

Court File No. CV-24-00000236-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

KINDRED CREDIT UNION LIMITED

Applicant

-and-

10603503 CANADA INC., 11393251 CANADA INC. and
11393235 CANADA INC.

Respondents

FACTUM OF THE APPLICANT
(Application Returnable November 20, 2024)

November 8, 2024

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TO: Service List

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11393235 CANADA INC.

Respondents

PART I – OVERVIEW

1. The applicant, Kindred Credit Union Limited (the “**Applicant**”) brings this application for the appointment of Albert Gelman Inc. (“**AGI**”) as receiver and manager (herein, the “**Receiver**”), without security, of all of the assets, undertakings and properties of the respondents, 10603503 Canada Inc. (“**106 Canada**”), 11393251 Canada Inc. (“**251 Canada**”) and 11393235 Canada Inc. (“**235 Canada**”) (collectively the “**Respondents**”) acquired for or used in relation to business carried on by the Respondents.

PART II – FACTS

2. The Applicant is a Credit Union incorporated pursuant to the *Credit Unions and Caisse Populaires Act* of Ontario.

Reference: Affidavit of Hillary Robertson sworn November 7, 2024, at paragraph 2 (the “**Robertson Affidavit**”).

3. The Applicant is the first mortgagee of the 950 Property (defined and described below), the 942 Property (defined and described below) and the 948 Property (defined and described below).

Reference: The Robertson Affidavit at paragraph 3.

4. 106 Canada is a company incorporated pursuant to the laws of the country of Canada. 106 Canada is the owner of the property known municipally as 950-956 2nd Avenue East, Owen Sound, Ontario and legally described as follows:

PIN 37074-0423

Part Lots 3 and 4, West Side of Poulett Street, Plan Owen Sound, as in R512556 City of Owen Sound, County of Grey

(the “**950 Property**”).

Reference: The Robertson Affidavit at paragraph 4 and Exhibits A and B.

5. 106 Canada is indebted to the Applicant pursuant to the terms of: (i) the Promissory Note from 106 Canada (defined and described below); (ii) the Mortgage of the 950 Property (defined and described below); (iii) the 106 Canada Guarantee of 251 Canada (defined and described below); and (iv) the 106 Canada Guarantee of 235 Canada (defined and described below).

Reference: The Robertson Affidavit at paragraph 6.

6. The 950 Property is zoned core commercial. The improvements include a two-storey brick building with two glass fronted commercial store front units and six residential units.

Reference: The Robertson Affidavit at paragraph 8 and Exhibits B and C.

7. 251 Canada is a company incorporated pursuant to the laws of the country of Canada. 251 Canada is the owner of the property known municipally as 942-944 2nd Avenue East, Owen Sound, Ontario and legally described as follows:

PIN 37074-0425

Part Lot 4, West Side of Poulett Street, Plan Owen Sound, as in R278636

City of Owen Sound, County of Grey

(the “**942 Property**”).

Reference: The Robertson Affidavit at paragraph 9 and Exhibits D and E.

8. 251 Canada also owns the registry parcel directly across from the 942 Property on the West side of 1st Avenue East and legally described as follows:

PIN 37074-0539 – Registry Non-Convert

Part River Frontages on the East Side of the River Sydenham, Plan Owen Sound, lying between the rear of the Town Lots fronting on the West Side of Poulette Street from Lot 1 to 24, City of Owen Sound, County of Grey

(“**Registry PIN 37074-0539**”).

Reference: The Robertson Affidavit at paragraph 11.

9. 251 Canada is indebted to the Applicant pursuant to the terms of: (i) the Promissory Note from 251 Canada (defined and described below); (ii) the Mortgage of the 942 Property (defined and described below); (iii) the Mortgage of Registry PIN 37074-0539 (defined and described below); (iv) the 251 Canada Guarantee of 106 Canada (defined and described below); and (v) the 251 Canada Guarantee of 235 Canada (defined and described below).

Reference: The Robertson Affidavit at paragraph 12.

10. The 942 Property is zoned core commercial. The improvements include a three-storey brick building with a commercial space on the first floor and twelve residential units on the second and third floors.

