security agreement (the "**2021 ELSA**") pursuant to which CWB made available to IHG three loan facilities and in connection therewith made advances in the aggregate maximum principal amount of $2,797,500 (the "**2021 ELSA Facility**");

(c) on November 24, 2021, CWB entered into a revolving credit agreement (the "**Revolver Agreement**") with IHG pursuant to which CWB make available to IHG a line of credit in the aggregate principal amount of $250,000 and increased the credit available (from $60,000 to $175,000) in connection with IHG's Visa credit card (and IHG's business Via application dated July 16, 2020, the "**Visa Agreement**") which are both overdrawn (collectively, the "**Revolver and Visa Loans**"); and

(d) on December 21, 2021, CWB and IHG entered into a third equipment loan and security agreement in respect of real estate (the "**2021 Real Estate ELSA**", together with the 2020 ELSA, the 2021 ELSA, the Revolver Agreement and the Visa Agreement, the "**Facility Agreements**") pursuant to which CWB made available to IHG a mortgage loan and in connection therewith made an advance in the aggregate principal amount of $480,000 (the "**2021 Real Estate ELSA Facility**", together with the 2020 ELSA Facility, the 2020 ELSA Facility and the Revolver and Visa Loans, the "**Facilities**").[9]

14. Security for the Facilities included, among other things:

[9] Hartwell Affidavit at paras 27-28, 30, 32, 34 and 36-37.

(a) *2020 ELSA Facility*: (i) a general security agreement by IHG and the 2020 ELSA Guarantors (the "**2020 GSA**"); and (ii) an unlimited guarantee and indemnity by IHG and the 2020 ELSA guarantors (the "**2020 Guarantee**");

(b) *2021 ELSA Facility*: (i) a general security agreement by IHG and the Corporate Guarantors (the "**2021 GSA**"); (ii) an unlimited guarantee and indemnity by IHG and the Corporate Guarantors (the "**2021 Guarantee**"); and

(c) *2021 Real Estate ELSA Facility*: (i) a first-ranking mortgage against the 421 Real Property (the "**421 Mortgage**").[10]

15. In connection with the Forbearance Agreement, 425 Wharncliffe and Abdul Muqeet ("**Muqeet**") (the principal of the Index Group) also provided secured guarantees to CWB in respect of the obligations and indebtedness due and owing under the Facilities. The security provided by 425 Wharncliffe included, among other things, (i) a general security agreement (the "**425 GSA**"); (ii) a guarantee (the "**425 Guarantee**") and (iii) a third-ranking mortgage against the 425 Real Property (the "**425 Mortgage**").[11]

16. The security granted by the Respondents to CWB, as applicable, is cross-collateralized, cross-guaranteed and cross-defaulted in respect of the Respondents' obligations and indebtedness to CWB pursuant to certain cross collateralization acknowledgements and agreements by the Forbearance Parties in favour of CWB (the "**Cross Collateralization Agreements**", together with the 2020 GSA, 2020 Guarantee, 2021 GSA, 2021 Guarantee, 421 Mortgage, 425 GSA, 425 Guarantee, 425 Mortgage, the "**Security**").[12]

[10] Hartwell Affidavit at para 38.
[11] Hartwell Affidavit at para 39.
[12] Hartwell Affidavit at para 41.

Defaults and Forbearance Termination Events

17. Events of default occurred under the Facility Agreements and Security, including without limitation:

(a) IHG's failure to make payments when due under the Facilities;

(b) termination by the landlord of certain real property leases in connection with restaurants either operated by or planned for development by the Index Group;

(c) registration of subordinate liens in respect of IHG and certain Corporate Guarantors without CWB's consent.[13]

18. Thereafter, on January 18, 2023, CWB delivered the Index Demand Letters and Index NITEs to the entities in the Index Group.[14]

19. On February 15, 2023, at the Index Group's request, CWB entered into a forbearance agreement with the Forbearance Parties (the "**Forbearance Agreement**"). In accordance with and subject to the terms of the Forbearance Agreement, CWB agreed to forbear, subject to various terms and conditions to June 30, 2023 or until the occurrence of defaults under the Forbearance Agreements. The Forbearance Termination Events that occurred included without limitation:

(a) a major fire occurred at a former Popeye's restaurant operated by the Respondents where certain of the Applicant's collateral was located;

[13] Hartwell Affidavit at para 42.
[14] Hartwell Affidavit at para 43.

