File No. CI 24-01- 48861

THE KING'S BENCH
Winnipeg Centre

IN THE MATTER OF:	**The Appointment of a Receiver pursuant to Section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c.B-3, as amended and Section 55 of *The Court of King's Bench Act*, C.C.S.M. c. C280**

BETWEEN:

ROYAL BANK OF CANADA,

Applicant,

- and -

VISTA MEDICAL LTD.,

Respondent.

APPLICATION BRIEF OF THE APPLICANT
HEARING DATE: October 4, 2024, at 10:00 a.m.
Before the Honourable Justice Grammond

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KALEV A. ANNIKO
File No. 180007-882/KAA

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APPLICATION BRIEF OF THE APPLICANT

A. DOCUMENTS TO BE RELIED UPON

1. Notice of Application, filed;
2. Affidavit of Kerry Orth, affirmed September 19, 2024, filed; and
3. Consent of MNP Ltd., filed.

B. AUTHORITIES TO BE RELIED UPON

Tab

1. Rules 2.03, 3.02, 16.04(1), 16.08(1), and 38.05 of the *Court of King's Bench Rules*, Man Reg 553/88
2. Section 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c.B-3, as amended
3. Section 55 of *The Court of King's Bench Act*, CCSM c.C280, as amended
4. *Bank of Montreal v. Carnival National Leasing Limited*, 2011 ONSC 1007
5. *RBC v Maxx Properties (No. 323) Ltd.*, 2024 ONSC 1660
6. *Callidus v. Carcap*, 2012 ONSC 163
7. Proposed Receivership Order [compare changes from model receivership order]

C. ISSUES

1. Should this Court abridge and validate the service of the within Notice of Application and supporting materials?

2. Should the Applicant's application to appoint MNP Ltd. as receiver (the "Receiver") of the undertaking of the Respondent and all of the Respondent's present and after acquired personal property be granted?

D. ARGUMENT

Service

1. This Court has authority to abridge the time for service, validate defective, service, and to dispense with service where necessary in the interests of justice.

Court of King's Bench Rules, Man Reg 553/88, Rules 2.03, 3.02, 16.04(1), 16.08(1), and 38.05 [**TAB 1**]

2. To the extent it my be required, RBC submits that service of this Notice of Application and supporting materials ought to be abridged or validated.

Appointment of Receiver

3. The facts giving rise to the within application and relevant to the applicant's request to appoint a receiver are set out in the Affidavit of Kerry Orth, affirmed September 19, 2024 (the "**Orth Affidavit**"). Any terms not otherwise defined herein have the meanings set out in the Orth Affidavit. In brief:

(a) Royal Bank of Canada ("**RBC**") loaned funds to Vista Medical Ltd. ("**Vista**") pursuant to a credit facility agreement dated October 21, 2021, repayable on demand (the "Credit Facilities").

Orth Affidavit at para 4, Exhibit "B".

(b) The indebtedness owing by Vista is $1,014,857.51 as at August 15, 2024 (the "**Indebtedness**").

Orth Affidavit at para 5.

(c) As security for its obligations under the Credit Facilities, Vista provided RBC with general security, which RBC has perfected by duly registering same in the personal property registry of Manitoba.

Orth Affidavit at paras 6 -8, Exhibits “C” and “D”.

(d) RBC has first priority over all present and after-acquired personal property of Vista, save potentially for certain specific leased equipment in which Xpedite Leasing Inc. has registered an interest.

Orth Affidavit at para 9, Exhibit “D”.

(e) In addition, Vista’s obligations to RBC were guaranteed by Vista’s US-based parent, Patientech LLC (“**Patientech**”).

Orth Affidavit at para 10.

(f) In January 2023, in consideration of Vista’s financial situation at that time, RBC issued a demarket letter to Vista.

Orth Affidavit at para 14, Exhibit “E”.

(g) Subsequently, RBC agreed to enter into a forbearance agreement with Vista and Patientech that required them to make a lump sum payment of $500,000.00 USD (at which point the facility would be turned into a non-revolving term loan), and then for monthly payments of $25,000.00 to be made, with the entire Indebtedness to be paid out by no later than January 31, 2025.

Orth Affidavit at para 16, Exhibit “F”.

(h) Vista and Patientech defaulted on their payment obligations under the Forbearance Agreement in May 2024, and the Forbearance Agreement was terminated in June 2024, at which time the Indebtedness owing by Vista was immediately due and payable.

Orth Affidavit at paras 20-22, Exhibit “H”.

(i) The parties continued to try to find a resolution, but Vista ultimately failed to propose a plan to make up the payments that had been required under the Forbearance Agreement, and refused to consent to RBC engaging a third-party agent to monitor and review the financial circumstances of Vista.

Orth Affidavit at paras 23 – 24, Exhibit “I”.

(j) RBC has numerous concerns with the operations of Vista, including:

(i) Failure to provide externally prepared financial statements;

(ii) Substantial variation and inconsistency in external and internal reporting of accounts receivable, and decrease in accounts receivable without correlating payments into RBC accounts;

(iii) Refusal by management to permit RBC to engage a professional to monitor and analyze the financial status of Vista;

(iv) Failure by Vista to make payments towards the Indebtedness which is presently due and payable in full.

Orth Affidavit at paras 12, 19, 22, 25, 26.

(k) RBC made demand and delivered Notice of Intention to Enforce Security under the Bankruptcy and Insolvency Act on or around August 19, 2024.

Orth Affidavit at para 26, Exhibit "J".

(l) RBC has continued to try to work with Vista to come to an agreement on repayment of its Indebtedness, but to date, those efforts have not resulted in any payments to RBC.

Orth Affidavit at para 20.

4. Accordingly, RBC seeks the appointment of a receiver to realize on the assets of the respondent.

5. Section 243(1) of the *Bankruptcy and Insolvency Act,* RSC 1985, c.B-3 ("BIA") [**TAB 2**] provides as follows:

> 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.

BIA s. 243(1) [**TAB 2**]

6. Section 55 of *The Court of King's Bench Act*, CCSM c C280 ("KBA") [**TAB 3**], mirrors section 243 of the BIA in that it gives this Honourable Court jurisdiction to appoint a receiver and manager where it appears to be just or convenient to do so:

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

KBA s. 55 [**TAB 3**]

7. In *Bank of Montreal v. Carnival National Leasing Limited*, 2011 ONSC 1007 [**TAB 4**], the Court summarized the legal principles applicable to the appointment of a receiver, as follows, at paragraph 24:

> In *Bank of Nova Scotia v. Freure Village on Clair Creek* 1996 CanLII 8258 (ON SC), (1996), 40 C.B.R. (3d) 274, Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:
>
> The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd*. (1992), 9 C.P.C. (3d) 399; *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.,* (1995), 30 C.B.R. (3d) 49.

Bank of Montreal v Carnival National Leasing Limited, 2011 ONSC 1007, para 24 [**TAB 4**]

8. While the Court acknowledged that the appointment of a receiver may, in certain circumstances, be considered an extraordinary remedy, it noted that the "extraordinary" nature of the remedy becomes less important, and is less essential to the inquiry, where the security provides for the appointment of a receiver, which is the case here.

Bank of Montreal v. Carnival National Leasing Limited, 2011 ONSC 1007, at para. 27 [**TAB 4**]

Orth Affidavit, Exhibit "C".

9. When considering whether it is just or convenient to appoint a receiver the courts have considered the following factors:

> a. Whether irreparable harm might be caused if no order is made, although as stated above, it is not essential for a creditor to establish irreparable harm if a receiver is not appointed where the appointment is authorized by the security documentation;
>
> b. the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of assets while litigation takes place;
>
> c. the nature of the property;
>
> d. the apprehended or actual waste of the debtor's assets;
>
> e. the preservation and protection of the property pending judicial resolution;
>
> f. the balance of convenience to the parties;
>
> g. the fact that the creditor has a right to appointment under the loan documentation;
>
> h. the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;
>
> i. the principle that the appointment of a receiver should be granted cautiously;
>
> j. the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;
>
> k. the effect of the order upon the parties;

l. the conduct of the parties;

m. the length of time that a receiver may be in place;

n. the cost to the parties;

o. the likelihood of maximizing return to the parties; and

p. the goal of facilitating the duties of the receiver.

RBC v Maxx Properties (No. 323) Ltd., 2024 ONSC 1660, para 12 [**TAB 5**]

10. Courts have also considered that the fact the applicant lost faith in a respondent companies' management is a factor that supports the appointment of a receiver.

Callidus v. Carcap, 2012 ONSC 163, at para. 51 [**TAB 6**]

11. In the case at bar RBC submits that it is just and convenient to appoint a receiver over Vista's assets in the circumstances of this case for, among others, the following reasons:

(a) Vista is substantially indebted to RBC, a secured creditor with a first priority interest in all or substantially all of Vista's personal property;

(b) Vista has executed Security in favor of RBC that specifically entitles RBC to appoint a Receiver upon default;

(c) Vista is in default of its obligations to RBC pursuant to the terms of the Loan Agreement and the GSA;

(d) RBC and Vista entered into a Forbearance Agreement on which Vista materially defaulted and which has been terminated;

(e) Upon termination of the Forbearance Agreement, all Vista's Indebtedness to RBC became immediately due and payable;

(f) Vista has had a substantial period of time to address its Indebtedness to RBC and has failed to do so - RBC has worked with Vista for nearly two years to address the Indebtedness, but Vista has been unable to adhere to its commitments under the Loan Agreement or under the Forbearance Agreement;

(g) RBC has acted in good faith towards Vista;

(h) Vista has failed to repay any amount of the Indebtedness since the termination of the Forbearance Agreement;

(i) despite issuance of demands, Vista has failed to pay the amounts outstanding to RBC;

(j) Vista's reported accounts receivable have been erratic and unreliable and show a drastic reduction which amounts to a deterioration of RBC's security;

(k) Vista's financial reporting has disclosed an increase in the amount due from related companies, which suggests Vista's assets are being transferred to non-arm's length, related companies;

(l) Vista has failed to provide engagement review financial statements as required under the Loan Agreement and subsequently under the Forbearance Agreement;

(m) Vista has refused to consent to RBC's request to have an agent review and analyze the financial and operational status of Vista;

(n) Vista continues to use collateral secured by RBC in its daily operations;

(o) RBC has lost confidence in the management of Vista;

(p) Given the Respondents' financial situation, a receiver and stay of proceedings is necessary to preserve and realize on assets for the benefit of stakeholders generally; and

(q) Court appointment is necessary to enable the receiver to carry out its duties more efficiently.

