Court File No.: CV-25-00735381-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

PEAKHILL CAPITAL INC.

Applicant

-and-

METAMORE INC.

Respondent

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

FACTUM OF THE APPLICANT

February 12, 2025

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Table of Contents

ADDENDA

Court File No.: CV-25-00735381-00CL

ONTARIO
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FACTUM OF THE APPLICANT

PART I - INTRODUCTION

1. On this Application, Peakhill Capital Inc. ("**Peakhill**") seeks an Order appointing msi Spergel Inc. (**"msi Spergel"**) as receiver and manager (the "**Receiver**") of the property municipally known as 228 Dundas Street East, Belleville, Ontario (the "**Property**") owned by the Respondent, Metamore Inc. (the "**Borrower**") pursuant to section 101 of the *Courts of Justice Act* (the "**CJA**") and section 243(1) of the *Bankruptcy and Insolvency Act* (the "**BIA**").

2. Peakhill is seeking a Court-appointed Receiver pursuant to the terms of the Loan (defined below), related security, and the Forbearance Agreement (defined below). The appointment of the Receiver is necessary because, *inter alia*:

(a) Peakhill, as the senior creditor of the Borrower, has lost faith in the Borrower's ability to manage the Property and repay the Loan (defined below) indebtedness;

(b) the Property requires active management regarding vulnerable tenants who reside at the Property; and

(c) a Court-appointed receivership process will provide the best forum for the Court supervised sale of the Property and to deal with any priority issues between Peakhill and other stakeholders.

3. As set out more fully below, the Borrower consented to the appointment of a receiver pursuant to the Forbearance Agreement (defined below). In the circumstances, it is just and convenient for this Court to appoint the Receiver over the Property.

PART II - SUMMARY OF FACTS

The Parties and The Property

4. Peakhill is an Ontario corporation with its registered head office in Toronto, Ontario. Peakhill carries on business in Ontario as, *inter alia*, a commercial mortgage lender. Peakhill is the first-ranking mortgagee with respect to the Property.[1]

5. The Borrower is an Ontario corporation and the owner and landlord of the Property.[2]

6. The Property is a multi-unit building comprised of a long-term not-for-profit tenant and approximately 26 additional residential tenanted units. The long-term not-for-profit tenant is part of the Canadian Mental Health Association and provides therapeutic, rehabilitative, and supporting housing programs for individuals with varied health and housing matters.[3]

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[1] Application Record, Affidavit of Christine Hazle, sworn January 27, 2025 ("**Hazle Affidavit**") at para 5.
[2] Hazle Affidavit at para 3.
[3] Hazle Affidavit at para 4.

The Loan

7. Pursuant to the terms of a mortgage commitment letter dated May 25, 2023, and amended by a mortgage commitment letter amendment dated June 9, 2023 (collectively, the "**Commitment**"), Peakhill made a secured loan to the Borrower in the principal amount of $12,000,000 (the "**Loan**"). The purpose of the Loan was to payout the Borrower's existing debt, fund financing costs and interest reserve, and provide equity repatriation to the Borrower.[4]

8. Pursuant to the terms of the Loan:

(a) the Loan indebtedness was accruing interest at RBC Prime + 2.50% per annum with a minimum interest rate of 9.20% ("**Pre-Step-Up Interest Rate**") up until June 30, 2024; and

(b) the Loan indebtedness is accruing interest at RBC Prime + 10% per annum (the "**Step-Up Interest Rate**") from July 1, 2024, onwards.

9. As security for its indebtedness and obligations to Peakhill under the Loan, the Borrower delivered, *inter alia*, the following security, without limitation, to Peakhill (collectively referred to as the "**Security**"):

(a) a Charge/Mortgage of Land between the Borrower, as Mortgagor, and Peakhill, as Mortgagee, registered as Instrument No. HT332633 (the "**Mortgage**");[5]

(b) a Notice of Assignment of Rents - General between the Borrower, as Assignor, and Peakhill, as Assignee, registered as Instrument No. HT332634;[6]

(c) a Security Agreement between Peakhill, as Secured Party, and the Borrower, as Debtor, made June 20, 2023 (the "**Security Agreement**");[7]

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[4] Hazle Affidavit at para 6.
[5] Hazle Affidavit, Exhibit 5.
[6] Hazle Affidavit, Exhibit 6.
[7] Hazle Affidavit, Exhibit 7.