Reference: The Robertson Affidavit at paragraph 14 and Exhibits E and F.

11. 235 Canada is a company incorporated pursuant to the laws of the country of Canada. 235 Canada is the owner of the property known municipally as 948 2nd Avenue East, Owen Sound, Ontario and legally described as follows:

PIN 37074-0424

Part Lot 4, West Side of Poulett Street, Plan Owen Sound, as in R288667, city of Owen Sound, County of Grey

(the “**948 Property**”).

Reference: The Robertson Affidavit at paragraph 15 and Exhibit G and H.

12. 235 Canada is indebted to the Applicant pursuant to the terms of: (i) the Promissory Note from 235 Canada (defined and described below); (ii) the Mortgage of the 948 Property (defined and described below); (iii) the 235 Canada Guarantee of 106 Canada (defined and described below); and (iv) the 235 Canada Guarantee of 251 Canada (defined and described below).

Reference: The Robertson Affidavit at paragraph 17.

13. The 948 Property is zoned core commercial. The improvements include a two-story brick building with a commercial unit on the main floor and two residential units on the second floor.

Reference: The Robertson Affidavit at paragraph 19 and Exhibits H and I.

The Indebtedness to the Applicant and the Security Held

14. As of November 4, 2024, the Respondents are indebted to the Applicant in the amount of \$2,811,090.76, plus accruing interest and the Applicant’s continuing costs of enforcement including legal costs and professional fees (collectively the “**Indebtedness**”) pursuant to financing advanced to the each of the Respondents (cross guaranteed) pursuant to the terms of a commitment letter dated December 14, 2022 (the “**Commitment Letter**”).

Reference: The Robertson Affidavit at paragraph 20 and Exhibits J and N.

15. The Commitment Letter established the following credit facilities in favour of the Respondents:

Borrower:	106 Canada
Account No.:	4542221
Credit Facility	Mortgage Loan

Amount Approved: \$870,536
Interest Rate: \$4.20% fixed

Borrower: 235 Canada
Account No. 4594123
Credit Facility: Mortgage Loan
Amount Approved: \$480,000
Interest Rate: 7.45% fixed

Borrower: 251 Canada
Account No. 4594131
Credit Facility: Mortgage Loan
Amount Approved: \$1,320,000
Interest Rate 7.45% fixed

(collectively the "**Credit Facilities**").

Reference: The Robertson Affidavit at paragraph 21.

16. On October 22, 2021, 106 Canada executed a promissory note in favour of the Applicant (the "**Promissory Note from 106 Canada**").

Reference: The Robertson Affidavit at paragraph 22 and Exhibit K.

17. On December 14, 2022, 251 Canada executed a promissory note in favour of the Applicant (the "**Promissory Note from 251 Canada**").

Reference: The Robertson Affidavit at paragraph 23 and Exhibit L.

18. On December 14, 2022, 235 Canada executed a promissory note in favour of the Applicant (the "**Promissory Note from 235 Canada**").

Reference: The Robertson Affidavit at paragraph 24 and Exhibit M.

19. As security for the Credit Facilities, the Applicant requested and did receive the following:

- i. continuing collateral mortgage in the principal amount of \$900,000 from 106 Canada registered against title to the 950 Property on October 28, 2021 as instrument GY216022 (the "**Mortgage of the 950 Property**");

