Court File No.: CV-15-10897-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

COMPUTERSHARE TRUST COMPANY OF CANADA

Applicant

- and -

MADY STEELES 2011 LTD.

Respondent

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.

FACTUM OF THE APPLICANT
(returnable March 5, 2015)

March 3, 2015

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PART I: OVERVIEW

1. The Applicant, Computershare Trust Company of Canada ("**Computershare**") seeks an order (the "**Appointment Order**") appointing Duff & Phelps Canada Restructuring Inc. ("**D&P**") as receiver (in such capacity, the "**Receiver**"), without security, of all of the lands and premises legally described in Schedule "A" to the Appointment Order and municipally described as 5789-5951 Steeles Avenue East, Toronto, Ontario (the "**Lands**") and all of the present and after acquired assets, undertakings, and properties of Mady Steeles 2011 Ltd. (the "**Debtor**") in any way relating to the Lands (collectively, including the Lands, the "**Property**"), pursuant to Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"), and Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c. C-43, as amended (the "**CJA**").

2. This Application is a straightforward receivership application. At its core, the Debtor has defaulted under certain loan and security arrangements, and Computershare, as first mortgagee and a secured creditor, is seeking the appointment of a receiver in accordance with and pursuant to Computershare's contractual rights.

3. The appointment of a receiver by the Court is just and appropriate in the circumstances. The two subsequent mortgagees, who have executed full subordination and standstill agreements in favour of Computershare, have, contrary to the terms of those agreements, challenged, contested, and brought into question the enforcement actions taken by Computershare to date. Accordingly, Computershare is no longer prepared to realize on the Property by way of power of sale, and the appointment of a court-appointed receiver has become necessary and is the most prudent method of effecting the sale of the Property in the circumstances.

4. The appointment of a receiver is also beneficial to all stakeholders since it will serve to maximize the value of the Property in an efficient, open, fair, transparent, and commercially reasonable Court supervised sale process in which all stakeholders will be afforded an opportunity to make their views known.

PART II: THE FACTS

5. The relevant facts of this Application are more fully set out in the affidavit of Noah Mintz sworn February 26, 2015 (the "**Mintz Affidavit**"), filed in support of this Application. Those facts are not repeated in full detail in this Factum. All capitalized terms used in this factum but not defined herein have the meanings given to them in the Mintz Affidavit.

A. The Parties

6. The Debtor is a corporation governed by the *Business Corporations Act* (Ontario). The Debtor was incorporated for the purpose of acquiring and holdings title to the Lands.

> Affidavit of Noah Mintz, sworn February 26, 2015 (the "**Mintz Affidavit**") at paras. 5-7, and Exhibits "A" and "B", Application Record, Tabs A and B.

7. On October 1, 2011, Mady Development Corporation ("**MDC**") entered into a commitment letter (the "**Commitment Letter**") with Trez Capital Corporation ("**TCC**") to finance the acquisition of the Lands. The Commitment Letter specifically permitted MDC to designate a single purpose entity affiliate of MDC in its place. The Debtor was that single purpose entity affiliate designated in place of MDC.

> Mintz Affidavit at para. 11, and Exhibit "C", Application Record, Tab C.

8. The Commitment Letter also permitted TCC to designate a party to act as lender in its place. The party designated by TCC to act as lender was TCC Mortgage Holdings Inc. ("**TCCMH**"). In entering into the Commitment Letter, TCC's role was purely that of originator and loan servicer. As contemplated in the Commitment Letter, TCCMH made a loan to the Debtor to finance the Debtor's acquisition of the Lands and was granted security by the Debtor in return.

Mintz Affidavit at para. 12, and Exhibit "C", Application Record, Tab C.

9. The Debtor acquired legal title to the Lands on or about December 15, 2011 and is the current owner of the Lands.

Mintz Affidavit at paras. 8-10.

B. The Original Loan

10. The original principal sum of $27,500,000 (the "**Loan**") was loaned by TCCMH to the Debtor. The purpose of the Loan was to provide first mortgage financing for the acquisition of the Lands by the Debtor. The term under the Commitment Letter was 13 months, commencing on January 1, 2012. The Loan was repayable on demand by the Lender following the occurrence of an event of default, and in any event was to be repaid in full at maturity.

Mintz Affidavit at paras. 12 and 14.

11. TCCMH was given by way of supporting security from the Debtor, among other things, a first ranking mortgage, general security agreement, general assignment of rents, and assignment of material contracts.