12. In light of the foregoing, the Applicant respectfully submits that the appointment of MNP Ltd. as Receiver over the property and undertaking of Vista is just and convenient in the circumstances. MNP Ltd. has consented to act as receiver.

13. In all the foregoing circumstances, the Applicant seeks an order substantially in the form attached as Schedule "A" to the Notice of Application. A copy of the draft order, showing the changes from this Court's Model Receivership Order, is appended hereto as **[Tab 7]**.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Winnipeg this ___ day of September, 2024.

Fillmore Riley LLP
Barristers and Solicitors
1700 - 360 Main Street
Winnipeg, MB R3C 3Z3

KALEV A. ANNIKO
Solicitors for the Applicant

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THE COURT OF KING'S BENCH ACT
(C.C.S.M. c. C280)

Court of King's Bench Rules

LOI SUR LA COUR DU BANC DU ROI
(c. C280 de la C.P.L.M.)

Règles de la Cour du Banc du Roi

Regulation 553/88
Registered December 13, 1988

Règlement 553/88
Date d'enregistrement : le 13 décembre 1988

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TABLE DES MATIÈRES

COURT MAY DISPENSE WITH COMPLIANCE

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

Modification or waiver of rules

2.04 If a person acts in a vexatious, evasive, abusive or improper manner or if the expense, delay or difficulty in complying with a rule would be disproportionate to the likely benefit, a judge may, on motion by any party or on his or her own motion, without materials being filed, do one or more of the following:

(a) modify or waive compliance with any rule;

(b) make a costs award or require an advance payment against costs payable, or both;

(c) make any other order respecting a proceeding that the judge considers appropriate in the circumstances.

M.R. 130/2017

DISPENSE DU TRIBUNAL

2.03 Le tribunal peut dispenser de l'observation d'une règle seulement si cela est nécessaire dans l'intérêt de la justice.

Modification des présentes règles ou renonciation à leurs exigences

2.04 Lorsqu'une personne agit de manière vexatoire, évasive, abusive ou inappropriée ou que l'observation d'une règle entraînerait des coûts, des délais ou des difficultés dont l'ampleur serait disproportionnée face à l'avantage attendu, un juge peut, sur motion d'une des parties ou de son propre chef, et sans que des documents n'aient été déposés, prendre une ou plusieurs des mesures suivantes :

a) modifier tout droit ou pouvoir que confère une règle ou en écarter l'application;

b) adjuger des dépens et exiger un versement préalable en vue du paiement de frais exigibles, ou prendre une de ces mesures;

c) rendre toute autre ordonnance concernant une instance qu'il estime indiquée compte tenu des circonstances.

R.M. 130/2017

Service at place of residence
16.03(5) Where an attempt is made to effect personal service at a person's place of residence and for any reason personal service cannot be effected, the document may be served by,

(a) leaving a copy, in a sealed envelope addressed to the person, at the place of residence with anyone who appears to be an adult member of the same household; and

(b) on the same day or the following day mailing another copy of the document to the person at the place of residence,

and service in this manner is effective on the fifth day after the document is mailed.

Signification au lieu de résidence
16.03(5) Si une tentative de signification à personne au lieu de résidence échoue, le document peut être signifié :

a) en en laissant une copie à son lieu de résidence, dans une enveloppe scellée adressée au destinataire, à une personne qui paraît majeure et qui semble habiter sous le même toit que lui;

b) en envoyant par la poste, le jour même ou le lendemain, une autre copie du document au lieu de résidence du destinataire.

Cette signification est valide à compter du cinquième jour suivant l'envoi par la poste du document.

Service on a corporation
16.03(6) Where the head office, registered office or principal place of business of a corporation or, in the case of an extra-provincial corporation, the attorney for service in Manitoba, cannot be found at the last address recorded with the director appointed under *The Corporations Act*, service may be made on the corporation as provided in section 247 of *The Corporations Act* but such service will not be effective if there are reasonable grounds for believing that the corporation did not receive the document.

M.R. 6/98

Signification à une corporation
16.03(6) Si le siège social, le bureau enregistré ou le principal établissement d'une corporation ou, s'il s'agit d'une corporation extra-provinciale, son fondé de pouvoir aux fins de signification au Manitoba, ne se trouve pas à la dernière adresse figurant dans les dossiers du directeur nommé en vertu de la *Loi sur les corporations*, la signification peut être effectuée selon les dispositions de l'article 247 de la *Loi sur les corporations*. Cependant, une telle signification ne sera pas valide s'il existe des motifs raisonnables de croire que la corporation n'a pas reçu le document.

R.M. 6/98

SUBSTITUTED SERVICE OR DISPENSING WITH SERVICE

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

SIGNIFICATION INDIRECTE OU DISPENSE DE SIGNIFICATION

Décision du tribunal
16.04(1) Si la signification à personne ou un autre mode de signification directe d'un acte introductif d'instance ou d'un autre document est requis et que le tribunal considère qu'il est difficile de l'effectuer sans délai, celui-ci peut ordonner la signification indirecte ou, si l'intérêt de la justice l'exige, dispenser de la signification.

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

M.R. 11/2018

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

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

M.R. 127/94

Exception
16.04(1.1) Le paragraphe (1) ne s'applique pas si la signification doit s'effectuer en conformité avec la Convention Notification de La Haye.

R.M. 11/2018

Date de la signification
16.04(2) Si l'ordonnance prévoit la signification indirecte, le tribunal précise la date à laquelle la signification est valide.

Dispense de signification
16.04(3) Si l'ordonnance dispense de la signification d'un document, celui-ci est réputé, aux fins de la computation des délais aux termes des présentes règles, être signifié à la date à laquelle l'ordonnance est signée.

R.M. 127/94

SERVICE ON LAWYER OF RECORD

Forms of service
16.05(1) Service of a document on the lawyer of record of a party may be made by,

(a) mailing a copy to the lawyer's office;

(b) leaving a copy with a lawyer or employee in the lawyer's office;

(c) faxing a copy in accordance with subrules (2), (3) and (4) but, where service is made under this clause between 5 p.m. and midnight, it shall be deemed to have been made on the following day;

(d) by sending a copy to the lawyer's office by courier; or

(e) attaching a copy of the document to an e-mail message sent to the lawyer's e-mail address in accordance with subrule (6), but service under this clause is effective only if the lawyer being served provides by e-mail to the sender an acceptance of service and the date of the acceptance, and where e-mail acceptance is received between 5 p.m. and midnight, it shall be deemed to have been made on the following day.

M.R. 6/98; 50/2001; 43/2003

SIGNIFICATION À L'AVOCAT

Modes de signification
16.05(1) Une personne peut signifier un document à l'avocat qui représente une partie :

a) en lui en envoyant une copie à son bureau par la poste;

b) en en laissant une copie à un avocat ou à un employé de son bureau;

c) en envoyant par télécopieur une copie conformément aux paragraphes (2), (3) et (4); toutefois, lorsque la copie est envoyée entre 17 heures et minuit, la signification est réputée avoir été faite le jour suivant;

d) en envoyant une copie à son bureau par service de messageries;

(b) a copy of the document may be sent by registered mail or certified mail in which case service is effective on the date the document was delivered to the person to be served as shown on the confirmation of delivery obtained from Canada Post Corporation.

M.R. 50/2001

b) une copie du document peut être envoyée par courrier recommandé ou par poste certifiée, auquel cas la signification est valide à compter de la date à laquelle le document a été livré au destinataire, telle qu'elle est indiquée sur la confirmation de livraison obtenue de la Société canadienne des postes.

R.M. 50/2001

WHERE DOCUMENT DOES NOT REACH PERSON SERVED

16.07 On a motion to set aside the consequences of default, for an extension of time or for an adjournment, a person may show that, even though served with a document in accordance with these rules, it did not come to the person's notice, or it did not come to the person's notice until some time later than when it was served or deemed to have been served.

NON-RÉCEPTION DU DOCUMENT

16.07 Dans le cadre d'une motion présentée par une personne en vue d'être relevée des conséquences du défaut, d'une motion en prorogation du délai ou d'une motion en ajournement de l'instance, la personne peut établir que même si elle a reçu signification d'un document conformément aux présentes règles, elle n'en a pas pris connaissance ou elle n'en a pris connaissance qu'à une date postérieure à la date à laquelle le document lui a été signifié ou est réputé le lui avoir été.

VALIDATING SERVICE

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

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

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

M.R. 11/2018

VALIDATION DE LA SIGNIFICATION

16.08(1) Si un document a été signifié d'une façon non autorisée ou irrégulière, le tribunal peut, par ordonnance, valider la signification s'il est convaincu, selon le cas :

a) que le destinataire en a pris connaissance;

b) que le document a été signifié de telle sorte que le destinataire en aurait pris connaissance s'il n'avait pas tenté de se soustraire à la signification.

R.M. 11/2018

Exception

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

M.R. 11/2018

Exception

16.08(2) Le paragraphe (1) ne s'applique pas si la signification doit s'effectuer en conformité avec la Convention Notification de La Haye.

R.M. 11/2018

SERVICE OF NOTICE

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

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

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

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

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

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

M.R. 130/2017

38.05(4) [Repealed]

M.R. 130/2017

SIGNIFICATION DE L'AVIS

Dispositions générales
38.05(1) L'avis de requête est signifié à toutes les parties. En cas de doute concernant l'obligation de signifier l'avis à une autre personne, le requérant peut demander des directives à un juge par voie de motion, sans préavis.

Cas où l'avis aurait dû être signifié
38.05(2) Le juge qui entend la requête, s'il est d'avis que l'avis de requête doit être signifié à une personne et ne l'a pas été, peut, selon le cas :

a) rejeter la requête ou la rejeter seulement contre la personne qui n'en a pas reçu signification;

b) ajourner la requête et ordonner la signification de l'avis de requête à cette personne;

c) ordonner la signification à cette personne de l'ordonnance rendue à la suite de la requête.

Délai de signification
38.05(3) Sauf si le tribunal abrège le délai de signification, lorsqu'une requête est présentée sur avis, l'avis de requête est signifié au moins 14 jours avant la date à laquelle elle doit être entendue.