- ii. assignment of rents from 106 Canada registered against title to the 950 Property on October 28, 2021 as instrument GY216023 (the **“Assignment of Rents for the 950 Property”**);
- iii. continuing collateral mortgage in the principal amount of \$1,320,000 from 251 Canada registered against title to the 942 Property on December 15, 2022 as instrument GY237687 (the **“Mortgage of the 942 Property”**);
- iv. assignment of rents from 251 Canada registered against title to the 942 Property on December 15, 2022 as instrument GY237688 (the **“Assignment of Rents for the 942 Property”**);
- v. continuing collateral mortgage in the principal amount of \$1,320,000 from 251 Canada registered against title to Registry PIN 37074-0539 on February 20, 2024 as instrument R565926 (the **“Mortgage of Registry PIN 37074-0539”**);
- vi. continuing collateral mortgage in the principal amount of \$480,000 from 235 Canada registered against title to the 948 Property on December 15, 2022 as instrument GY237685 (the **“Mortgage of the 948 Property”**);
- vii. assignment of rents of 235 Canada registered against title to the 948 Property on December 15, 2022 as instrument GY237686 (the **“Assignment of Rents for the 948 Property”**);
- viii. guarantee of the obligations due and owing by 251 Canada limited to \$1,320,000 from 106 Canada dated December 14, 2022 (the **“106 Canada Guarantee of 251 Canada”**);
- ix. guarantee of the obligations due and owing by 235 Canada limited to \$480,000 from 106 Canada dated December 14, 2022 (the **“106 Canada Guarantee of 235 Canada”**);
- x. guarantee of the obligations due and owing by 106 Canada limited to \$900,000 from 235 Canada dated December 14, 2022 (the **“235 Canada Guarantee of 106 Canada”**);
- xi. guarantee of the obligations due and owing by 251 Canada limited to \$1,320,000 from 235 Canada dated December 14, 2022 (the **“235 Canada Guarantee of 251 Canada”**);
- xii. guarantee of the obligations due and owing by 106 Canada limited to \$900,000 from 251 Canada dated December 14, 2022 (the **“251 Canada Guarantee of 106 Canada”**);
- xiii. guarantee of the obligations due and owing by 235 Canada limited to \$480,000 from 251 Canada dated December 14, 2022 (the **“251 Canada Guarantee of 235 Canada”**);
- xiv. guarantee of the obligations due and owing by 106 Canada limited to \$900,000 from Craig Dunkerley (**“Mr. Dunkerley”**) dated October 22, 2021;

- xv. guarantee of the obligations due and owing by 251 Canada limited to \$1,320,000 from Mr. Dunkerley dated December 14, 2022;
- xvi. guarantee of the obligations due and owing by 235 Canada limited to \$480,000 from Mr. Dunkerley dated December 14, 2022;
- xvii. guarantee of the obligations due and owing by 106 Canada limited to \$900,000 from Blackthorn Investment Group Inc. ("**Blackthorn**") dated December 14, 2022;
- xviii. guarantee of the obligations due and owing by 251 Canada limited to \$1,320,000 from Blackthorn dated December 14, 2022; and
- xix. guarantee of the obligations due and owing by 235 Canada limited to \$480,000 from Blackthorn dated December 14, 2022.

(collectively the "**Security**")

Reference: The Robertson Affidavit at paragraph 26 and Exhibits O to FF.

The Applicant's Interest in the 950 Property

20. The Applicant's interest in the 950 Property is secured by the Mortgage of the 950 Property.

The Mortgage of the 950 Property is a first charge.

Reference: The Robertson Affidavit at paragraph 27.

21. The Parcel Register for the 950 Property identifies the following registrations:

- a) the Mortgage of the 950 Property;
- b) the Assignment of Rents for the 950 Property;
- c) a mortgage to 2391628 Ontario Ltd. in the principal amount of \$879,375 registered on January 4, 2023 as Instrument No. GY238299;
- d) a mortgage to Oswald Emmanuel Real Estate Inc. in the principal amount of \$350,000 registered on February 15, 2023 as Instrument No. GY239669;
- e) a notice of assignment of rents to Oswald Emmanuel Real Estate Inc. registered on February 15, 2023 as Instrument No. GY239670;
- f) a postponement from 2391628 Ontario Ltd. to Oswald Emmanuel Real Estate Inc. registered on February 15, 2023 as Instrument No. GY239671; and

- g) a mortgage to Maes Holding Inc. in the principal amount of \$600,000 registered on December 7, 2023 as Instrument No. GY251708.

Reference: The Robertson Affidavit at paragraph 28.

The Applicant's Interest in the 942 Property

22. The Applicant's interest in the 942 Property is secured by the Mortgage of the 942 Property.

The Mortgage of the 942 Property is a first charge.