(b) failure by IHG to pay CWB certain amounts when due under the Facility Agreements;

(c) Canada Revenue Agency issued to certain Respondents requirements to pay in the aggregate amount of more than $350,000; and

(d) termination by the landlord of the real property lease in respect of the Popeyes restaurant formerly operated by the Respondent 11030418.[15]

20. Following the occurrence of certain Forbearance Termination Events, the Forbearance Period (as defined in the Forbearance Agreement) terminated and, on April 12, 2023, CWB delivered a demand letter and notice of intention to enforce security under section 244 of the BIA to 425 Wharncliffe (the "**425 NITE**").[16]

21. Importantly, as part of the Forbearance Agreement, the Respondents provided the Consent. The form of receivership order attached to the Consent is substantially the same as the form of Receivership Order being requested in this application.[17]

22. It is just and convenient in the circumstances to appoint a receiver of the Property with the power to market and sell the Property for the benefit of CWB and other creditors for the following reasons:

(a) defaults and Forbearance Termination Events have occurred in respect of the Facility Agreements and Forbearance Agreement, as applicable, and the Indebtedness remains outstanding;

[15] Hartwell Affidavit at para 46.
[16] Hartwell Affidavit at para 48.
[17] Hartwell Affidavit at para 5.

(b) appointing a receiver is within CWB's rights under the Security; and

(c) the Respondents have executed the Consent.[18]

Other Secured Parties or Registered Interests

23. Searches conducted pursuant to the Personal Property Security Act (the "**PPSA**") in Ontario against the Respondents as of April 11, 2023, disclose the following:

(a) a first priority registration made against each of the Respondents in favour of CWB,

(b) a registration against IHG in favour of 2851604 Ontario Inc.,

(c) a registration against IGC in favour of (i) Toyota Credit Canada Inc., (ii) The Bank of Nova Scotia, (iii) Hyundai Capital Lease Inc. and Genesis Motor Finance,

(d) a registration against III in favour of 1000017398 Ontario Inc.,

(e) a registration against IFI in favour of 1000017398 Ontario Inc.,

(f) a registration against 2700774 in favour of 2851605 Ontario Inc., and 2752908 Ontario Ltd. / Midtown Capital, and

(g) a registration against 2723710 in favour of 2851606 Ontario Inc.[19]

24. The Ontario PPSA searches did not disclose registrations in favour of any other secured party in respect of any of the Respondents.[20]

[18] Hartwell Affidavit at paras 66-68.
[19] Hartwell Affidavit at para 56.
[20] Hartwell Affidavit at para 57.

25. A search of title against the 421 Real Property as of April 12, 2023 discloses no registrations other than those in favour of CWB. In addition to those registrations, there is also an application to register a government order registered against title to the 421 Real Property in favour of The Corporation of the City of London in respect of property standards violations. [21]

26. A search of title against the 425 Real Property current to April 12, 2023 discloses registrations other than those in favour of CWB as follows:

(a) three mortgages registered in favour of 1778130 Ontario Inc. (two of which were registered earlier in time compared to the 425 Mortgage and one registered after); and

(b) two general assignments of rents and leases registered in favour of 1778130 Ontario Inc. (one registered earlier in time compared to the general assignments of rents and leases in favour of CWB and one registered after). [22]

27. In addition, several of the Respondents' creditors granted assignments and postponements of claims in favour of CWB in connection with the 2020 ELSA and 2021 ELSA.