R.M. 130/2017

38.05(4) [Abrogé]

R.M. 130/2017

AMENDMENTS

When amendments may be made
38.05.1(1) The applicant may amend a notice of application

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

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

MODIFICATIONS

Moment d'apporter des modifications
38.05.1(1) Le requérant peut modifier un avis de requête :

a) en déposant le consentement écrit de toutes les parties et, le cas échéant, celui de la personne qui doit être jointe ou substituée comme partie;

b) en tout temps sur demande, afin de corriger des erreurs d'écriture;

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CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

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province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

R.S., 1985, c. B-3, s. 242; 2002, c. 7, s. 85; 2007, c. 36, s. 57.

s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

L.R. (1985), ch. B-3, art. 242; 2002, ch. 7, art. 85; 2007, ch. 36, art. 57.

PART XI

Secured Creditors and Receivers

Court may appoint receiver

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

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

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

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

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.

Definition of *receiver*

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

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

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

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

243 (1) Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;

b) à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;

c) à prendre toute autre mesure qu'il estime indiquée.

Restriction relative à la nomination d'un séquestre

(1.1) Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

a) que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l'exécution de la garantie à une date plus rapprochée;

b) qu'il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

Définition de *séquestre*

(2) Dans la présente partie, mais sous réserve des paragraphes (3) et (4), ***séquestre*** s'entend de toute personne qui :

a) soit est nommée en vertu du paragraphe (1);

b) soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d'un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie,

business carried on by the insolvent person or bankrupt — under

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

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

ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant, la totalité ou la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires.

Definition of *receiver* — subsection 248(2)

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

Définition de *séquestre* — paragraphe 248(2)

(3) Pour l'application du paragraphe 248(2), la définition de ***séquestre***, au paragraphe (2), s'interprète sans égard à l'alinéa a) et aux mots « ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant ».

Trustee to be appointed

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

Syndic

(4) Seul un syndic peut être nommé en vertu du paragraphe (1) ou être habilité aux termes d'un contrat ou d'une ordonnance mentionné à l'alinéa (2)b).

Place of filing

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

Lieu du dépôt

(5) La demande de nomination est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

Orders respecting fees and disbursements

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

Ordonnances relatives aux honoraires et débours

(6) Le tribunal peut, relativement au paiement des honoraires et débours du séquestre nommé en vertu du paragraphe (1), rendre toute ordonnance qu'il estime indiquée, y compris une ordonnance portant que la réclamation de celui-ci à l'égard de ses honoraires et débours est garantie par une sûreté de premier rang sur tout ou partie des biens de la personne insolvable ou du failli, avec préséance sur les réclamations de tout créancier garanti; le tribunal ne peut toutefois déclarer que la réclamation du séquestre est ainsi garantie que s'il est convaincu que tous les créanciers garantis auxquels l'ordonnance pourrait sérieusement porter atteinte ont été avisés à cet égard suffisamment à l'avance et se sont vu accorder l'occasion de se faire entendre.

Meaning of *disbursements*

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

1992, c. 27, s. 89; 2005, c. 47, s. 115; 2007, c. 36, s. 58.

Sens de *débours*

(7) Pour l'application du paragraphe (6), ne sont pas comptés comme débours les paiements effectués dans le cadre des opérations propres aux affaires de la personne insolvable ou du failli.

1992, ch. 27, art. 89; 2005, ch. 47, art. 115; 2007, ch. 36, art. 58.

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M A N I T O B A

THE COURT OF KING'S BENCH ACT

C.C.S.M. c. C280

LOI SUR LA COUR DU BANC DU ROI

c. C280 de la *C.P.L.M.*

As of 17 Sept. 2024, this is the most current version available. It is current for the period set out in the footer below.

Le texte figurant ci-dessous constitue la codification la plus récente en date du 17 sept. 2024. Son contenu était à jour pendant la période indiquée en bas de page.

PART X

INTERLOCUTORY PROCEEDINGS

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

Terms on injunction or appointment
55(2) An order under subsection (1) may include such terms as are considered just.

No injunction re personal services
56(1) The court shall not grant an injunction which requires a person to work or perform personal services for an employer.

No contempt re personal services
56(2) No person shall be held in contempt of court by reason only of a refusal, neglect or failure of the person to work or perform personal services for an employer.

No injunction re freedom of speech
57(1) Subject to subsection (3), the court shall not grant an injunction that restrains a person from exercising the right to freedom of speech.

"Exercise right to freedom of speech"
57(2) For the purposes of this section, the communication by a person on a public thoroughfare of information by true statements, either orally or through printed material or through any other means, is an exercise of the right to freedom of speech.

PARTIE X

PROCÉDURES INTERLOCUTOIRES

Injonctions et séquestres
55(1) Le tribunal peut accorder une injonction interlocutoire de faire ou de ne pas faire ou peut nommer un séquestre ou un administrateur-séquestre au moyen d'une ordonnance interlocutoire, dans tous les cas où le juge estime qu'il est juste ou approprié d'agir ainsi.

Conditions
55(2) L'ordonnance prévue au paragraphe (1) peut être assortie des conditions que le tribunal estime justes.

Injonction portant sur des services personnels
56(1) Le tribunal ne peut accorder une injonction qui enjoint à une personne de travailler pour un employeur ou de lui rendre des services personnels.

Outrage au tribunal
56(2) Une personne ne peut être condamnée pour outrage au tribunal pour la seule raison qu'elle a refusé, négligé ou omis de travailler pour un employeur ou de lui rendre des services personnels.

Liberté d'expression
57(1) Sous réserve du paragraphe (3), le tribunal ne peut accorder une injonction qui restreint l'exercice de la liberté d'expression d'une personne.

Définition de l'« exercice de la liberté d'expression »
57(2) Pour l'application du présent article, la communication de renseignements qu'une personne fournit sur une voie publique au moyen de déclarations véridiques, soit verbalement, soit par documents imprimés ou par tout autre moyen, constitue un exercice de la liberté d'expression de cette personne.

Exceptions
57(3) Nothing in this section affects

(a) enforcement by criminal or quasi criminal proceedings of an Act of Parliament or of the Legislature or of a by-law of a municipality respecting

(i) the use of public thoroughfares,

(ii) the protection of public property,

(iii) the general conduct of persons in public places, or

(iv) restrictions on or prohibitions against the making of certain statements or statements of certain types; or

(b) enforcement by a civil proceeding

(i) of an Act of Parliament or of the Legislature respecting restrictions on or prohibitions against certain statements or statements of certain types, or

(ii) of the law respecting defamation.

"Public thoroughfare"
57(4) In this section, **"public thoroughfare"** includes a walk, driveway, roadway, square and parking area provided outdoors at the site of and in conjunction with a business or undertaking and to which the public is usually admitted without fee or charge and whether or not the walk, driveway, roadway, square or parking area is owned by the person carrying on the business or undertaking or is publicly owned.

Exception
57(3) Le présent article ne porte pas atteinte :

a) soit à l'exécution, par voie d'instance en matière criminelle ou quasi-criminelle, d'une loi du Parlement ou de la Législature ou d'un règlement municipal régissant, selon le cas :

(i) l'usage des voies publiques,

(ii) la protection de la propriété publique,

(iii) la conduite générale des personnes dans des endroits publics,

(iv) la limitation ou l'interdiction de certaines déclarations ou de certaines sortes de déclarations;

b) soit à l'exécution, par voie d'instance en matière civile :

(i) d'une loi du Parlement ou de la Législature concernant la limitation ou l'interdiction de certaines déclarations ou de certaines sortes de déclarations,

(ii) du droit concernant la diffamation.

Définition de « voie publique »
57(4) Au présent article, l'expression **« voie publique »** s'entend d'une promenade, d'une allée, d'une chaussée, d'un square ou d'une aire de stationnement extérieur, situé sur les lieux d'un commerce ou d'une entreprise et offert conjointement avec ces lieux, où le public est généralement admis gratuitement, que la promenade, l'allée, la chaussée, le square ou l'aire de stationnement soit ou non la propriété de la personne qui exploite le commerce ou l'entreprise ou qu'il soit ou non propriété publique.

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CITATION: Bank of Montreal v Carnival National Leasing Limited, 2011 ONSC 1007
COURT FILE NO.: CV-10-9029-00CL
DATE: 20110215

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

RE: BANK OF MONTREAL, Applicant

AND:

CARNIVAL NATIONAL LEASING LIMITED and CARNIVAL AUTOMOBILES LIMITED, Respondents

BEFORE: Newbould J.

COUNSEL: John J. Chapman and Arthi Sambasivan, for the Applicants
Fred Tayar and Colby Linthwaite, for the Respondents
Rachelle F. Mancur, for Royal Bank of Canada

HEARD: February 11, 2011

ENDORSEMENT

[1] Bank of Montreal ("BMO") applies for the appointment of PriceWaterhouse Coopers Inc. as national receiver of the respondents Carnival National Leasing Limited ("Carnival") and Carnival Automobiles Limited ("Automobiles") under sections 243 (1) of the *Bankruptcy and Insolvency Act* and 101 of the *Courts of Justice Act*.

[2] Carnival is in the business of leasing new and used passenger cars, trucks, vans and equipment vehicles. It has approximately 1300 vehicles in its fleet. Carnival is indebted to BMO for approximately $17 million pursuant to demand loan facilities. Automobiles guaranteed the indebtedness of Carnival to BMO limited to $1.5 million. David Hirsh is the president and sole director of Carnival and has guaranteed its indebtedness to BMO limited to $700,000. BMO holds security over the assets of Carnival and Automobiles, including a general security agreement under which it has the right to appoint a receiver

of the debtors or to apply to court for the appointment of a receiver. On November 30, 2010 BMO delivered demands for payment to Carnival, Automobiles and Mr. Hirsh.

[3] The respondents contend that no receiver should be appointed. In my view BMO is entitled to appoint PWC as a receiver of the respondents and it is so ordered for the reasons that follow.

Events leading to demand for payment

[4] The respondents quarrel with the actions of BMO leading to the demands for payment and assert that as a result a receiver should not be appointed.

[5] BMO has been Carnival's banker for 21 years. Loans were made annually on terms contained in a term sheet. Each year BMO did an annual review of the account, after which a new term sheet for the following year was signed. The last term sheet was signed on January 29, 2010 and was for the 2010 calendar year. The last annual review, completed on October 27, 2010, recommended a renewal of the credits with various changes being proposed, including a risk rating upgrade from 45 to 40 and a reduction in the demand wholesale leasing facility from $21.9 million to $20 million That review, however, was not sent to senior management for approval and no agreement was made extending the credit facilities to Carnival for the 2011 calendar year.