(d) a guarantee provided by Laurie Consitt, Shawn Beattie, and Jeremy Steeves (collectively, the "**Guarantors**") to Peakhill dated June 20, 2023 (the "**Guarantee**");[8]

(e) an estoppel certificate to Peakhill in respect of Canadian Mental Health Association Hastings and Prince Edward, a tenant at the Property.[9]

10. Peakhill also made registrations pursuant to the *Personal Property Security Act* (the "**PPSA**").[10]

Other Creditors

11. Peakhill is the first ranking mortgagee and there are no other charges registered against the Property as at January 23, 2025.[11]

12. None of the Ontario PPSA registrations against the Borrower pertain to the Property other than Peakhill's registration.[12]

13. As at January 22, 2025, the Borrower does not have any execution creditors.[13]

14. As at January 23, 2025, there are two registered construction liens on the Property:

(a) a construction lien for the amount of $1,433,800 registered as Instrument No.: HT339561 on November 15, 2023, by 995451 Ontario Inc.;[14] and

(b) a construction lien for the amount of $256,835 registered as Instrument No.: HT344657 on March 25, 2024, by 995451 Ontario Inc..[15]

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[8] Hazle Affidavit, Exhibit 8.
[9] Hazle Affidavit, Exhibit 9.
[10] Hazle Affidavit at para 9, Exhibits 10 and 11.
[11] Hazle Affidavit at para 10; see Hazle Affidavit, Exhibit 2 (Property parcel register).
[12] Hazle Affidavit at para 11, Exhibit 12.
[13] Hazle Affidavit at para 12, Exhibit 13.
[14] Hazle Affidavit, Exhibit 14.
[15] Hazle Affidavit, Exhibit 15.

15. Associated with the above-noted liens, the lien claimant 995451 Ontario Inc. registered a certificate of action as Instrument No.: HT344681 on March 26, 2024.[16]

Default and Demand

16. The Borrower defaulted and breached the terms of the Loan in the summer of 2024 and applicable Security by, *inter alia*:[17]

(a) failing to repay the Loan on its maturity (July 1, 2024);

(b) failing to pay its August 2024 interest payment; and

(c) causing the above-noted construction liens to be registered on the Property.

17. Peakhill issued a formal demand letter to the Borrower and the Guarantors on August 29, 2024, demanding repayment of all amounts owing under the Loan. The demand letter enclosed a Notice of Intention to Enforce Security pursuant to section 244 of the BIA (the demand letter and section 244 notice collectively referred to as the "**Demand**"). The statutory notice period provided for under the BIA and outlined in the Demand has expired.[18]

18. Following the Demand, the Borrower made a proposal to Peakhill that would have had the Loan repaid by December 1, 2024, by either refinancing or sale of the Property. Accordingly, Peakhill agreed to forbear from taking any further steps to enforce the Security held by Peakhill until December 1, 2024 (the "**Forbearance Date**") on the terms and conditions set out in the Forbearance Agreement dated September 12, 2024 (the "**Forbearance Agreement**").[19]

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[16] Hazle Affidavit at para 14.
[17] Hazle Affidavit at para 15.
[18] Hazle Affidavit at para 16.
[19] Hazle Affidavit at para 17, Exhibit 18.

19. On September 26, 2024, as an accommodation to the Borrower and the Guarantors, Peakhill provided an initial 2-week extension to October 14, 2024 (the "**Extended Payment Date**") to make the August, September and October payments required pursuant to the Forbearance Agreement.[20]

20. The Borrower defaulted and breached the terms of the Forbearance Agreement by, *inter alia*, failing to make monthly interest payments as required under the Forbearance Agreement.[21]

21. Following its breach of the Forbearance Agreement, the Borrower made a revised proposal whereby the Borrower would be required to make payment of the September, October and November interest payments on or before November 8, 2024 (the "**Revised Extended Payment Date**") and for the Forbearance date to be extended from December 1, 2024, to May 1, 2025.[22]

22. As a result of the revised proposal, Peakhill provided a final indulgence and accommodation to the Borrower to amend the Forbearance Agreement, and the parties entered into a Forbearance Agreement Amendment Agreement made as of November 14, 2024 (the "**Forbearance Amendment Agreement**"). The default provisions of the Forbearance Agreement remained unchanged and in force pursuant to the Forbearance Amendment Agreement.[23]

23. The Borrower defaulted and breached the terms of the Forbearance Amendment Agreement by, *inter alia*, failing to make monthly interest payments as required under the Forbearance Amendment Agreement.[24]

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[20] Hazle Affidavit at para 18.
[21] Hazle Affidavit at para 19.
[22] Hazle Affidavit at para 20.
[23] Hazle Affidavit at para 21, Exhibit 20.
[24] Hazle Affidavit at para 22.