Reference: The Robertson Affidavit at paragraph 29.

23. The Parcel Register for the 942 Property identifies the following registrations:

- a. the Mortgage of the 942 Property;
- b. the Assignment of Rents for the 942 Property;
- c. a mortgage to 2391628 Ontario Ltd. in the principal amount of \$879,375 registered on December 22, 2022 as Instrument No. GY238084;
- d. a mortgage to Christina Kerr in the principal amount of \$250,000 registered on January 17, 2023 as Instrument No. GY238681;
- e. a notice of assignment of rents to Christina Kerr registered on January 17, 2023 as Instrument No. GY238682; and
- f. postponement from 2391628 Ontario Ltd. to Christina Kerr registered on January 23, 2024 as Instrument GY238925.

Reference: The Robertson Affidavit at paragraph 30.

The Applicant's Interest in the 948 Property

24. The Applicant's interest in the 948 Property is secured by the Mortgage of the 948 Property.

The Mortgage of the 948 Property is a first charge.

Reference: The Robertson Affidavit at paragraph 31.

25. The Parcel Register for the 948 Property identifies the following registrations:

- a. the Mortgage of the 948 Property;
- b. the Assignment of Rents for the 948 Property;
- c. a mortgage to 2391628 Ontario Ltd. in the principal amount of \$879,375 registered on January 4, 2023 as Instrument No. GY238298;
- d. a mortgage to Christina Kerr in the principal amount of \$250,000 registered on January 17, 2023 as Instrument No. GY238679;
- e. a notice of assignment of rents to Christina Kerr registered on January 17, 2023 as Instrument No. GY238680; and
- f. postponement from 2391628 Ontario Ltd. to Christina Kerr registered on January 23, 2024 as Instrument GY238926.

Reference: The Robertson Affidavit at paragraph 32.

The Stray Registry Parcels on the West Side of First Avenue

26. The following parcels on the West side of 1st Avenue East, Owen Sound, were not converted to Land Titles Conversion Qualified on December 18, 2006 and remain registered under the *Registry Act*:

- a. PIN 37074-0538;
- b. PIN 37074-0543; and
- c. Registry PIN 37074-0539

(the “**Registry Act Parcels**”)

Reference: The Robertson Affidavit at paragraph 34 and Exhibit HH.

27. The Corporation of the City of Owen Sound (the “**City**”) Bylaw 2021-005, registered as Instrument R565775 on November 16, 2022, declared certain riverfront lands to not be required for harbour purposes and authorized the Mayor and Clerk for the City to complete the transfer the lands to the beneficial owners (the “**By-Law**”).

Reference: The Robertson Affidavit at paragraph 35.

28. The Registry Act Parcels are subject to the By-Law.

Reference: The Robertson Affidavit at paragraph 36.

29. PIN 37074-0538 was transferred to 106 Canada by the City pursuant to a Quit Claim Transfer registered as Instrument R565781 on November 22, 2022. PIN 37074-0538 is unencumbered.

Reference: The Robertson Affidavit at paragraph 37.

30. Registry PIN 37074-0539 was transferred to 251 Canada by the City pursuant to a Quit Claim Transfer registered as Instrument R565776 on November 21, 2022. PIN 37074-0539 is encumbered by: (i) a mortgage to 2391628 Ontario Ltd. in the principal amount of \$670,000 registered on June 18, 2020 as Instrument No. R565505; and (ii) the Mortgage of Registry PIN 37074-0539.

Reference: The Robertson Affidavit at paragraph 38.

31. PIN 37074-0543 remains registered in the name of the City. PIN 37074-0543 is unencumbered.

Reference: The Robertson Affidavit at paragraph 39.

The Sheriff Search Results

32. There are no outstanding executions registered against the Respondents.

Reference: The Robertson Affidavit at paragraph 41 and Exhibit II.

The Applicant's Interest in the Personal Property of the Respondents

33. The Applicant does not have a security interest in the personal property of the Respondents.

Reference: The Robertson Affidavit at paragraphs 42, 43 and 44 and Exhibits JJ to LL.