[6] The 2010 term sheet provided for two major lines of credit. The larger facility was a demand wholesale leasing facility with a limit of $21.9 million, under which Carnival submitted vehicle leases to BMO. If a lease was approved BMO advanced up to 100% of the cost of the vehicle and in return received security over the vehicle. The second facility was a general overdraft facility described as a demand operating loan with a limit of $1.15 million. The term sheet provided that all lines of credit were made on a demand loan basis and that BMO reserved the right to cancel the lines of credit "at any time at its sole discretion".

[7] Under the terms of the wholesale leasing facility, total advances for used vehicle financing were not to exceed 30% of the approved lease portfolio credit line. That apparently had been a term of the facility for many years. The annual review of October 27, 2010 stated that for the past year, the concentration of used leases was 27.8%. In the previous annual review in 2009, the figure for used lease concentration was 11.6%. Mr. Findlay of the BMO special accounts management unit (SAMU) said on cross-examination that while he could not say as a fact where those percentages came from, the routine for annual reviews was for the person preparing the annual review to obtain such figures from the support staff of the bank's automotive centre.

[8] Shortly after the 2010 annual review had been completed, and before it was sent to higher levels of the bank for approval, Mr. Lavery, the account manager at BMO for Carnival, received information from someone at BMO, the identity of whom I do not believe is in the record, informing him that the used car lease portfolio was approximately 60% of the leases financed by BMO, well in excess of the 30% condition of the loan. That led Mr. Lavery to call Mr. Findlay of SAMU. On November 17, 2010 BMO engaged PWC to review the operations of Carnival. On November 26, 2010 BMO's solicitors delivered to Carnival a letter which stated, amongst other things, that BMO would not finance any future leases until PWC's review engagement was completed, that BMO would no longer allow any overdraft on Carnival's operating line and that the bank reserved its right to demand payment of any indebtedness at any time in the future.

[9] On November 29, 2010 PWC provided its initial report to BMO. It contained a number of matters of concern to BMO, including itemizing a number of breaches of the lending agreements that Carnival had with BMO. On November 30, 2010 BMO's solicitors delivered to Carnival a letter itemizing a number of breaches of the loan agreements, one of which was that advances for used vehicle financing were in excess of 30% of the approved lease portfolio credit line. Demand for payment under the lines of credit totalling $17,736,838.45 was made. Following the demand, PWC continued its engagement and discovered a number of irregularities in the Carnival business, some of which are contained in the affidavit of Mr. Findlay.

[10] It turns out that the 30% limit for used vehicle leases had not been met for some time. Carnival provided to BMO's automotive centre copies of the individual leases and bills of sale which showed the model year of the car to to be financed and this information was in the BMO automotive centre computer records. Reports on BMO's website as at December 31, 2008 demonstrated 45% of Carnival's BMO financed leases were for used vehicles. At December 31, 2009 it was 73% and as at October 31, 2001 it was 60%. The evidence of Mr. Findlay on cross-examination was that while that information was on the computer system, it was not known by the account management responsible for the Carnival credits. He acknowledged that if the account management went to the computer system they would have seen that information but if they did not they would not have known of it. There is no evidence that Mr. Lavery or others in the account management of BMO responsible for the Carnival credit were aware before late October, 2010 of the true percentage of the used car lease portfolio.

[11] Mr. Hirsh said on cross-examination that he assumed somebody in control at the bank knew the percentage of used vehicle leases. Although the loan terms he signed each year contained the 30% condition, he never suggested that the percentage should be changed to a higher figure. One can argue that Mr. Hirsh should have told his account manager at BMO that the condition he was agreeing to was not being met. Of course if he had done so he could well have faced a likely loss of credit needed to run his business. The loan terms included a requirement that Carnival provide an annual detailed analysis of the entire lease portfolio, including a breakdown of the lease concentrations. Had those been provided, it would appear that the percentage of used vehicle leases would have been reported by Carnival. While the record does not indicate whether such reports were provided, I think it can be assumed that if they had been, Mr. Hirsh would have provided that information in his affidavit.

[12] Since November 26, 2010, BMO has not financed any further vehicles under the demand wholesale line of credit. Pending the application to appoint a receiver, BMO has continued to extend the $1.15 million operating facility, in spite of its demand. Under the terms of the demand wholesale line of credit, Carnival is obliged after selling vehicles

financed by BMO to pay down the wholesale leasing line within 30 days by transferring the money received from its operating line account to the wholesale leasing line. It has not always done so and PWC estimates the amount involved to be $814,000. The operating facility is now in overdraft as a result of the demand for payment.

Issues

(a) Right to enforce payment

[13] On a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. Reasonable time will generally be of a short duration, not more than a few days and not encompassing anything approaching 30 days. See *Kavcar Investments Ltd. v. Aetna Financial Services Ltd.* (1989), 70 O.R. (2d) 225 (C.A.) per McKinley J.A. See also *Toronto-Dominion Bank v. Pritchard* [1997] O.J. No. 4622 (Div. C.) per Farley J.:

> 5. It is clear therefore that the reasonable time to repay after demand is a very finite time measured in days, not weeks, and it is not "open ended" beyond this by the difficulties that a borrower may have in seeking replacement financing, be it bridge or permanent.

[14] Under the loan agreements, the credits were on demand and as well BMO had the right to cancel the credits at any time at its sole discretion. It is now over 70 days since demand for payment was made.

[15] I do not see the issue of BMO management not being aware of the percentage of used car leases as affecting BMO's rights under its loan agreements, even assuming it was all BMO's fault, which I am not at all sure is the case. There is no evidence that BMO in any way intentionally waived its 30% loan condition, nor is it the case that it was only a breach of the 30% condition that led to the demand for payment being delivered to Carnival. There were a number of other concerns that BMO had. In any event, there was no requirement before demand or termination of the credits that BMO had to have

justification to demand payment. To the contrary, the agreement provided that BMO had the right to terminate the credits at any time at its sole discretion.

[16] In argument, Mr. Tayar said that Carnival needs just a little more time to obtain financing to pay out the BMO loans. From a legal point of view Carnival has been provided more time than is required. From a practical point of view, it is very unlikely that Carnival will be able in any reasonably foreseeable period of time to pay out BMO.

[17] The car leasing business for businesses such as Carnival has been very difficult for a number of years, as acknowledged by Mr. Hirsh. Competitors such as Ford, GM and Chrysler began offering very low interest rates for new vehicles that Carnival could not provide. The economy led to more customers missing payments. There were lower sales generally. Carnival's leased assets fell from $49 million in 2006 to $35 million in 2009. Carnival had a profit of $1.2 million in 2006 but in the years 2007 through 2009 had a cumulative net loss of $244,000. While its business was shrinking, Carnival's accounts receivable grew significantly, from $1.5 million in 2006 to $2.8 million in 2009, indicating, as Mr. Hirsh acknowledged on cross-examination, that customers owed more than in the past for lease payments because of difficult economic times.

[18] Carnival also borrowed from RBC to finance its lease portfolio. Some leases were financed with BMO and some with RBC. In the mid-2000s, the size of Carnival's loan facility with BMO and RBC was about even. In 2008 RBC stopped lending to Carnival on new leases and since then Carnival has been paying down its RBC loans. Today Carnival owes RBC approximately $5.6 million. Thus Carnival owes the two banks approximately $22.6 million.

[19] In an affidavit sworn February 8, 2011, Mr. Hirsh disclosed that he has had discussions with TD Bank and has an indication of a loan of approximately $11.5 million. A deal sheet has yet to be provided to TD's credit department for approval, but is expected to be considered by the end of February. If approved, it is contemplated that funds could be advanced sometime in April. Mr. Hirsh states that the TD guidelines allow TD to advance (i) on new vehicles $6.5 million on leases currently financed by BMO and $1.9 million

on leases currently financed by RBC and (ii) on used vehicles, $2 million on leases currently financed by BMO and $392,000 on leases currently financed by RBC. A further $2 million would be available on non-bank financed leases. Thus if a TD loan were granted, at most the amount that would be available to pay down BMO would be $10.5 million and it might be less if, as is likely, there are not $6.5 million worth of new car leases currently being financed by BMO.

[20] Mr. Hirsh further states in his affidavit that he believes he will be able to pay off the balance of BMO loans through a combination of TD financing new Carnival leases and the payout of existing leases and/or sales of Carnival vehicles. No time estimate is given for this and one can only conclude that it would not be soon.

[21] In these circumstances, assuming that it is permissible to consider the chances of refinancing in considering what a reasonable time would be to permit enforcement of security after a demand for payment, I do not consider the chances of refinancing in this case to prevent BMO from acting on its security.

[22] BMO had the right under its loan agreements to stop financing new vehicle leases and to demand payment of the outstanding loans. No new term sheet was signed for 2011. Since the demand for payment, it has provided far more time than required in order to enforce its security. In my view, BMO is entitled to payment of the outstanding loans and to enforce its security including, if it wished to do so, to privately appoint a receiver of the assets of Carnival and Automobile or serve notices to the large number of lessees of the assignment of the leases and require payment directly to BMO.

(b) Court appointed receiver

[23] Under section 243 of the *BIA* and section 101 of the *Courts of Justice Act*, a court may appoint a receiver if it is “just and convenient” to do so.

[24] In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, Blair J. (as he then was) dealt with a similar situation in which the bank held security that

permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:

> 10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally Third Generation Realty Ltd. v. Twigg (1991) 6 C.P.C. (3d) 366 at pages 372-374; Confederation Trust Co. v. Dentbram Developments Ltd. (1992), 9 C.P.C. (3d) 399; Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd. (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49.

[25] It is argued on behalf of Carnival that the appointment of a receiver is an extraordinary remedy to be granted sparingly and that as it amounts to execution before judgment, there must be strong evidence that the plaintiff's right to judgment must be exercised sparingly. The cases that support this proposition, however, are not applicable as they do not deal with a secured creditor with the right to enforce its security.

[26] *Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd.* (1987) 16 C.P.C. (2d) 130 is relied on by Carnival as supporting its position. That case however dealt with a disputed claim to payments said to be owing and a claim for damages. The plaintiff had no security that permitted the appointment of a receiver and requested a court appointed receiver until trial. Salhany L.J.S.C. likened the situation to a plaintiff seeking execution before judgment and considered that the test to support the appointment of a receiver was no less stringent than the test to support a Mareva injunction. With respect, that is not the law of Ontario so far as enforcing security is concerned. The same situation pertained in

Anderson v. Hunking 2010 ONSC 4008 cited by Mr. Tayar. I have serious doubts whether *1468121 Ontario Ltd. v. 663789 Ontario Ltd*. 2008 CarswellOnt 7601 cited by Mr. Tayar was correctly decided and would not follow it.