28. All of the parties with interests registered against the 425 Real Property or Ontario PPSA registrations against any of the Respondents have been served with the court materials in connection with this application. Counsel for CWB also attempted to discuss this application with the first mortgagee, 1778130 Ontario Inc., in respect of the 425 Real Property but counsel for CWB did not receive a response from the mortgagee.

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[21] Hartwell Affidavit at para 59.
[22] Hartwell Affidavit at para 60.

PART III - ISSUES AND LAW

29. The single issue on this Application is whether this Court should appoint MNP as Receiver over the Property.

30. It is appropriate for this Court to appoint MNP as Receiver because:

(a) the technical requirements for the appointment of a receiver under the BIA have been satisfied; and

(b) it is just and convenient to appoint a receiver under the BIA and CJA in the circumstances.

Technical Requirements are Satisfied

31. Section 243 of the BIA authorizes the Court to appoint a receiver on an application by a secured creditor over the property of an insolvent person. Subsection 243(1.1) of the BIA requires that a notice of intention to enforce security as required by section 244 of the BIA is delivered to the insolvent person prior to such application.[23]

32. There is no dispute that these requirements have been met. CWB is the primary secured creditor of the Respondents pursuant to the Security and has standing to bring this application. The Applicant delivered Index NITEs to the Loan Parties on January 18, 2023 and the 425 NITE to 425 Wharncliffe on April 12, 2023. The 10-day notice periods have expired. Accordingly, the technical requirements have been met.[24]

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[23] *Bankruptcy Insolvency Act,* ss 243, 243(1.1) and 244(2).
[24] Hartwell Affidavit at paras 44 and 48-49 and Exhibits “CC”, “DD” and “JJ”.

33. MNP is qualified to act as Receiver in accordance with subsection 243(4) of the BIA and has provided its consent to act.[25]

Appointing MNP as Receiver is Just and Convenient

34. Section 101 of the CJA and subsection 243(1) of the BIA each permit the appointment of a receiver where it is "just or convenient".[26]

35. Given the Consent, it is not open to the Respondents in this case to argue that the appointment of the receiver is not "just or convenient". The Alberta Court of Queen's Bench in *Servus Credit Union Ltd. v Proform Management Inc.* recently reviewed the law relating to a contested receivership application following a consent to receivership having been provided by the respondents. In that case, the respondents argued that the receivership order should not be made, despite their consent having been provided. In appointing a receiver, the Alberta Court gave considerable weight to the debtors' consent to the appointment of a receiver and after reviewing the case law in this area held:

> [50] By signing the consent receivership order, the debtors acknowledged their indebtedness to Servus, their default status, the triggering of Servus's enforcement options (which included applying for a receiver), and that the appointment of a receiver was warranted i.e. once the period of forbearance, purchased (in part) by the provision of the consent receivership order, had expired without clearance of Servus's debt.
>
> [51] The debtors effectively surrendered, on a contingent basis: "If we are not able to clear our defaults in full by the end of the forbearance period, you can enter this receivership order."
>
> …
>
> [53] It is not open to the debtors or the guarantor, at this stage, to offer arguments about why the receivership order is not "just or convenient" in light of this agreement. Servus lived up to its end of the deal, forbearing from taking enforcement action, first (formally) for four months and then a further (formal) two and a half months, plus informally in the lead-ups to the two forbearance agreements. By the end of those periods, the debtors had not

[25] BIA, ss 2 and 243(4); Hartwell Affidavit at para 70 and Exhibit "PP".
[26] CJA, s 101; BIA, s 243(1).