Default

34. The Respondents are in default of the obligations owing to Applicant pursuant to the terms of the Commitment Letter.

Reference: The Robertson Affidavit at paragraphs 45 and 46 and Exhibit MM.

35. The municipal taxes for the 950 Property, the 942 Property and the 948 Property are in arrears.

Reference: The Robertson Affidavit at paragraphs 47, 48 and 49 and Exhibits NN to PP.

36. On March 19, 2024, the Applicant delivered: (i) a demand for payment and notice of intention to enforce security to the Respondents; and (ii) a demand for payment to Mr. Dunkerley and Blackthorn (collectively the “**Guarantors of the Respondents**”) (collectively the “**Demands**”).

Reference: The Robertson Affidavit at paragraph 50 and Exhibit QQ.

37. The Respondents failed or otherwise neglected to respond to the Demands.

Reference: The Robertson Affidavit at paragraph 51.

38. On April 29, 2024, the Applicant issued a statement of claim for payment and possession with the Ontario Superior Court of Justice in Owen Sound (the “**Statement of Claim**”).

Reference: The Robertson Affidavit at paragraph 52 and Exhibit RR.

39. On May 2, 2024, the Applicant issued notices of sale under mortgage with respect to the Mortgage of the 950 Property, the Mortgage of the 942 Property, the Mortgage of Registry PIN 37074-0539 and the Mortgage of the 948 Property (collectively the “**Notices of Sale**”).

Reference: The Robertson Affidavit at paragraph 53 and Exhibit SS.

40. The Respondents acknowledged the amounts due and owing as set out in the Statement of Claim and the Notices of Sale.

Reference: The Robertson Affidavit at paragraph 54

41. The Respondents requested a period of forbearance to refinance the 950 Property, the 942 Property, Registry PIN 37074-0539 and the 948 Property (collectively the "**Properties**").

Reference: The Robertson Affidavit at paragraph 55.

42. On May 22, 2024, the Applicant and the Respondents entered into minutes of settlement (the "**Minutes of Settlement**").

Reference: The Robertson Affidavit at paragraph 56 and Exhibit TT.

43. The Respondents agreed to pay the Outstanding Debt (defined and described in the Minutes of Settlement) on or before August 8, 2024.

Reference: The Robertson Affidavit at paragraph 57.

44. The Respondents failed or otherwise neglected to pay the Outstanding Debt pursuant to and in accordance with the terms of the Minutes of Settlement.

Reference: The Robertson Affidavit at paragraph 58.

45. In the event of default pursuant to the Minutes of Settlement, the Respondents along with the Guarantors of the Respondents consented to judgment for payment and possession of the Properties.

Reference: The Robertson Affidavit at paragraph 59.

46. On October 16, 2024, the Applicant entered judgment against the Respondents and the Guarantors of the Respondents (the "**Judgment**").

Reference: The Robertson Affidavit at paragraph 60 and Exhibit UU.

47. The Respondents refused to deliver possession of the Properties.

Reference: The Robertson Affidavit at paragraph 61.

The Applicant's Right to and Rationale for the Appointment of a Receiver

48. The Respondents are in default pursuant to the terms of the Commitment Letter.

Reference: The Robertson Affidavit at paragraph 62.

49. Judgment for payment and possession has been entered against the Respondents.

Reference: The Robertson Affidavit at paragraph 63.

50. The Applicant has received no payments from 106 Canada since November 28, 2023.

Reference: The Robertson Affidavit at paragraph 64.

51. The Applicant has received no payments from 251 Canada since a partial payment on January 19, 2024.

Reference: The Robertson Affidavit at paragraph 65.

52. The Applicant has received no payments from 235 Canada since January 15, 2024.

Reference: The Robertson Affidavit at paragraph 66.

53. The Mortgage of the 950 Property, the Mortgage of the 942 Property, the Mortgage of Registry PIN 37074-0539 and the Mortgage of the 948 Property incorporate standard charge terms 201118 by reference.

Reference: The Robertson Affidavit at paragraph 67 and Exhibit VV.