[27] In *Bank of Nova Scotia v. Freure Village on Clair Creek,* Blair J. dealt with an argument similar to the one advanced by Carnival and stated that the extraordinary nature of the remedy sought was less essential where the security provided for a private or court appointed receiver and the issue was essentially whether it was preferable to have a court appointed receiver rather than a private appointment. He stated:

> 11. The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.
>
> 12. While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager

[28] In *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*, (1995), 30 C.B.R. (3d) 49, in which the bank held security that permitted the appointment of a private or court ordered receiver, Ground J. made similar observations:

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

[29] See also *Bank of Nova Scotia v. D.G. Jewelry Inc*., (2002) 38 C.B.R. (4th) 7 in which Ground J. rejected the notion that it is necessary where there is security that permits the appointment of a private or court ordered receiver to establish that the property is threatened with danger, and said that the test was whether a court ordered receiver could more effectively carry out its duties than it could if privately appointed. He stated:

> I do not think that, in order to appoint an Interim Receiver pursuant to Section 47 of the BIA, I must be satisfied that there is an actual and immediate danger of a dissipation of assets. The decision of Nova Scotia Registrar Smith in Royal Bank v. Zutphen Brothers, [1993] N.S.J. No. 640, is not, in my view, the law of Ontario.
> …
>
> On the main issue of the test to be applied by the court in determining whether to appoint a Receiver, I do not think the Ontario courts have followed the Saskatchewan authorities cited by Mr. Tayar which require a finding that the legal remedies available to the party seeking the appointment are defective or that the appointment is necessary to preserve the property from some danger which threatens it, neither of which could be established in the case before this court. The test, which I think this court should apply, is whether the appointment of a court - appointed Receiver will enable that Receiver to more effectively and efficiently carry out its duties and obligations than it could do if privately appointed.

[30] This is not a case like *Royal Bank v. Chongsim Investments Ltd* (1997) 32 O.R. (3d0 565 in which Epstein J. (as she then was) dismissed a motion to appoint a receiver. While the loan was a demand loan and the bank's security permitted the appointment of a receiver, the parties had agreed that the loan would not be demanded absent default, and Epstein J. held that the bank, acting in bad faith, had set out to do whatever was necessary to create

a default. Thus she held it was not equitable to grant the relief sought. That case is not applicable to the facts of this case.

[31] Carnival relies on a decision in *Royal Bank of Canada v. Boussoulas* [2010] O.J. No. 3611, in which Stinson J. was highly critical of the actions of the bank and its counsel in overstating its case and making unsupportable allegations of fraud in its motion affidavit material and facta filed before him and previously before Cumming J. He thus declined to continue a Mareva injunction earlier ordered by Cumming J. or appoint an interim receiver over the defendant's assets. There is no question but that a court can decline to order equitable relief in the face of misconduct on the part of a party seeking equitable relief.

[32] In my view, there is no basis to refuse the order sought because of alleged misconduct on the part of BMO or its counsel. To the contrary, if anything, the shoe is on the other foot. The factum filed on behalf of Carnival is replete with allegations of false assertions on behalf of BMO, none of which have been established.

[33] Carnival says the first affidavit of Mr. Findlay was false when it said that the bank first discovered the high concentration of used cars in late October, 2010, because it says the concentration was on the bank's website. This ignores the fact that the account management personnel responsible for the Carnival account did not know of the high concentration of used car leases in excess of the 30% limit, as testified to by Mr. Findlay and evident from the loan reviews for the past two years prepared by account management which stated that the used car concentration was 27.8 and 11.6 %. Although the BMO internal auditors had conducted quarterly audits, the unchallenged evidence of Mr. Findlay is that the purpose of each audit was to review whether each individual lease has been properly papered and handled. The audit did not look at the Carnival portfolio as a whole or to see what percentage of leases were for new or used vehicles.

[34] It is argued that BMO has tried to mislead the Court by suggesting that payments received by Carnival after a leased vehicle was sold were to be held in trust for BMO. There is nothing in this allegation. Mr. Findlay referred in his affidavit to the term "sold

out of trust", or SOT, a term apparently widely used in the automobile industry, to refer to the situation in which a borrower such as Carnival fails to remit to its lender the proceeds of sale of a financed vehicle. Mr. Findlay did not say that there was any type of legal trust, nor did he imply it. He identified what he said were SOTs, as did PWC in its report, and while he said on cross-examination that he understood that all proceeds from sales of vehicles were paid into Carnival's account at BMO, Carnival had not paid down its loans with these proceeds as it was required to do under the loan terms, but rather had kept the money in its operating account available for its operating purposes. The fact that some of Mr. Findlay's calculations of amounts involved differ from the calculations of PWC after it was sent in to investigate the situation hardly makes the case that BMO set out to mislead the Court by a fabrication and by use of falsified numbers, as was alleged in Mr. Tayar's factum.

[35] In his first affidavit Mr. Findlay referred to a concern of BMO as set out in the initial report that Mr. Hirsh was using the Carnival operating line to pay personal mortgages on his home. On cross-examination he said he understood that the money from the mortgages was put into the Carnival account as an injection of capital and he agreed that the payment of interest on the mortgages from Carnival's account was not an improper use of its resources. This is somewhat different from the statement of concern in his affidavit, but I do not see it as terribly important and as Mr. Findlay was in special account management and not managing the account, it is quite possible that the difference was due to learning more and changing his mind. I do not conclude that he set out to mislead the Court.

[36] In my view, it would be preferable to have a court appointed receiver rather than a privately appointed one. Mr. Tayar said that if a private appointment were made, Carnival would litigate its right to do so. This would not at all be helpful when it is recognized that there are some 1300 vehicles under lease and any dispute as to whom lease payments were to be paid could quickly dry up or lessen the payments made. There are already a number of leases in default, and people might opportunistically decide not to pay if there were a dispute as to who was in control. The prospect of more litigation was a

consideration that led Blair J. to ordering the appointment of a receiver in *Bank of Nova Scotia v. Freure Village on Clair Creek.*

[37] While there may be increased costs over a private receivership, it would appear that this may well be at the expense of BMO and RBC, the other secured creditor. RBC supports the appointment of a receiver by the Court. Carnival has accounts receivable of some $4.4 million. As at November 25, approximately $3 million was more than 120 days old. The book value of the leases of $30 million is therefore questionable, and the repayment of $22.6 owing to BMO and RBC is not assured. Further, a court appointed receiver would have borrowing powers, which might be required as Cardinal has not so far been able to obtain new operating credit lines.

[38] In the circumstances the order sought by BMO is granted in the form contained in tab 3 of the application record.

_____

Newbould J.

DATE: February 15, 2011

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CITATION: RBC v. Maxx Properties (No. 323) Ltd., 2024 ONSC 1660
COURT FILE NO.: CV-23-00706680-00CL
DATE: 20240228

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

RE: Royal Bank of Canada, Plaintiff

AND:

Maxx Properties (No. 323) Ltd. and Blake Larsen, Defendants

BEFORE: Peter J. Osborne J.

COUNSEL: *George Benchetrit*, for the Plaintiff

Rahul Shastri, for Maxx Properties (No. 323) Ltd., Defendant/Debtor and for Blake Larsen, Defendant/Guarantor

Daniel Shunock, for McDougall Energy Inc., Secured Creditor

HEARD: February 28, 2024

ENDORSEMENT

[1] The Plaintiff, the Royal Bank of Canada, (the "Plaintiff" or "RBC") seeks the appointment of a Receiver pursuant to s. 243 of the *Bankruptcy and Insolvency Act* and s. 101 of the *Courts of Justice Act*, of the assets, undertakings and properties of the Defendant, Maxx Properties (No. 323) Ltd., the Debtor, including the real property owned by the Debtor at 1510 and 1516 Markham Rd., Scarborough, ON.

[2] Defined terms in this Endorsement have the meaning given to them in the motion materials unless otherwise stated.

[3] RBC relies upon the Affidavit of Peter Gordon sworn September 25, 2023 together with exhibits thereto and the Supplementary Affidavit of Peter Gordon sworn January 19, 2024, together with exhibits thereto.

[4] The Debtor relies upon the affidavit of Mr. Blake Larsen affirmed February 26, 2024 together with exhibits thereto. Mr. Larsen is the president, sole officer and sole director of the Debtor. He is also the Guarantor of the indebtedness of the Debtor.

[5] Almost all of the relevant facts are not in dispute and are not contested. Indeed, the position of the Debtor is that it does not contest the contractual right of the Plaintiff to appoint a receiver in the event of default under the security documents, and that an event of default has occurred. In his

Affidavit, Mr. Larsen deposes at paragraph 13 that: "I realize that the Bank is in a position to force the appointment of a Receiver".

[6] The Debtor submits, however, that it should be given one more additional extension and a brief period of time until March 8, 2024, since there is a transaction at hand that is expected to close on that date and which, it is submitted, would yield sufficient funds to pay out RBC as well as a subordinate ranking creditor, McDougall Energy (who was present today as an observer and took no position on the motion).

[7] RBC seeks the appointment of a Receiver today notwithstanding the possibility of a new transaction, given the chronology of this matter and particularly the repeated indulgences and forbearances granted to the Debtor that have not resulted in any transaction.

[8] The test for the appointment of a receiver pursuant to s. 243 of the *BIA* or s. 101 of the *CJA* is not in dispute. Is it just or convenient to do so?

[9] In making a determination about whether it is, in the circumstances of a particular case, just or convenient to appoint a receiver, the court must have regard to all of the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto. These include the rights of the secured creditor pursuant to its security: *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 O.J. No. 5088, 1996 CanLII 8258.

[10] Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties: *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 at para. 27. However, the presence or lack of such a contractual entitlement is not determinative of the issue.

[11] The appointment of a receiver becomes even less extraordinary when dealing with a default under a mortgage: *BCIMI Construction Fund Corporation et al v. The Clover on Yonge Inc.*, 2020 ONSC 1953 at paras. 43-44.