24. Notwithstanding the Borrower's default, Peakhill still made attempts to accommodate the Borrower. Unfortunately, Peakhill has lost faith in the Borrower's ability to repay the Loan indebtedness.[25]

25. The terms of the Mortgage (section 42)[26] and Security Agreement (section 12)[27], among other Security, permit Peakhill to appoint a receiver over the Property in the event that the Borrower is in default of the Loan.

26. Pursuant to the Forbearance Agreement, upon an event of default, "The Borrower and Guarantors hereby consent to the appointment of a private or court appointed Receiver and covenant not to take any steps to oppose or interfere with such appointment and to provide all reasonable assistance, access to all books, records, assets and documents of the Borrower to permit such Receiver to properly fulfil its duties."[28]

27. As of January 24, 2025, the Borrower owed Peakhill $12,811,967.35 plus per diem interest, costs, legal fees and disbursements, and other expenses incurred by Peakhill.[29]

Status of the Property and Attornment of Rent

28. The Property is listed for sale and remains tenanted.[30] The Property requires active management in order to preserve this Borrower's asset, the tenancies and the interests of the tenants, given the vulnerable nature of the tenants.

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[25] Hazle Affidavit at para 23.
[26] Application Record, p 85, Hazle Affidavit, Exhibit 5 (Mortgage), section 42.
[27] Application Record, p 108, Hazle Affidavit, Exhibit 7 (Security Agreement), section 12(1).
[28] Application Record, p 177, Hazle Affidavit, Exhibit 18 (Forbearance Agreement), section 5.1.
[29] Hazle Affidavit at para 26, Exhibit 22.
[30] Hazle Affidavit at para 27.

29. One of the main tenants at the Property, Canadian Mental Health Association Hastings Prince Edward Addictions and Mental Health Services ("**CMHA**"), advised the Borrower that the Borrower was in breach of the lease for failing to pay for the Property utilities (water and electricity).[31] As set out in the letter, as at January 27, 2025, the Borrower was in arrears of approximately $41,161.02 for electricity and $5,454.26 for water.[32]

30. Upon learning about the City of Belleville (the "**City**") and the electrical provider taking steps to disconnect utilities services at the Property for non-payment, Peakhill took immediate steps to contact the City and the electricity provider and receive confirmation that the City would refrain from disconnecting the water services at the Property pending the within application to appoint the Receiver.[33] The electricity provider also advised it would not disconnect the services but the arrears remain outstanding.

31. As described above, the Property has construction liens registered on title with respect to alleged invoices that remain unpaid by the Borrower with respect to work allegedly conducted on the Property.[34]

32. Notwithstanding that the Borrower was collecting rent from the tenants at the Property, the Borrower was diverting the rent from the Property to its other projects and not using these funds to meet its mortgage obligations.[35]

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[31] Supplementary Application Record, Supplementary Affidavit of Christine Hazle ("**Supplementary Hazle Affidavit**") at para 11.
[32] Supplementary Hazle Affidavit at para 10.
[33] Supplementary Hazle Affidavit at paras 11-13.
[34] Hazle Affidavit at para 28.
[35] Hazle Affidavit at para 29.

33. As a result and pursuant to the terms of the Security, on or about January 22, 2025, Peakhill has appointed msi Spergel as a private receiver in respect of the Property for the purpose of collecting rents from the tenants of the Property pending the court appointment of msi Spergel in this proceeding.[36]

34. On or about January 24, 2025, Peakhill, through msi Spergel, delivered to the tenants of the Property a notice of attornment of rent.[37]

35. However, shortly after msi Spergel delivered the notices of attornment of rent to the tenants of the Property, on or about January 28, 2025, Peakhill became aware that the Borrower had circulated a letter to the tenants advising them that rent is to be paid to the Borrower and to disregard the notices of attornment of rent.[38]

36. Peakhill, through its counsel, advised the Borrower's counsel of the Borrower's attempt to sabotage Peakhill's efforts to attorn rent.[39] The Borrower advised that its communication to the tenants to disregard the notices of attornment was an office mistake and not intentional.[40] Notwithstanding this, Peakhill delivered a further letter to the tenants at the Property to pay the rent to msi Spergel in accordance with the notices of attornment to ensure there was no further confusion.[41]

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[36] Hazle Affidavit at para 30.
[37] Hazle Affidavit at para 31.
[38] Supplementary Hazle Affidavit at para 4.
[39] Supplementary Hazle Affidavit at para 5.
[40] Supplementary Hazle Affidavit at para 6.
[41] Supplementary Hazle Affidavit at para 7.