54. The Mortgage of the 950 Property, the Mortgage of the 942 Property, the Mortgage of Registry PIN 37074-0539 and the Mortgage of the 948 Property authorize the Applicant to appoint a receiver in the event of default.

Reference: The Robertson Affidavit at paragraph 68.

55. No further credit is available from the Applicant.

Reference: The Robertson Affidavit at paragraph 69.

56. The appointment of AGI as receiver is necessary to protect: (i) the estate of the Respondents and the Properties; and (ii) the interest of the Applicant as secured creditor.

Reference: The Robertson Affidavit at paragraph 70.

57. AGI has consented to the appointment as receiver of the Respondents and the Properties.

Reference: The Robertson Affidavit at paragraph 71 and Exhibit WW.

PART III – ISSUES, LAW AND ARGUMENT

Issues

58. The issues before this Court, and addressed below, are:

- a) Does this Court have jurisdiction to appoint the Receiver?
- b) Should this Court appoint the Receiver?
- c) If this Court decides to appoint the Receiver, then are the terms of the receivership order appropriate in the circumstances of this receivership?

(a) This Court has jurisdiction to appoint the Receiver

59. Subsection 243(5) of the Bankruptcy and Insolvency Act (“**BIA**”) provides that an application under subsection 243(1) of the BIA is to be filed in a court having jurisdiction in the judicial district of the “locality of the debtor”, which is defined in section 2 of the BIA.

Reference: [BIA, s. 2, Schedule “B”](#); [BIA, s. 243\(5\), Schedule “B”](#).

60. The businesses carried on by the Respondents that are subject to the proposed receivership includes the Properties and the Registry PIN 37074-0539. This application is properly brought before the Ontario Superior Court of Justice in Owen Sound, Ontario.

61. Subsection 243(4) of the BIA provides that only a trustee, as defined in section 2 of the BIA, may be appointed under subsection 234(1) of the BIA.

Reference: [BIA, s. 2, Schedule “B”](#); [BIA, s. 243\(4\), Schedule “B”](#).

62. AGI is a trustee as defined in the BIA, and therefore, satisfies the requirements for appointment pursuant to the BIA.

(b) This Court should appoint the Receiver

63. Section 244(1) of the BIA requires that a secured creditor provide an insolvent person with the requisite advance notice of its intention to enforce security.

Reference: [BIA, s. 244\(1\), Schedule “B”](#).

64. On March 19, 2024, the Applicant delivered the Demands to the Respondents. This application is being heard on a date that is after the date on which the applicable notice periods expired.

65. Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended (the “CJA”) provides for the appointment of a receiver by this Court where it is “just and convenient”. Section 243(1) of the BIA also provides that, on an application by a secured creditor, this Court may appoint a receiver if it considers it to be just and convenient to do so to: (a) take possession over the assets of an insolvent person; (b) exercise any control that the Court considers advisable over the property and business; or (c) take any other action that the Court considers advisable.

Reference: [CJA, s. 101, Schedule “B”](#); [BIA, s. 243\(1\) and 243\(2\), Schedule “B”](#).

66. Where the loan agreement and related transaction documents contemplate the appointment of a receiver, this Court may have regard to the principles summarized by Justice Newbould in *RMB Australia Holdings Limited v. Seafield Resources Ltd.*:

28 In determining whether it is “just or convenient” to appoint a receiver under either the BIA or CJA, Blair J., as he then was, in *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) stated that in deciding whether the appointment of a receiver was just or convenient, 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, which includes the rights of the secured creditor under its security. He also referred to the relief being less extraordinary if a security instrument provided for the appointment of a receiver:

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.

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

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

Reference: [RMB Australia Holdings Limited v. Seafield Resources Ltd., 2014 ONSC 5205 \(CanLII\), paras. 28-29.](#)

67. The existence of a contractual right to appoint a receiver in the loan agreement and related transaction documents is key and transforms the appointment of a receiver from an

extraordinary remedy to relief that is granted more as a matter of course, especially in cases in which the circumstances further support such an appointment. That is the case here.