[12] As observed in *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186, the Supreme Court of British Columbia, citing *Bennett on Receivership*, 2nd ed. (Toronto, Carswell, 1999) listed numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver and with which I agree: *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 at para. 25):

a. whether irreparable harm might be caused if no order is made, although as stated above, it is not essential for a creditor to establish irreparable harm if a receiver is not appointed where the appointment is authorized by the security documentation;

b. the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of assets while litigation takes place;

c. the nature of the property;

d. the apprehended or actual waste of the debtor's assets;

e. the preservation and protection of the property pending judicial resolution;

f. the balance of convenience to the parties;

g. the fact that the creditor has a right to appointment under the loan documentation;

h. the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;

i. the principle that the appointment of a receiver should be granted cautiously;

j. the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;

k. the effect of the order upon the parties;

l. the conduct of the parties;

m. the length of time that a receiver may be in place;

n. the cost to the parties;

o. the likelihood of maximizing return to the parties; and

p. the goal of facilitating the duties of the receiver.

[13] How are these factors to be applied? The British Columbia Supreme Court put it, I think, correctly: "these factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient: *Pandion Mine Finance Fund LP v. Otso Gold Corp*., 2022 BCSC 136 at para. 54).

[14] It is not essential that the moving party establish, prior to the appointment of a receiver, that it will suffer irreparable harm or that the situation is urgent. However, where the evidence respecting the conduct of the debtor suggests that a creditor's attempts to privately enforce its security will be delayed or otherwise fail, a court-appointed receiver may be warranted: *Bank of Montreal v. Carnival National Leasing Ltd*., 2011 ONSC 1007 at paras. 24, 28-29.

[15] Accordingly, is it just or convenient to appoint a receiver in the particular circumstances of this case?

[16] In my view, it is, for the following reasons.

[17] The Credit Agreement entered into between RBC and the Debtor provides that the failure by the Debtor to pay any principal, interest or other amount when due is an event of default. If that occurs, the bank is entitled to demand immediate repayment and realize on any or all of the security.

[18] Similarly, the Mortgage provides that it is an event of default when the chargor fails to make payment of any instalment of principal, interest or taxes secured by the charge. The Mortgage also provides for the appointment of a receiver over the Real Property in the event of default. The GSA also provides that nonpayment when due of any principal or interest is an event of default, and the GSA allows for the appointment of a receiver upon default.

[19] The Credit Facilities have been in default since at least September, 2023. The total amount owed by the Debtor to RBC as of February 22, 2024 is in excess of $7.2 million.

[20] On September 5, 2023, RBC made formal written demand for payment on the Debtor and the Guarantor and delivered s. 244 *BIA* notices of its intention to enforce its security.

[21] The Debtor then began depositing collections and cash receipts in a bank account not at RBC, but rather at the Bank of Montréal, contrary to the agreed provisions of the GSA.

[22] The indebtedness was not repaid, with the result that RBC brought this motion first returnable on October 24, 2023, for the appointment of a receiver.

[23] Just prior to that first appearance, the Debtor delivered to the bank an agreement of purchase and sale dated October 16, 2023 for the sale of the Properties, conditional upon due diligence being performed by the purchaser. The scheduled closing date was January 25, 2024. The receivership motion was scheduled to be heard on November 23, 2023.

[24] Approximately three weeks prior to that hearing date, on November 1, 2023, the Debtor advised RBC that the due diligence condition in the agreement of purchase and sale had been waived, but that the closing date had been extended to January 31, 2024.

[25] On November 7, 2023, the Debtor advised RBC that it had "a *bona fide* firm deal" with an arm's-length party and that "all arrears in priority payables will be made good within a week". Accordingly, the Debtor sought from the bank a forbearance on the basis that the information provided "should be sufficient to allow for a forbearance agreement".

[26] Indeed, it was, and on November 17, 2023, RBC, the Debtor and the Guarantor entered into a forbearance agreement made as of November 14, 2023. Pursuant to that forbearance agreement, RBC agreed not to take any steps to enforce the security until the earlier of January 31, 2024 and the occurrence of an event of default.

[27] Pursuant to the forbearance agreement, the Debtor was required to pay all regularly scheduled interest payments when due, and the Debtor and the Guarantor were required to give to the Monitor appointed by RBC over the business and affairs of the Debtor during the forbearance period (on consent), their full cooperation in facilitating the monitoring of the activity in the Debtor's bank accounts as well as developments relating to the sale of the Properties.

[28] Moreover, the Debtor agreed to provide the Monitor with all information and documents that had been provided to the real estate broker in connection with the listing of the Properties for sale, and all materials provided to the purchaser under the agreement of purchase and sale with respect to its due diligence (including environmental reports, tax bills, insurance statements and all lease agreements and contracts relating to the Property).

[29] In addition, the Debtor was to transfer, forthwith, all funds in the Bank of Montréal account into an account at RBC, and all payments or other proceeds received by the Debtor were to be deposited into an RBC account. Finally, the Debtor was required to provide written evidence to the Monitor, upon request, that Priority Payables had been paid.

[30] Upon the occurrence of an event of default under the forbearance agreement, not cured within five days, the outstanding balance of the Indebtedness would become immediately due and payable, and the bank had the right to proceed with this motion to appoint a receiver as soon as possible. Importantly, pursuant to the forbearance agreement, and upon the occurrence of an event of default, the Debtor irrevocably consented to the appointment of a receiver.

[31] Events of default under the forbearance agreement (as well as the original security agreements) have occurred and continue to occur. In particular, the Debtor has failed to make the regularly scheduled interest payments; has failed to provide to the Monitor the information set out above; has failed to transfer the funds in the BMO account to RBC; has failed to provide evidence to the Monitor that Priority Payables have been paid; and has committed other defaults.

[32] Notice of the default under the forbearance agreement was sent on behalf of RBC to the Debtor in December 6, 2023, triggering the five day cure period. The defaults were not cured. On January 10, 2024, RBC notified the Debtor that if a satisfactory response was not provided, RBC would assume that the proposed transaction would not close and the bank would proceed accordingly.

[33] The transaction did not close. Yet still, however, the Debtor failed to respond to RBC in any way, with the result that on January 16, 2024, RBC advised the Debtor that it would seek a hearing date for this motion. On January 25, 2024, the Debtor advised RBC that the closing date for the transaction had been extended to March 8, 2024 as a result of a timing issue with the purchaser's funding.

[34] That same day, the bank requested further information from the Debtor regarding the extension of the closing date, in response to which the Debtor provided a copy of a mortgage commitment letter which was highly conditional and the loan amount ($6 million) was materially

lower than the purchase price in the agreement of purchase and sale, and also materially lower than the indebtedness owed to RBC.

[35] On January 30, 2024, at a scheduling appointment attended by both parties, today's hearing was scheduled.

[36] There was still no response from the Debtor and no responding materials were filed until two days ago, when the Debtor filed an affidavit from Mr. Larsen stating that on January 25, 2024, he was advised by the agent involved in the transaction that the buyer required a six week extension to close as its financing had been delayed. The Debtor then agreed to the extension with the result that the transaction is now scheduled to close on March 8, 2024.

[37] RBC is extremely concerned about the continued erosion of the value of its security in all the circumstances. There is no question that the Debtor has defaulted on its obligations under the original security documents as well as under the forbearance agreement.

[38] The defaults are not merely technical. In addition to the fundamental fact that there has been no monetary repayment whatsoever since December, the Debtor continues to operate the gas station business at the Property and receive revenues. Yet, no repayment is being made to the bank, nor have the funds been transferred to an RBC account as was specifically agreed to. The inescapable inference is that the funds are being diverted on a continuing basis.

[39] At the same time, the information and documents requested by the Monitor, and agreed to be provided by the Debtor, have simply not been provided, again without any explanation whatsoever.

[40] The Debtor has been given multiple indulgences and forbearances for months, the entire fundamental premise for which was that his transaction was afoot and that it was unconditional. Now, it is sought to be extended yet again because the proposed purchaser does not have financing.

[41] The extension agreement attached to the affidavit of Mr. Larsen required the consent of RBC. Yet the record is clear that RBC was not even made aware of the request for an extension, let alone was its consent given, prior to that extension agreement being signed.

[42] The Debtor simply went ahead and executed the agreement. Even the agreement by the Debtor is odd and unexplained, since it is dated December 28, 2023, weeks before the extension was apparently sought. Whether that is a typographical error (oddly) or not is unexplained. Moreover, the record does not include any information or documents explaining how the request for the extension came about; for example, when it was requested, on what basis, and in what form. There are no documents.

[43] Even more substantively, there is no evidence whatsoever in the record as to the financial means of the proposed purchaser in order that the court (or RBC) can assess whether there is a reasonable prospect of the financing coming through for the Debtor or not.

[44] In the circumstances, and particularly in the circumstances of a continuing very material payment default, the continuing erosion of security, and the failure or refusal of the Debtor to comply with the terms to which it voluntarily agreed in the forbearance agreement to get an earlier forbearance, I am satisfied that the appointment of a Receiver now is appropriate.

[45] Moreover, I cannot accept the submission of the Debtor, made without evidence, that the appointment of a Receiver "will almost certainly" result in the transaction not closing. There is no basis for the conclusion that the purchaser would be any less motivated to close the transaction if that is its intention and ability, by way of submitting an offer to the Receiver who would consider it and if appropriate seek court approval for a sale pursuant to the *Soundair* Principles.

[46] The Fuller Landau Group Inc. is well qualified to act as Receiver and consents to the appointment in this case.

[47] The draft order is consistent with the Model Order of the Commercial List. While not determinative, that gives me additional comfort about the scope of the receivership and the terms of the proposed order. Counsel for the Debtor was candid in his submissions that while he opposed the appointment of a Receiver, he was content with the form of order if the court concluded, as I have done, that a Receiver should be appointed.

[48] Order to go in the form signed by me today which is effective immediately and without the necessity of issuing and entering.

Osborne J.

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CITATION: Callidus v. Carcap, 2012 ONSC 163
COURT FILE NO.: CV-11-00009498-OOCL
DATE: 20120105

SUPERIOR COURT OF JUSTICE - ONTARIO
(COMMERCIAL LIST)

RE: CALLIDUS CAPITAL CORPORATION, Applicant/Respondent by cross-application

A N D:

CARCAP INC. and CAR EQUITY LOANS CORP., Respondents/Applicants by cross-application

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

AND RE: KAPTOR FINANCIAL INC. and CARCAP AUTO FINANCING, Applicants by cross-application

AND:

CALLIDUS CAPITAL CORPORATION, Respondent by cross-application

BEFORE: MESBUR J.