> accomplished the one thing that could stave off enforcement action: clearing Servus's debt in full.
>
> …
>
> [56] Having effectively conceded their default status and the triggering of Servus's enforcement options, and having expressly agreed that Servus could seek the entry of the consent receivership order in that circumstance, the debtors have blocked themselves from resisting the granting of the orders i.e. beyond forbearance-related arguments, as discussed further below.[27]

36. In addition, at the scheduling appearance for this application heard on April 28, 2023, Muqeet advised this Court that the Respondents would not be opposing this application.[28]

37. Even absent the Consent, in the circumstances, granting the Receivership Order is "just and convenient". In determining whether the appointment of a receiver is "just or convenient", the Court must consider the circumstances and specifically the nature of the property and the rights and interests of all relevant parties in connection with the property. The rights of a secured creditor under its security are an important consideration in this regard.[29]

38. Where a secured creditor has a contractual right to appointment of a receiver under its security:

(a) the appointment of a receiver is not regarded as an extraordinary equitable remedy, since the secured creditor is merely enforcing the terms of its contract;[30]

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[27] ***Servus Credit Union Ltd. v Proform Management Inc.*, 2020 ABQB 316** [*Servus*] at para 53. See also, ***Alexander v 2025610 Ontario Ltd.*, 2012 ONSC 3486**.

[28] Endorsement of Justice Conway dated April 28, 2023, Court File No. CV-23-00698447-00CL, para 5 (See **Schedule "D"** of this Factum for a copy of this decision).

[29] ***Bank of Nova Scotia v Freure Village on Clair Creek* (1996), 40 CBR (3d) 274 (Ont SCJ)** [*Freure Village*] at paras 10-11. See also ***Urbancorp Management Inc. (Re)*, 2021 ONSC 3593** at para 27.

[30] ***Elleway Acquisitions Ltd. v Cruise Professionals Ltd.*, 2013 ONSC 6866** [*Elleway*] at para 27; ***Bank of Nova Scotia v Freure Village on Clair Creek* (1996), 40 CBR (3d) 274 (Ont SCJ)** [*Freure Village*] at para 12. See also ***KingSett Mortgage Corporation v 30 Roe Investments Corp.*, 2022 ONSC 2777** at paras 30, 35-36.

(b) a receiver should be appointed where the secured creditor has lost faith in the debtor, unless there is good reason to deny the appointment;[31] and

(c) a court will examine the surrounding circumstances and consider in its discretion whether it is in the interests of all relevant parties to have the receiver appointed. Specifically, the Court should consider the following without limitation:[32]

(i) the potential costs of the receiver;

(ii) the relationship between the debtor and the creditors;

(iii) the likelihood of preserving and maximizing the return on the subject property; and

(iv) the best way to facilitate the work and duties of the receiver.

39. The appointment of a receiver is appropriate where a debtor has failed to pay its creditors despite its creditors permitting a reasonable time for payment following the debts becoming due.[33]

40. Considering the circumstances, it is just and convenient for this Court to appoint the Receiver over the Property for the following reasons, among others:

(a) the Indebtedness is now approximately $8.1 million and remains outstanding;

(b) defaults have occurred and are continuing under the Facility Agreements and Security;

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[31] *Romspen Investment Corporation v Atlas Healthcare (Richmond Hill) Ltd., et al,* 2018 ONSC 7382 at para 100 (See **Schedule "C"** of this Factum for a copy of this decision. See also ***PricewaterhouseCoopers Inc. v Northern Citadel,* 2023 ONSC 37** at paras 92-94.
[32] *Elleway* at para 28; *Freure Village* at para 12.
[33] ***Bank of Montreal v Sherco Properties Inc.,* 2013 ONSC 7023** at paras 47-48.

(c) the Applicant is entitled to the appointment of a receiver pursuant to the terms of the Security;

(d) the Respondents executed the Consent as a condition for CWB entering into the Forbearance Agreement, and pursuant to the terms of the Forbearance Agreement, the Consent is unconditional;

(e) the Respondents have been unable to complete a sale of the Property or obtain replacement financing to repay the Indebtedness;

(f) numerous registrations of subordinate liens against certain Respondents without CWB's consent;

(g) CWB has lost all confidence in the Respondents' ability to operate their business in a manner that protects CWB's collateral and maintains its value; and

(h) the appointment of a receiver will facilitate a transparent marketing of the Property for the benefit of CWB and other creditors.