Mintz Affidavit at paras. 16-20, and Exhibits "D", "E", "F", "G" and "H", Application Record, Tabs D, E, F, G, and H.

12. The Debtor mortgaged the Lands in favour of TCCMH (the "**2011 Mortgage**") on December 15, 2011. Under the terms of the 2011 Mortgage, the Debtor agreed to, among other things, pay or cause to be paid the full amount and interest secured by the 2011 Mortgage and to do, observe, perform, fulfill and keep all the provisions, covenants, agreements and stipulations contained in the 2011 Mortgage.

Mintz Affidavit at para. 16, and Exhibits "D" and "E", Application Record, Tabs D and E.

13. The terms of the 2011 Mortgage provide for the appointment of a receiver upon default by the Debtor.

Mintz Affidavit at para. 17 and Exhibits "D" and "E", Application Record, Tabs D and E.

14. The general security agreement (the "**GSA**") provided by the Debtor to TCCMH on December 14, 2011 similarly provides for the appointment of a receiver upon default by the Debtor.

Mintz Affidavit at paras. 18-19 and Exhibit "F", Application Record, Tab F.

15. Shortly after the original loan and security arrangements were put in place, Trez Capital Limited Partnership ("**TCLP**"), through its general partner Trez Capital (2011) Corporation, became the loan servicer for the Loan and security arrangements in place between TCCMH and the Debtor, replacing TCC in that role.

Mintz Affidavit at para. 23.

C. First Renewal and Security

16. The original loan and security arrangements were renewed and amended by a first renewal letter dated October 4, 2012 (the "**First Renewal Letter**"). Pursuant to the First Renewal Letter, the principal sum of the Loan was increased to $35,000,000, the interest rate was amended, and the term was extended to December 1, 2013. The 2011 Mortgage was amended by an agreement amending charge/mortgage between the Debtor and TCCMH dated November 21, 2012 (the "**2012 Mortgage Amendment**") to implement the changes contemplated by the First Renewal Letter.

> Mintz Affidavit at paras. 24-26 and Exhibits "K" and "L", Application Record, Tabs K and L.

17. On or about January 16, 2013, the original loan and security arrangements (as amended by the First Renewal Letter and the 2012 Mortgage Amendment) in place between TCCMH and the Debtor were transferred to Computershare. Computershare acts as custodian of the loan and security given by the Debtor pursuant to a custodian agreement dated June 4, 2014 (the "**Custodian Agreement**") between Trez Capital Mortgage Investment Corporation ("**TCMIC**"), TCLP and Computershare.

> Mintz Affidavit at paras. 30-31 and Exhibit "P", Application Record, Tab P.
>
> Mintz Affidavit at paras. 56-59 and Exhibit "GG", Application Record, Tab GG.

18. Following the transfer to Computershare, TCLP maintained its role as the loan servicer, and also manages the loan and security arrangements for Computershare under the Custodian Agreement.

> Mintz Affidavit at para. 59.

D. Second Renewal and Security

19. The original loan and security arrangements (as amended by the First Renewal Letter, and the 2012 Mortgage Amendment) were further renewed and amended by a second renewal letter dated September 23, 2013 (the "**Second Renewal Letter**"). Pursuant to the Second Renewal Letter, the term of the Loan (as amended) was extended to May 1, 2014 and the interest rate was again amended. The terms of the 2011 Mortgage (as amended) were further amended by an agreement amending charge/mortgage between the Debtor and Computershare dated October 1, 2013 (the "**2013 Mortgage Amendment**") to implement the changes contemplated in the Second Renewal Letter.

> Mintz Affidavit at paras. 32-34, and Exhibits "Q" and "R", Application Record, Tabs Q and R.

E. Third Renewal and Security

20. The original loan and security arrangements (as amended by the First Renewal Letter, the 2012 Mortgage Amendment, the Second Renewal Letter, and the 2013 Mortgage Amendment) were further amended by a third renewal letter dated May 1, 2014 (the "**Third Renewal Letter**"). Pursuant to the Third Renewal Letter, the interest rate was amended and the term of the Loan (as amended) was extended to November 1, 2014.

> Mintz Affidavit at paras. 38-39, and Exhibit "V", Application Record, Tab V.

F. Default and Enforcement

21. Pursuant to the terms of the Commitment Letter (as amended by the First Renewal Letter, the Second Renewal Letter and the Third Renewal Letter), the 2011 Mortgage (as amended by the 2012 Mortgage Amendment and the 2013 Mortgage Amendment), the GSA, and all other

loan and security documentation) (all such documentation, collectively, the "**Mortgage Documentation**"), the term of the Loan (as amended) expired on November 1, 2014. By the Debtor's failure to pay the full principal amount and interest secured by the Mortgage Documentation, the Debtor was in default under the Mortgage Documentation as of November 1, 2014.