Consent of the Receiver

37. The Receiver has consented to its Court appointment, and executed a Consent to this effect.[42]

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

Issue

38. The sole issue on this application is whether it would be just and convenient to appoint a receiver over the Property.

The Test to Appoint a Receiver

39. The test to appoint a receiver under section 101 of the *CJA* and section 243(1) of the *BIA* is whether it would be just or convenient to do so.

40. Section 101 of the *CJA* states:

> "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."[43]

41. Section 243(1) of the *BIA* states:

"… 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

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[42] Hazle Affidavit at para 34 and Exhibit 26.
[43] *CJA*.

(c) take any other action that the court considers advisable."[44]

42. In assessing whether it is just and convenient to appoint a receiver, the question is whether it is more in the interests of all concerned to have the receiver appointed or not.[45] When there is a contractual power of appointment, the Court assesses "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]".[46]

43. When deciding 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. The fact that the moving party has a right to appoint a receiver is an important factor to be considered, as is the question of whether or not an appointment by the Court is necessary to enable the receiver to carry out its work and duties more efficiently.[47]

44. Courts have considered the following factors, among others, when determining whether it is just and convenient to appoint a receiver:

(a) 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;[48]

(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 the assets while litigation takes place;

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[44] *BIA*.
[45] *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONSC 1911 (CanLII) (Ont. S.C.J. [Commercial List]) [***Business Development Bank***] at para. 22.
[46] *Royal Bank of Canada v. CFNDRS Inc.*, 2017 ONSC 7661 (CanLII) (Ont. S.C.J. [Commercial List]) [***RBC***] at para. 9, citing *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CanLII 8258 (Ont. Gen Div. [Commercial List]) [***Freure Village***] at para. 12.
[47] *RBC* at para. 8, citing *Freure Village* at para. 11; *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 (CanLII) (Ont. S.C.J.) [***BMO***] at para. 24; *Elleway Acquisitions Limited v. The Cruise Professionals Limited*, 2013 ONSC 6866 (CanLII) at para 27.
[48] *RBC* at para. 8.

(c) the nature of the property;

(d) the rights of the parties thereto and the balance of convenience to the parties;

(e) the preservation and protection of the property pending judicial resolution;

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

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

(h) that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly, however, this proposition does not apply or is less essential to a secured creditor with a right to enforce its security; [49]

(i) whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;

(j) the effect of the order on the parties;

(k) the conduct of the parties;

(l) the length of time that a receiver may be in place;

(m) costs to the parties;

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

(o) facilitating the duties of the receiver; and

(p) the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity.[50]

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[49] *BMO* at para. 25; *Freure Village* at para. 13.
[50] Appendix "A" hereto, Frank Bennett, *Bennett on Receivership, 3d ed.* (Toronto: Carswell, 2011), at pages 155-159; *Business Development Bank*, at para. 22.

It is Just and Convenient to Appoint a Receiver Over the Borrower

45. Peakhill submits that it is just and convenient to appoint the Receiver in the circumstances, and therefore, the statutory test for the appointment of a receiver is satisfied for the following reasons:

(a) the Borrower is in default of its obligations under, among other things, the Loan and the Forbearance Agreement;

(b) the terms of the Mortgage (section 42)[51] and Security Agreement (section 12)[52], among other Security, permit Peakhill to appoint a receiver over the Property in the event that the Borrower is in default of the Loan;

(c) the Borrower consented to the appointment of the receiver pursuant to the Forbearance Agreement, as amended;

(d) Peakhill has lost faith in the Borrower's ability to manage the Property and repay the Loan indebtedness;

(e) the appointment of the Receiver is necessary to properly manage matters pertaining to Property, including, among other things, the vulnerable tenants;

(f) msi Spergel has consented to its Court appointment; and

(g) a court appointed receivership process will provide the best forum to deal with any priority issues as between Peakhill and other stakeholders.