PART IV - ORDER REQUESTED

41. For the reasons stated herein, it is just and convenient to appoint MNP as Receiver of the Property in the circumstances. CWB respectfully requests an order substantially in the form attached at Tab 1.A of the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of May, 2023.

Cassels Brock & Blackwell LLP

Cassels Brock & Blackwell LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Jeremy Bornstein LSO #: 65425C
Tel: 416.869.5386
jbornstein@cassels.com

Stephanie Fernandes LSO #: 85819M
Tel: 416.860.6481
sfernandes@cassels.com

Lawyers for the Applicant

Schedule "A"
LIST OF AUTHORITIES

1. *Servus Credit Union Ltd. v Proform Management Inc*, 2020 ABQB 316.
2. *Alexander v 2025610 Ontario Ltd.*, 2012 ONSC 3486.
3. Endorsement of Justice Conway dated April 28, 2023, Court File No. CV-23-00698447-00CL.
4. *Bank of Nova Scotia v Freure Village on Clair Creek* (1996), 40 CBR (3d) 274 (Ont SCJ).
5. *Urbancorp Management Inc. (Re),* 2021 ONSC 3593.
6. *Elleway Acquisitions Ltd. v Cruise Professionals Ltd.*, 2013 ONSC 6866.
7. *KingSett Mortgage Corporation v 30 Roe Investments Corp*., 2022 ONSC 2777.
8. *Romspen Investment Corporation v Atlas Healthcare (Richmond Hill) Ltd., et al,* 2018 ONSC 7382.
9. *PricewaterhouseCoopers Inc. v Northern Citadel,* 2023 ONSC 37.
10. *Bank of Montreal v Sherco Properties Inc.,* 2013 ONSC 7023.

Schedule "B"
TEXT OF STATUTES, REGULATIONS & BY- LAWS

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

Court may appoint receiver

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

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

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

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

Restriction on appointment of receiver

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

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

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

Trustee to be appointed

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

Place of filing

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

Orders respecting fees and disbursements

(4) 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.

Advance notice

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

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

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

Period of notice

(6) 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.

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

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. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

Schedule "C"
Copy of *Romspen Investment Corporation v Atlas Healthcare (Richmond Hill) Ltd., et al,* 2018 ONSC 7382.

See attached.

CITATION: Romspen Investment Corporation v. Atlas Healthcare (Richmond Hill) Ltd. et al, 2018 ONSC 7382
COURT FILE NO.: CV-18-607303-00CL
COURT FILE NO: CV-18-00609634-00CL
DATE: December 10, 2018

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUJSTICE ACT*, R.S.O. 1990 C. C.43, AS AMENDED, AND SECTION 68 OF THE *CONSTRUCTION ACT*, R.S.O. 1990, C. 30, AS AMENDED

RE: ROMSPEN INVESTMENT CORPORATION, Applicant

AND:

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

AND RE:

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

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

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

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

Clifton Prophet, for Meridian Credit Union Limited

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

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

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

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

HEARD: November 27, 2018

ENDORSEMENT

[1] There are two applications before the Court.

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

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

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

Factual Background

The Debtors

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

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

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

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

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

Financing of the Project

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

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

(1) Loans made by Meridian Credit Union Limited ("Meridian") in favour of Richmond Hill (collectively, the "Meridian Loan") secured by a first charge on the Project (the "Meridian Charge") and a first general assignment of rents; and

(2) A loan made by Romspen in favour of the Debtors together with an outstanding loan acquired by Romspen (collectively, the "Loan"), secured by the Bridging Charge (defined below) and the Romspen Third Charge (defined below), both of which rank behind the Meridian Charge.

These financing arrangements are further described below.