Mintz Affidavit at paras. 61-65.

22. Computershare issued a written demand for payment of the indebtedness on the Debtor by a letter dated November 26, 2014, accompanied by a notice of intention to enforce security under subsection 244(1) of the BIA (the "**BIA Notice**"). The Debtor has not complied with Computershare's demand for payment.

Mintz Affidavit at paras. 67-69, and Exhibits "HH" and "II", Application Record, Tabs HH and II.

23. Computershare issued a notice of sale under mortgage dated December 30, 2014, pursuant to the *Mortgages Act*, R.S.O. 1990, Chapter M. 40 in respect of the Mortgage (the "**Notice of Sale**"). The Debtor has not paid the sum specified in the Notice of Sale as of the date of this Application.

Mintz Affidavit at paras. 70-71, and Exhibit "JJ", Application Record, Tab JJ.

G. Second and Third Mortgages

24. The Lands are subject to second and third mortgages in favour of Northbridge Financial Corporation ("**Northbridge**") and 2307760 Ontario Ltd. ("**2307760**"), respectively. The Debtor has mortgaged the Lands in favour of Northbridge to secure payment of the principal sum of $15,000,000 (the "**Northbridge Mortgage**"). Similarly, the Debtor has mortgaged the Lands in

favour of 2307760 to secure payment of the principal sum of $6,550,000 (the "**2307760 Mortgage**").

Mintz Affidavit at paras. 40-41 and 47-48, and Exhibits "W" and "AA", Application Record, Tabs W and AA.

H. Subordination and Standstill Agreements

25. Northbridge and 2307760 have each executed full subordination and standstill agreements in favour of TCCMH (and, later, Computershare) on three separate occasions. The first set of subordination and standstill agreements were executed on December 14, 2011, and the subordination and standstill agreements were subsequently confirmed by Northbridge and 2307760 when material amendments were made to the loan and security arrangements between TCCMH (and, later, Computershare) and the Debtor.

Mintz Affidavit at paras. 42-46 and Exhibits "X", "Y" and "Z", Application Record, Tabs X, Y and Z.

Mintz Affidavit at paras. 49-53 and Exhibits "BB", "CC" and "DD", Application Record, Tabs BB, CC and DD.

26. The subordination and standstill agreements, which are all substantially in the same form, provide, among other things, that neither Northbridge nor 2307760 shall challenge, contest or bring into question (among other things) any "Enforcement Action" taken by Computershare to enforce its loan and security. Enforcement Action is defined very broadly as follows:

> ..."**Enforcement Action**" means the commencement of power of sale, foreclosure or other judicial or private sale proceedings, appointing or obtaining the appointment of a receiver, a manager or a receiver and manager or other person having similar powers in respect of any person or property, attornment of Rents, taking possession or control of any property or undertaking, commencing, giving or making any demand for payment, any notice or intention to enforce security or any action or proceeding seeking payment or recovery of all or any part of any indebtedness or damages in lieu thereof, or acting a transfer of any

property in lieu of foreclosure, or the exercise of any other rights or remedies available to a creditor under its security or otherwise at law or in equity, including without limitation, any bankruptcy proceedings.

Application Record, Tabs X, Y and Z.

Application Record, Tabs BB, CC and DD.

I. Discussions with Subordinated Mortgagees Following Default

27. Notwithstanding the subordination and standstill agreements, Northbridge and 2307760 (directly or through their counsel) have repeatedly attempted to challenge, contest, and/or bring into question the enforcement actions taken by Computershare by, among other things objecting to the engagement of a particular broker that Computershare intended to use to assist in its power of sale proceedings.

Mintz Affidavit at paras. 72-78 and Exhibit "KK", Application Record, Tab KK.

28. Computershare is no longer prepared to proceed to realize on the Property by way of power of sale.

J. The Proposed Receiver

29. Subject to Court approval of the Appointment Order, D&P has consented to act as Receiver over the Property.

Mintz Affidavit at para. 81 and Exhibit "LL", Application Record, Tab LL.

PART III: ISSUE

30. The only issue raised on this Application is whether this Court should appoint D&P as Receiver over the Property pursuant to section 243 of the BIA and section 101 of the CJA.