COUNSEL: Harvey G. Chaiton and George Benchetrit for the applicant/respondent by cross-application

Mel Solmon, Fred Tayar and Colby Linthwaite for the respondents and applicants by cross-application

Robb English for the Toronto Dominion Bank

A. Kaufman for proposed Receiver, BDO Canada Ltd.

Jennifer Imrie for Third Eye Capital

HEARD: December 14, 2011

E N D O R S E M E N T

Introduction:

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

> For reasons to follow, an order will go in the following terms:
>
> a) The debtors' cross application for an initial order under the CCAA is dismissed.
>
> b) The application to appoint a Receiver is granted, but will not take effect until 5:00 p.m. on December 20, 2011.
>
> c) If the debtor has obtained alternate financing & has paid the applicant in full by 5:00 p.m. December 20, 2011 then the Receivership Order will not take effect.
>
> d) If the terms of paragraph (3) [i.e. paragraph (c)] above have not occurred then the Receivership order will be with effect as of 5:01 pm December 20/11.
>
> e) If the parties cannot agree on the terms of the Receivership order (following the terms of the Model Order) they may make an appointment to settle the terms of the order.
>
> f) Even if the Receivership Order takes effect on December 20/11 at 5:00 pm nothing prohibits the Debtor from continuing its efforts to refinance.

[2] Counsel tell me the debtor was unable to obtain financing to pay the applicant in full by December 20, 2011. Accordingly, the Receivership Order is now in effect, and it is necessary for me to deliver the reasons for my decision to appoint a receiver and decline to make an initial order under the *CCAA*.

[3] These are those reasons.

[1] R.S.C. 1985 c. C-36

The application and cross-application:

[4] The applicant, Callidus, is the respondents' first secured lender. On this application, it sought the appointment of a Receiver under both the *Bankruptcy and Insolvency Act*[2] and section 101 of the *Courts of Justice Act.*[3] The TD Bank, who is the respondents' second secured lender, supported the receivership application. It pointed out none of the respondents' refinancing proposals included sufficient financing to retire the respondents' debt to the TD Bank. Accordingly, the TD Bank took the position that even if the respondents were able to find alternate financing sufficient to pay out Callidus, the TD Bank would bring its own application to appoint a receiver under the terms of its own security.

[5] The respondents brought a cross-application for relief under the *CCAA.* Both Callidus and TD Bank opposed the cross-application.

Facts:

[6] The respondent CarCap is in the business of sub-prime car lease financing. The respondent Cashland provides sub-prime equity car loans. Both companies are subsidiaries of CarCap Auto Finance Inc., which itself is a subsidiary of Kaptor Financial Inc. Kaptor Financial owns several other companies, either in whole or in part. The parties refer to these companies as the Kaptor Group. An individual named Eric Inspektor controls the entire Kaptor Group, either directly or indirectly.

[7] The Kaptor Group, including the respondents, had deposit accounts with the TD Bank. Initially, they did not have any credit facilities with the TD. Both the respondents and the Kaptor Group had financing elsewhere. Before Callidus lent operating funds to the respondents, the Laurentian Bank provided an operating facility to them. In addition, the Kaptor Group used private investors to finance their businesses through separately incorporated special purpose investment vehicles. They refer to them as "silos". The silos provided funding either through secured term debentures or preference shares.

Callidus provides financing

[8] On September 1, 2011 Callidus replaced the Laurentian Bank as the respondents' first secured lender. It did so pursuant to a credit facility agreement, under which it

[2] R.S.C. 1985 c. B-3 as amended
[3] R.S.O. 1990, c. C-43, as amended

agreed to advance a demand loan of up to $15 million subject to certain margin conditions. The agreement provided that advances were to be used:

a) To pay off the existing indebtedness to the Laurentian Bank;

b) To repay certain silo investors;

c) To provide working capital; and

d) To finance existing and future vehicle lease and vehicle loan transactions.

[9] Another term of the agreement required the respondents to establish "blocked" accounts at a bank. The respondents had to deposit all funds they received from all sources into these blocked accounts. The respondents established the blocked accounts at the TD Bank.

[10] The Callidus credit facility had other provisions that are relevant to this application. The respondents' representations required them to disclose "all commitments of any lender (other than the Lender) for all debt for borrowed money, and all debt for borrowed money outstanding of the Borrowers or Corporate Guarantors."[4] The respondents did not disclose they owed any money to TD Bank, although at the time they did. In fact, in the schedule where the respondents were required to list their "current debt defaults", they entered "none". This was not true. I will discuss this more fully in the section "Changes to the respondents' arrangements with TD Bank", below.

[11] The respondents also represented that all the information they had given Callidus was "true and correct and does not omit any fact necessary in order to make such information not misleading."[5]

[12] Callidus made its advances to a disbursement account that the respondents maintained. The disbursement account was also at the TD Bank.

[13] The credit facility's terms provided that it was due on demand, and was repayable in full on the earlier of September 1, 2012 or an event of default. Remedies on default include Callidus' right to appoint a receiver and to apply to the court to appoint a receiver.

[14] The credit facility is fully secured by general security agreements as well as a first ranking secured interest over the properties, assets and undertakings of the respondents.

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[4] Credit facility agreement paragraph 17(k)
[5] *Ibid.* paragraph 17(q)

Changes to the respondents' arrangements with TD Bank.

[15] The respondents and other Kaptor Group companies initially had only deposit accounts with the TD Bank. Their banking arrangements did not include any overdraft or credit facilities. In July and August of 2011 the TD noticed what it characterized as a high rate of unusual activity in the respondents' accounts as well as in those of other Kaptor Group companies.

[16] What was unusual is that more than $60 million in cheques passed through various Kaptor Group accounts. On August 18, 2011 about $18 million flowed through in a single day. TD Bank viewed this as unusual since the businesses generally had annual revenue of about $24 million. That day, the TD Bank froze the Kaptor Group accounts. When they froze the accounts, they were in an overdraft position of about $7 million, contrary to their banking arrangements with the TD.

[17] TD Bank then entered into an accommodation agreement with the Kaptor Group, including the respondents. The accommodation agreement, which was dated August 23, 2011, provided a secured loan of $5 million to cover the overdraft, and to provide some working capital. The loan was to be repaid in full by August 29, 2011. It was not.

Callidus advances

[18] Callidus knew nothing about the Kaptor Group/respondents' overdraft with the TD Bank, the accommodation agreement or their failure to repay the TD loan. On September 1, 2011 Callidus made its first advance into the respondents' disbursement accounts. The advance totalled just over $8.4 million and was used to pay out the Laurentian Bank debt, make payments to silo investors and provide working capital of just under $1 million. Clearly, given the respondents' situation with TD Bank at the time of the advance, the respondents were in breach of their representations to Callidus in the credit facility agreement.

The TD Bank's accommodation agreement is amended, then terminated

[19] Since the TD Bank had not been repaid, it entered into an agreement to amend the original accommodation agreement. The amending agreement was dated September 7, 2011, a week after Callidus had advanced. The amending accommodation agreement provided for the Kaptor Group to acknowledge it was in overdraft at that date to the extent of $2.6 million. TD Bank agreed to advance up to $2 million (instead of the original $5 million) to cover the overdraft. TD Bank was to be repaid in full by September 12, 2011. Again, it was not.

[20] On September 16, TD Bank entered into an agreement to terminate the accommodation agreement. In the termination agreement TD Bank agreed to extend the financing subject to certain paydowns, and with the requirement that the financing be paid in full by September 30. Once again, Kaptor Group failed to pay off the debt. It remains outstanding. Currently, the respondents owe the TD Bank about $1 million.

[21] By this point the respondents had set up the required blocked account and disbursement accounts at TD Bank, and Callidus had advanced. By this point as well, TD Bank was no longer prepared to do business with the respondents. As part of its termination agreement with the respondents, TD Bank required them to transfer the blocked accounts and disbursement accounts within 90 days of September 16, 2011.

[22] Before TD Bank made its various accommodation agreements with the respondents and Kaptor Group, there was a three week period in September where the TD Bank returned as NSF many cheques the respondents had written for payroll, investor payments and dealer and supplier payments. The NSF cheques to silo investors also put the respondents in breach of their obligations to Callidus.

Callidus learns of the debt with TD Bank

[23] Callidus did not learn of any of the respondents' agreements with TD Bank, or the security they had given the Bank until three weeks after Callidus had made its first advance. It was only around that time that Eric Inspektor, who essentially controls the Kaptor Group, including the respondents, told Callidus that the respondents and other Kaptor Group companies maintained accounts with the TD Bank. He said that their arrangements with the TD Bank permitted the TD Bank to offset overdrafts in one corporate account against deposits in another, including the disbursement accounts into which Callidus deposited its advances to the respondents.

[24] Mr. Inspektor explained that because of the overdraft position the Kaptor Group found itself in, the TD Bank had returned as NSF some of the cheques the respondents had written to some silo investors under Callidus' initial advance. It was one of the conditions of the advance that these investors were to be paid from the advance. Until this time, Callidus knew nothing of any debt the respondents owed to TD Bank. Callidus also did not know that one of the conditions of its initial advance had not been fulfilled – that is, paying off some specific silo investors.

[25] Matters deteriorated. TD Bank dishonoured various Cashland cheques for things like payroll, dealership payments and business expenses. Dealers were complaining to the Ontario Motor Vehicle Industry Council.

The field audit

[26] Under the terms of its security, Callidus was permitted to conduct a field audit of the respondents. When it did, it discovered that some government remittances were made late. It also learned that Mr. Inspector had directed funds in various Kaptor Group accounts to cover overdrafts in other accounts. This might have included diversion of funds from the respondents to cover overdrafts of other Kaptor Group companies. Over $300,000 in September lease and loan payments had been deposited into the disbursement accounts instead of into the blocked accounts. Mr. Inspektor and his wife deposited nearly $700,000 into the disbursement accounts instead of the blocked accounts. Again, this constituted a breach of the terms of the credit facility agreement.

The Callidus demand

[27] Needless to say, all of this created significant concern for Callidus. Callidus took the position that the respondents had made misrepresentations and material non-disclosure to it. It viewed the respondents' actions as constituting material breaches of the credit facility agreement. It was not prepared to continue to lend. On October 18, 2011 it demanded payment in full, pursuant to the terms of the credit facility agreement. It also served notice under section 244 of the *BIA* of its intention to enforce its security.

The Callidus forbearance agreement and events following

[28] On October 25, 2011 Callidus entered into a forbearance agreement with the respondents. Callidus agreed to forbear from enforcing its rights, but only on a day-to-day basis. The agreement permitted Callidus to terminate it at any time, in its sole and absolute discretion.

[29] In the Callidus forbearance agreement the respondents have acknowledged Callidus' *BIA* Notices are valid. They agree not to contest the validity of the demands for payment. They waive the 10-day notice period, and consent to the immediate enforcement of Callidus' security.