The Meridian Loan

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

The Romspen Loan Arrangements

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

The Romspen Loan

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

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

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

The Bridging Finance Loan and the Bridging Charge

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

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

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

The Romspen Security in the Properties

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

(3) a second charge on the Project in the principal amount of $40,850,000, originally given in favour of Bridging Finance Inc. and transferred to Romspen on May 24, 2018 (the "Bridging Charge");

(4) a third charge against the Project in the principal amount of $5 million (the "Romspen Charge");

(5) a subordinate general assignment of rents of the Project;

(6) a first charge over the Shouldice Property in the principal amount of $81.2 million (the "Shouldice Charge"), together with a general assignment of rents and a specific assignment of the Hospital Lease; and

(7) a first charge over the Brampton Property in the principal amount of $81.2 million (the "Brampton Charge") together with a general assignment of rents in respect of the Brampton Property.

Status of the Project

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

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

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

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

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

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

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

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

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

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

Demands under the Loan and the Meridian Loan

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

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

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

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

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

The Receivership Application

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

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

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

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

The Receivership Financing

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

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

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

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

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

The CCAA Application

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

The DIP Facility

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

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

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

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

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

Applicable Law

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

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

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

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

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

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

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

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

(a) the period during which the company is expected to be subject to proceedings under the CCAA;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report, if any.

Analysis and Conclusions

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

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

Operational Issues Pertaining to the Competing Applications

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

The Competing Financial Plans

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

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

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

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

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

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

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

The Competing Construction Plans

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

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

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

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

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

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

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

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

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

Conclusion Regarding Operational Issues Pertaining to the Competing Applications

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

The Nature of the Property

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Legal Rights and Interests of Meridian and Romspen

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

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

The Security Position of Meridian and Romspen

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Contractual Rights of Meridian and Romspen

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

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

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

The Interests of the Other Stakeholders in the Project

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Respective Costs of a Receivership Versus a CCAA Proceeding

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

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

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

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

Conclusions

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

Wilton-Siegel J.

Date: December 10, 2018

Schedule “D”
Copy of Endorsement of Justice Conway dated April 28, 2023, Court File No. CV-23-00698447-00CL

See attached.

SUPERIOR COURT OF JUSTICE

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-23-00698447-00CL **DATE: 28-APR-2023**

NO. ON LIST: 2

TITLE OF PROCEEDING: CANADIAN WESTERN BANK v. INDEX HOLDING GROUP INC. et al.

BEFORE: JUSTICE CONWAY

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Jeremy Bornstein	Canadian Western Bank	jbornstein@cassels.com
Stephanie Fernandes	Canadian Western Bank	sfernandes@cassels.com

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info
Adbul Muqeet	Self-represented	Muqeet.rana@hotmail.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
John Leslie	Proposed Receiver, MNP	jleslie@dickinsonwright.com

ENDORSEMENT OF JUSTICE CONWAY:

[1] Scheduling appointment held today.

[2] This is an application for the appointment of a receiver. It has been scheduled for May 8, 2023 at 11 a.m. for 40 minutes.

[3] Mr. Muqeet says he appears for all of the respondents. He has not obtained leave to represent the corporate respondents. He advised that he is retaining counsel but will not be opposing the receivership order and does not seek to push back the May 8th date.

[4] Counsel for the applicant advises that there is a consent to the receivership order as part of a forbearance arrangement and the respondents waived their right to obtain independent legal advice.

[5] If the respondents will be retaining counsel, they should do so right away and let counsel know about the May 8th date, which is less than two weeks away. However, Mr. Muqeet confirmed that the respondents will not be opposing the receivership order.

[6] Under the circumstances, the hearing will proceed on **May 8, 2023 at 11 a.m. for 40 minutes (any judge, confirmed with the CL office).**

Conway J.

CANADIAN WESTERN BANK
Applicant

and

INDEX HOLDING GROUP INC. et al.
Respondents

Court File No. CV-23-00698447-00CL

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TORONTO

FACTUM
(RECEIVERSHIP APPLICATION
RETURNABLE MAY 8, 2023)

Cassels Brock & Blackwell LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Jeremy Bornstein LSO #: 65425C
Tel: 416.869.5386
jbornstein@cassels.com

Stephanie Fernandes LSO #: 85819M
Tel: 416.860.6481
sfernandes@cassels.com

Lawyers for the Applicant