PART IV: LAW AND ARGUMENT

A. The Test for Appointing a Receiver under the BIA and CJA

31. Section 243(1) of the BIA permits a court to appoint a receiver if it considers it to be "just or convenient to do so". Section 243(1) provides:

> **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.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended, at s. 243(1) [*BIA*].

32. As defined in section 2(1) of the BIA, the term "secured creditor" means, among other things, a "person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor..."

BIA at s. 2(1).

33. The term "insolvent person" is also defined in section 2(1) of the BIA as follows:

> "*insolvent person*" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

BIA, s. 2(1).

34. Under the BIA, there is a notice requirement that must be met by a secured creditor who intends to enforce its security on all or substantially all of the property of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person. The court must be satisfied that either: (i) the insolvent person received ten days prior notice under section 244(1) of the BIA of the secured creditor's intention to enforce its security, (ii) the insolvent person consented to an earlier enforcement, or (iii) the court considers it appropriate to appoint a receiver before the expiry of the ten day notice period under section 244(1) of the BIA.

BIA, 243(1.1) and *BIA,* s. 244(1).

35. The test for the appointment of a receiver under section 101 of the CJA is whether it appears to the court to be "just or convenient" to do so:

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

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101(1).

36. In determining whether it is just and convenient to appoint a receiver, a court must have regard to all of the circumstances of the case, particularly to the nature of the property and the rights and interests of all parties in relation thereto.

> *Bank of Montreal v. Carnival National Leasing Ltd.* (2011), 74 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List]) at para. 24 [*Carnival National Leasing*], Book of Authorities of the Applicant [*Applicant's Book of Authorities*], Tab 1.
>
> *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) at para. 11 [*Freure Village*], Applicant's Book of Authorities, Tab 2.

37. Where the rights of a secured creditor under the security instrument governing the relationship between the debtor and secured creditor includes the right to seek the appointment of a receiver, the burden on the applicant seeking to have the receiver appointed is relaxed. As per *Morawetz J.* (as he then was) in *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*,

> ...while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.
>
> *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 at para. 27, Applicant's Book of Authorities, Tab 3.
>
> *Freure Village*, *supra*, at para. 13, Applicant's Book of Authorities, Tab 2.

38. Where the creditor is entitled under the security instrument to seek the appointment of a receiver, the "just or convenient" question becomes one of the court determining whether, in the exercise of its discretion, on an examination of all the circumstances, it is in the interest of all concerned to have the receiver appointed by the court. In determining whether it is "just or convenient" that a receiver should be appointed, courts have considered many factors that vary in the circumstances of the case. These factors include the following:

(a) the rights of the parties in the property;

(b) the fact that the creditor has the right to appoint a receiver under its security;

(c) the enforcement rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtors and others; and

(d) the conduct of the parties;

(e) whether irreparable harm might be caused if no order were made (although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed);

(f) the apprehended or actual waste of the debtor's assets;

(g) the balance of convenience to the parties;

(h) cost to the parties;

(i) the likelihood of maximizing the return to the parties;

(j) the best way of facilitating the work and duties of the receiver; and

(k) the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity.

Freure Village, supra, at para. 13, Applicant's Book of Authorities, Tab 2.

Carnival National Leasing, supra, at paras. 26-29, Applicant's Book of Authorities, Tab 1.

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]), at para. 28, Applicant's Book of Authorities, Tab 4.

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd. (2010) 67 C.B.R. (5th) 97 (B.C.S.C.) at para. 50, Applicant's Book of Authorities, Tab 4.

Frank Bennett, *Bennett on Receiverships*, 3d ed. (Toronto: Carswell, 2011) at 155-159, Applicant's Book of Authorities, Tab 6.

39. Absent fraud or want of good faith, courts will positively assist a secured creditor in the enforcement of its security interest in circumstances where the debtor or others purport to interfere with such rights.

Uvalde Investment Co. v. 754223 Ontario Ltd., [1997] O.J. No. 711 (Ont. Gen. Div.) at para. 7, Applicant's Book of Authorities, Tab 7.

STN Labs Inc. v. Saffron Rouge Inc. (2010) 68 C.B.R. (5th) 287 (Ont. S.C.J.) at para. 42, Applicant's Book of Authorities, Tab 8.