46. The proposed Receivership Order substantially follows the terms of the Model Order. IT is respectfully submitted that the terms of the draft Receivership Order are necessary and appropriate based on the facts set out herein to permit the Receiver to take possession of, and realize upon, the assets of the Borrower for the benefit of its stakeholders.

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[51] Application Record, p 85, Hazle Affidavit, Exhibit 5 (Mortgage), section 42.
[52] Application Record, p 108, Hazle Affidavit, Exhibit 7 (Security Agreement), section 12(1).

PART IV - ORDER REQUESTED

47. For all the foregoing reasons, Peakhill requests that this Court grant an Order substantially in the form of the draft Receivership Order located at Tab B of its Supplementary Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: February 12, 2025

Dominique Michaud

Date: February 12, 2025

Joey Jamil

CERTIFICATE RE AUTHORITIES

I, Joey Jamil, counsel for the Applicants, certify:

All authorities are genuine, as required by the Rule 4.06(2.1) of the *Rules of Civil Procedure*.

Date: February 12, 2025

Joey Jamil

I, Dominique Michaud, counsel for the Applicants, certify:

All authorities are genuine, as required by the Rule 4.06(2.1) of the *Rules of Civil Procedure*.

Date: February 12, 2025

Dominique Michaud

SCHEDULE 'A'
LIST OF AUTHORITIES

1. *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONSC 1911 (CanLII) (Ont. S.C.J. [Commercial List])

2. *Royal Bank of Canada v. CFNDRS Inc.*, 2017 ONSC 7661 (CanLII) (Ont. S.C.J. [Commercial List])

3. *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CanLII 8258 (Ont. Gen Div. [Commercial List])

4. *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 (CanLII) (Ont. S.C.J.)

5. *Elleway Acquisitions Limited v. The Cruise Professionals Limited*, 2013 ONSC 6866 (CanLII)

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

SCHEDULE 'B'
TEXT OF STATUTES, REGULATIONS & BY – LAWS

1. *Courts of Justice Act*, RSO, c C.43, section 101(1)

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.

2. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, section 243(1)

Court may appoint receiver

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

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

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

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

APPENDIX "A"

Frank Bennett, *Bennett on Receivership, 3d ed.* (Toronto: Carswell, 2011), at pages 155-159

BENNETT on RECEIVERSHIPS

Third Edition

by

Frank Bennett

L.S.M., LL.M.

Toronto, Canada

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Once an order is made appointing a receiver, the court may refer the conduct of all or part of the receivership to a referee under Rule 54 of the Ontario *Rules of Civil Procedure*.[51]

(b) Under What Circumstances—Who May Apply

In determining whether it is "just or convenient" that a receiver should be appointed, the court considers many factors that vary in the circumstances of the case. While the remedy is usually employed by a security holder to enforce payment of a debt, other parties can employ the remedy seeking protection and preservation of assets pending adjudication of the issues. These factors include the following:[52]

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in an appointment of a receiver: see *B.C. Power Corp v. A.G. (B.C.)* (1962), 38 W.W.R. 577 at p. 588 and p. 635 *ff*, 34 D.L.R. (2d) 196 at p. 211, 1962 CarswellBC 71 (B.C. C.A.), appeal allowed (sub nom. *B.C. Power Corp. v. B.C. Electric Co.)* [1962] S.C.R. 642, 38 W.W.R. 701, 34 D.L.R. (2d) 196 at p. 274 (S.C.C.).

See also *McKnight v. Hutchison*, 2011 BCSC 36 (CanLII), 2011 CarswellBC 41 (B.C. S.C.) where the court did not appoint a receiver in a partnership dispute, but made a preservation order pending the trial.

51 Once a court-appointed receiver is appointed, it is doubted that the security holder can simply discontinue the action especially after the court has ordered a sale. Although the appointment of a receiver is corollary relief in an action, the receiver cannot be discharged except by the court which appointed it: see *Guar. Trust Co. of Canada v. 208633 Holdings Ltd.; Northland Bank v. 208633 Holdings Ltd.* (1982), 19 Alta. L.R. (2d) 151, 42 C.B.R. (N.S.) 90, 1982 CarswellAlta 312 (Alta. Q.B.).