[30] The forbearance agreement also required the respondents to hire a new interim executive officer to replace Mr. Inspektor, who ceased to have any managerial role, or any cheque signing authority. The respondents also agreed to hire MNP

corporate Finance Inc. to find them alternate financing so they could pay out Callidus by April 30, 2012. They were not able to secure alternate financing in this way.

[31] The agreement also required the respondents to submit a complete restructuring plan to Callidus by November 30, 2011. First, the plan had to be acceptable to Callidus, and second had to be completed by December 31, 2011. The respondents have been unable to comply with either of these conditions.

[32] Although the parties concede the term is not enforceable, the Callidus forbearance agreement also contains a promise from the respondents not to commence any restructuring or reorganization proceedings under either the *BIA* or *CCAA.*

[33] Since the forbearance agreement, Callidus says the respondents' financial position has deteriorated more. The loan balance has increased by more than $770,000 while the lease rental stream has dropped by about $225,000. By the end of November, the respondents were in an over advance position of more than $1.2 million.

[34] Callidus was not prepared to continue without changes to the arrangement. On November 16, Callidus told the respondents it would continue to fund under the credit facility if and only if there was a minimum cash injection at least $500,000 into the businesses by subordinated debt or equity within two days, and the respondents would also have to fund their 30% of the cost of buying new vehicles for lease. The respondents failed to fulfil either of these conditions.

[35] On November 24, Callidus terminated the forbearance agreement, and told the respondents it would apply to court to have a receiver appointed.

[36] Even though it has terminated the forbearance agreement, Callidus continues to provide some funding to the respondents. It does so at its discretion, in order to protect its security.

[37] The respondents have been looking for alternate financing. They have not been able to secure any.

Discussion:

[38] Callidus takes the position that the respondent made material misrepresentations even before the first advance. It says had it known of the respondents' situation with TD Bank it would never have agreed to advance in the first place. Now it sees the respondents' financial position deteriorating. Its demand for payment has not been satisfied. The respondents' revenue stream is declining, meaning it cannot acquire new vehicles to lease. Callidus says this results in a reduction of its security, while the debt increases. As a result, Callidus says it is just

and convenient to appoint a receiver in order to protect its security and the interests of other stakeholders.

[39] For their part, the respondents accuse Callidus of taking an aggressive and unreasonable position (even though every position Callidus has taken has been supported by the specific terms of either the credit facility or the forbearance agreement.) The respondents point out that they are not actually behind in their payments. They view the interim financial officer who is now in place as being akin to a "soft receivership", and suggested that if they were able to have a *CCAA* stay in place for thirteen weeks, they would be able to restructure. They did not, however, present any restructuring plan, even in very draft form.

Receiver?

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

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

a) The effect on the parties of appointing the receiver. This includes potential costs and the likelihood of maximizing return on and preserving the subject property;

b) The parties' conduct; and

c) The nature of the property and the rights and interests of all parties in relation to it.[7]

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

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[6] *Bank of Nova Scotia v. Freure Village on Clair Creek,* 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (S.C.J.)
[7] *Bank of Montreal v. Carnival Leasing Limited,* 2011 ONSC 1007 (CanLII)
[8] *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* [1995] O.J. No. 144 (O.C.J. – Gen. Div.)

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

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

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

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

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

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

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

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

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

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

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

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

CCAA?

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

[56] The respondents have no operating capital. They are borrowers in default, with two unwilling lenders who are unprepared to lend more. Under the *CCAA* these lenders have no obligation to advance more funds.[10] Without further advances,

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[9] *GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co.* [2011] O.J. No. 2954 (S.C.J.)
[10] Section 11.01(b) of the *CCAA*

the respondents cannot continue to operate without further deterioration in inventory of vehicles and the resulting deterioration in revenue.

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

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

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

[59] The respondents have been attempting to refinance for some time. They have failed to meet every deadline for payment they agreed to with Callidus as well as with the TD Bank. Even when I delayed the date for the receivership order to take effect in order to give the respondents time to complete a refinancing, they were unable to do so.

[60] The absence of even a "germ of a plan" militates against granting relief under the *CCAA.*

[61] Finally, in considering the question of whether to grant relief under the *CCAA,* I must also look at the position of the two major secured creditors. Neither will

[11] 2009 BCSC 145
[12] [1992] O.J. No. 8 (Gen. Div.)

support a plan of arrangement. They represent a considerable part of the respondents' creditors. I have no evidence any other creditors would support a plan, either. I see no merit in making an initial order and imposing a stay in circumstances where a plan of arrangement is most likely going to be defeated.

[62] Having considered all these factors, I decline to grant relief under the *CCAA.*

Conclusion:

[63] It is for these reasons I made the order I did on December 14, 2011.

_____

MESBUR J.

Released: 20120105

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File No. [ ]

THE ~~QUEEN'S~~KING'S BENCH
Winnipeg Centre

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

BETWEEN:

~~[APPLICANT'S NAME]~~

ROYAL BANK OF CANADA,

Applicant,

- and -

~~[RESPONDENT'S NAME]~~

VISTA MEDICAL LTD.,

Respondent.

ORDER
(Appointing Receiver)

~~[FIRM NAME, ADDRESS, LAWYER'S NAME, TELEPHONE #]~~

FILLMORE RILEY LLP
1700 - 360 Main Street
Winnipeg, Manitoba
R3C 3Z3

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KALEV A. ANNIKO / MICHAEL O. BADEJO
File No. 180007-882/KAA

THE ~~QUEEN'S~~KING'S BENCH
Winnipeg Centre

IN THE MATTER OF:	THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE BANKRUPTCY AND INSOLVENCY ACT R.S.C. 1985, c. B-3 AS AMENDED AND SECTION 55 OF *THE COURT OF KING'S BENCH ACT*, C.C.S.M. c. C280	
THE HONOURABLE JUSTICE GRAMMOND	)))	FRIDAY, THE 4th DAY OF OCTOBER, 2024

BETWEEN:

~~[APPLICANT'S NAME]~~

ROYAL BANK OF CANADA,

Applicant,

- and -

~~[RESPONDENT'S NAME]~~

VISTA MEDICAL LTD.,

Respondent.

ORDER
(appointing Receiver)

THIS APPLICATION made by the Applicant for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") and section 55 of *The Court of King's Bench Act* C.C.S.M. c. C280 (the "**KB Act**") appointing ~~[RECEIVER'S NAME]~~MNP Ltd. as receiver ~~[and manager]~~ (in such ~~capacities~~capacity, the "**Receiver**") without security, of all of the assets, undertakings and properties of ~~[DEBTOR'S NAME]~~Vista Medical Ltd. (the "**Debtor**") acquired for, or used in relation to a business carried on by the Debtor, was heard this day at the Law Courts Building, 408 York Avenue, Winnipeg, Manitoba.

ON READING the affidavit of ~~[NAME]~~Kerry Orth sworn ~~[DATE]~~September 19, 2024, and on hearing the submissions of counsel for ~~[NAMES],~~the Applicant, no one appearing for ~~[NAME]~~Vista Medical Ltd., although duly served as appears from the affidavit of service of [NAME] sworn [DATE] and on reading the consent of ~~[RECEIVER'S NAME]~~MNP Ltd. to act as the Receiver,

SERVICE

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

APPOINTMENT

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

RECEIVER'S POWERS

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

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

(b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the

engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

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

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

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

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

(g) to settle, extend or compromise any indebtedness owing to the Debtor;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

(i) to undertake environmental or workplace safety and health assessments of the Property and operations of the Debtor;

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

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

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

(i) without the approval of this Court in respect of any transaction not exceeding ~~$_____,~~$100,000.00, provided that the aggregate consideration for all such transactions does not exceed ~~$_____;~~$500,000.00; and

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

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

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

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

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

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

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

(r) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have; and

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

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

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

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

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

6. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the

Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

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

NO PROCEEDINGS AGAINST THE RECEIVER

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

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

9. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court provided; however, that nothing in this Order shall affect a Regulatory Body's investigation in respect of the Debtor or an action, suit or proceeding that is taken in respect of the Debtor by or before the Regulatory Body, other than the enforcement of a payment order by the Regulatory Body of the Court. **"Regulatory Body"** means a person or body that has powers, duties or functions relating

to the enforcement or administration of an Act of Parliament or of the legislature of a province.

NO EXERCISE OF RIGHTS OR REMEDIES

10. THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

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

CONTINUATION OF SERVICES

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

paid by the Receiver in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

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

EMPLOYEES

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

PIPEDA

15. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is disclosed shall

maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtor, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

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

LIMITATION ON THE RECEIVER'S LIABILITY

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

RECEIVER'S ACCOUNTS

18. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

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

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

FUNDING OF THE RECEIVERSHIP

21. THIS COURT ORDERS that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed ~~$_____~~$200,000.00 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

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

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

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

SERVICE AND NOTICE

25. THIS COURT ORDERS that the Applicant and the Receiver be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier,

personal delivery, facsimile or electronic transmission to the Debtor's creditors or other interested parties at their respective addresses as last shown on the records of the Debtor and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

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

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

GENERAL

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

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

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

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

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

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

~~[DATE]~~

October 4, 2024

I, ~~[NAME]~~KALEV A. ANNIKO OF THE FIRM OF ~~[NAME]~~FILLMORE RILEY LLP HEREBY CERTIFY THAT I HAVE RECEIVED THE CONSENTS AS TO FORM OF THE FOLLOWING PARTIES: [INSERT] AS DIRECTED BY THE HONOURABLE ~~[INSERT]~~.JUSTICE GRAMMOND.

SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

1. THIS IS TO CERTIFY that ~~[RECEIVER'S NAME],~~MNP Ltd. the receiver (the "**Receiver**") of the assets, undertakings and properties ~~[DEBTOR'S NAME]~~Vista Medical Ltd. acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (collectively, the "**Property**") appointed by Order of The ~~Queen's~~King's Bench, Winnipeg Centre (the "**Court**") dated the ~~___~~4th day of ~~_____, 20__~~October, 2024 (the **"Order"**) made in an action having Court file number _____, has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of $_____, being part of the total principal sum of ~~$_____~~$200,000.00 which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

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

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at ***, ***.

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

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

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

DATED the _____ day of _____, 20__.

MNP Ltd., solely in its capacity
as Receiver of the Property, and not in its personal capacity

Per: _____

Name: Victor Kroeger

Title: Senior Vice-President