B. It is Appropriate to Appoint a Receiver over the Property

40. The technical requirements for the appointment of a Receiver have been met:

(a) Computershare is a secured creditor of the Debtor and is entitled to bring this Application under section 243 of the BIA;

(b) the Debtor is incorporated and existing under the laws of Ontario and this Application has been filed in a court having jurisdiction in the judicial district of the locality of the Debtor, in accordance with subsection 243(5) of the BIA;

(c) the BIA Notice was sent to the Debtor on November 26, 2014, as required by subsection 243(1.1) of the BIA; and

(d) in accordance with subsection 243(4) of the BIA, D&P is a trustee within the meaning of subsection 2(1) of the BIA and, as such, is qualified to act as Receiver.

41. It is also just and convenient to appoint D&P as the Receiver in the circumstances. As detailed above, the Debtor has defaulted on its obligations under the Mortgage Documentation. Such defaults are continuing as of the date of this Application. The Debtor's default has given rise to Computershare's rights under the Mortgage Documentation to institute court proceedings for the appointment of a receiver.

42. In the circumstances of this case, it cannot be said that Computershare is seeking an extraordinary equitable remedy; rather it is simply seeking to enforce an express relief provided for in the Mortgage Documentation that was consented to by the parties.

43. The appointment of D&P as Receiver is just and convenient given the conduct of Northbridge and 2307760 to date. As discussed above, notwithstanding the subordination and standstill agreements, Northbridge and 2307760 (directly or through their counsel) have repeatedly attempted to challenge, contest, and/or bring into question the enforcements actions taken in good faith by Computershare. Given the interference of Northbridge and 2307760, Computershare is unable to efficiently and effectively exercise its private remedies. In these circumstances, it is just and convenient for the Court to positively assist Computershare in the enforcement of its security.

44. The conduct of Northbridge and 2307770 has also raised concerns that if Computershare proceeds to realize on the Property by way of a power of sale, objections could be made as to the bona fides of the sale process or regarding any eventual sale transaction.

45. Regardless of the steps taken by Computershare to maximize the value of the Property, Computershare may face the risk of a claim for improvident realization should one or both of the subordinated mortgagees not recover all amounts owing to them. Consequently, it is no longer practical or prudent in the circumstances for Computershare to proceed to realize on the Property by way of power of sale, and Computershare is no longer prepared to do so.

46. Computershare and the subsequent mortgagees are effectively deadlocked, and any further attempts by Computershare to enforce its security privately could lead to costly, protracted and unproductive litigation. A court-appointed receiver with a mandate to develop, implement, and seek approval of a sale process will be able to resolve this impasse. Therefore, in these circumstances, the best way for Computershare to maximize return on the Property is by seeking the appointment of a receiver by the Court, who will realize on the Property in a transparent manner that is intended to maximize value under the oversight of the Court pursuant to a Court approved sale process.

47. The appointment of D&P is also in the interests of all stakeholders. D&P has consented to act as the Receiver and is in the process of developing a sale process for the Property. As an officer of the Court, D&P will be obliged to act in a fiduciary capacity to ensure that the sale process is effected in an efficient, open, fair, transparent, and commercially reasonable manner that considers the interests of all stakeholders. Therefore, the appointment of D&P as the Receiver by the Court will serve to facilitate the work of the receiver and enable it to carry out its work and duties more efficiently.

PART V: ORDER REQUESTED

48. The Applicant seeks the granting of the Appointment Order in the form contained in the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of March, 2015.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Bank of Montreal v. Carnival National Leasing Ltd.* (2011), 74 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List])

2. *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List])

3. *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866

4. *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List])

5. *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.* (2010) 67 C.B.R. (5th) 97 (B.C.S.C.)

6. Frank Bennett, *Bennett on Receiverships*, 3d ed. (Toronto: Carswell, 2011)

7. *Uvalde Investment Co. v. 754223 Ontario Ltd.,* [1997] O.J. No. 711(Ont. Gen. Div.)

8. *STN Labs Inc. v. Saffron Rouge Inc.* (2010) 68 C.B.R. (5th) 287 (Ont. S.C.J.)

SCHEDULE "B"

RELEVANT STATUTES

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

Court may appoint receiver

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

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

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

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

Restriction on appointment of receiver

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

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

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

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 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.

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).

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).

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.

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.

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.

Advance notice

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

(*a*) the inventory,

(*b*) the accounts receivable, or

(*c*) the other property

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

Period of notice

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

No advance consent

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

Exception

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

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

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

Idem

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

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

Injunctions and receivers

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

Terms

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

COMPUTERSHARE TRUST COMPANY OF CANADA
Applicant

-and-

MADY STEELES 2011 LTD.
Respondent

Court File No. CV-15-10897-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

FACTUM
(Returnable March 5, 2015)

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