68. With this lower burden, the following additional “just or convenient” factors identified by Justice Farley in *Confederation Life Insurance Co. v. Double Y Holdings Inc.* may be considered:

- a) The lenders’ security is at risk of deteriorating;
- b) There is need to stabilize and preserve the debtor’s business;
- c) Loss of confidence in the debtor’s management; and,
- d) Positions and interests of other creditors.

Reference: *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 (Ont. S.C.J. (Commercial List)) [“*Confederation Life*”], paras. 19-24, Tab 1 of the Applicant’s Book of Authorities.

69. It is not essential that the moving party/secured creditor establish that it will suffer irreparable harm if a receiver/manager is not appointed.

Reference: *Swiss Bank Corporation (Canada) v. Odyssey Industries Incorporated* (1995), 30 C.B.R. (3d) 49 at paragraph 28, Tab 2 of the Applicant’s Book of Authorities.

70. When the above *Confederation Life* factors are applied to this case, the Applicant submits that the burden to appoint a receiver has been met and that such appointment is just and convenient in the circumstances:

- a) ***The Respondents contractually agreed to the appointment of a receiver.*** The Mortgage of the 950 Property, the Mortgage of the 942 Property, the Mortgage of Registry PIN 37074-0539 and the Mortgage of the 948 Property expressly entitle the Applicant to appoint a receiver under certain circumstances, including the present circumstances. The Applicant now exercises these entitlements, subject to this Court’s authority.
- b) ***The Commitment Letter is in default.*** As set out above, events of default have occurred and are continuing under the Commitment Letter and the related transaction documents. The Applicant has demanded payment. The Applicant

provided the Respondents with statutory notice of its intention to enforce security, and the applicable notice periods have elapsed.

- c) ***The Respondents' business needs to be stabilized and preserved.*** The Respondents have various arrears owing to third parties, as detailed above, including the property tax arrears. A receiver will be able to take the necessary steps to preserve the Security, including conducting an orderly sale process that will generate recoveries for creditors. If the Security is not preserved, there will be further negative consequences. The Respondents' business will continue to worsen in the absence of action.
- d) ***The Applicant has lost confidence in the Respondents' management.*** The Applicant has lost confidence in the management of the Respondents due to the events described in the Robertson Affidavit.
- e) ***Position and interests of other Creditors.*** The Applicant is not the only creditor of the Respondents. The Receiver will be able to properly and equitably deal with the interests of creditors other than the Applicant. A receivership provides parties with an effective forum in which to deal with any issues, including any competing claims, that may arise in respect of the Respondents and the Properties.

(c) The Terms of the Receivership Order are Appropriate

71. The terms of the proposed receivership order are substantially the same as the terms of the Commercial List's model receivership order.

Reference: Blackline of the draft Order against the Model Receivership Order; Application Record, Tab 4.

PART IV – ORDER REQUESTED

72. For the reasons set forth herein and in the Application Record, it is respectfully submitted that the appointment of a receiver is just and convenient and is necessary for the protection of the estate of the Respondents and the interests of the Applicant and other stakeholders.

73. The Applicant respectfully requests that this Honourable Court grant the Appointment Order substantially in the form attached as Tab 5 to the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of November, 2024



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SCHEDULE "A"**LIST OF AUTHORITIES**

1. [*RMB Australia Holdings Limited v. Seafield Resources Ltd.*, 2014 ONSC 5205 \(CanLII\)](#);
2. *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 (Ont. S.C.J. (Commercial List));
3. *Swiss Bank Corporation (Canada) v. Odyssey Industries Incorporated* (1995), 30 C.B.R. (3d) 49.

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bankruptcy and Insolvency Act, RSC 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

- (f) is appointed under subsection (1); or
- (g) 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.

Courts of Justice Act, RSO 1990, c. C-43.

Injunctions and receivers

101. (1) In the Superior Court of Justice, an interlocutory 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.

KINDRED CREDIT UNION LIMITED

- and- 11393251 CANADA INC. et al.

Applicant

Respondents

Court File No. CV-24-00000236-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at
Owen Sound, Ontario

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