52 These factors were considered in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.* (2002), 46 C.B.R. (4th) 95, 2002 ABQB 430 (CanLII), 2002 CarswellAlta 1531 (Alta. Q.B.) and in *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.* (2009), 60 C.B.R. (5th) 142, 2009 BCSC 1527 (CanLII), 2009 CarswellBC 2982 (B.C. S.C. [In Chambers]).

In *1468121 Ontario Ltd. v. 663789 Ontario Ltd.*, 2008 CanLII 66137, 2008 CarswellOnt 7601 (Ont. S.C.J.) at para. 9, leave to appeal to the Divisional Court dismissed 2009 CanLII 9440, 2009 CarswellOnt 1128 (Ont. S.C.J.) where the court considered the four following factors in dismissing a motion for the appointment of an interim receiver:

> "(1) Since the appointment of a receiver is very intrusive, it should only be used sparingly with due consideration for the effect on the parties as well as a consideration of conduct of the parties. (See: *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565 (Ont. Gen. Div.));
>
> (2) Since an appointment of a receiver is tantamount to execution before judgment, it should not be granted unless there is strong evidence that the creditor will not recover. (See: *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of)* (1987), 16 C.P.C. (2d) 130 (Ont. H.C.));
>
> (3) When the security interest permits the appointment of a receiver – and the circumstances of default justify the appointment – the extraordinary nature of the remedy is less essential to the consideration of the court. (See *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]));
>
> (4) Where there is default which is not caused by the moving party where a loan had matured and there was no other means to protect the party's interest, then a receivership order should issue. (See *Royal Bank v. 605298 Ontario Inc.*, 1998 CarswellOnt 4436 (Ont. Gen. Div. [Commercial List])).

In *Lindsey Estate v. Strategic Metals Corp.* (2010), 67 C.B.R. (5th) 88, 2010 ABQB 242 (CanLII), 2010 CarswellAlta 641 (Alta. Q.B.), appeal dismissed (2010), 27 Alta. L.R. (5th) 241, 69 C.B.R. (5th) 42, 2010 ABCA 191 (CanLII) (Alta. C.A.), the motion court considered the following factors in

(1) whether irreparable harm might be caused if no order were made, although it is not essential that the creditor establish that it will suffer irreparable harm if a receiver is not appointed;[53]

(2) the risk to the security holder. In considering the risk factor, the court considers the size of the debtor's equity in the assets and the need for protection or safeguarding the assets while the litigation takes place. If the security holder can readily establish that there is going to be a sizeable deficiency in relation to the size of the loan, then the court will lean in favour of making the appointment as there is clear prejudice to the security holder. On the other hand, the court may not consider this factor to be important if there is no danger or jeopardy to the security holder or in other words, there is a substantial equity that will adequately protect the security holder;[54]

(3) the nature of the property;

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determining "just or convenient":

> "In determining whether it is just and convenient to appoint a Receiver, a Court should consider various factors such as:
>
> a. whether irreparable harm might be caused if no order is made;
> b. the risk to the parties;
> c. the risk of waste debtor's assets;
> d. the preservation and protection of property pending judicial resolution; and
> e. the balance of convenience."

See also *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.* (2010), 67 C.B.R. (5th) 97, 2010 BCSC 477 (CanLII), 2010 CarswellBC 855 (B.C. S.C. [In Chambers]).

53 *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) referring to *Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97, 37 C.B.R. (N.S.) 281, 123 D.L.R. (3d) 394 (Ont. H.C.). In the *Odyssey* case, there was no evidence of the loans being in jeopardy of repayment while being in default.

The *Swiss Bank* case has been distinguished and not followed in Alberta: *BG International Ltd. v. Canadian Superior Energy Inc.* (2009), 53 C.B.R. (5th) 161, 2009 ABCA 127 (CanLII), 2009 CarswellAlta 469 (Alta. C.A.) where the court stated that the debtor does not to prove any special hardship, much less "undue hardship" to resist an application for the appointment of a receiver.

See also *Lakeside Colony of Hutterian Brethren v. Hofer* (1993), 87 Man. R. (2d) 216, 19 C.B.R. (3d) 190, 1993 CarswellMan 30 (Man. Q.B.) where the court also took into consideration the fact that the plaintiffs had a strong *prima facie* case and that the balance of convenience favoured the appointment.

54 If there is no danger to the debtor's property, and the appointment will have a devastating effect on the debtor, the court will not appoint a receiver: *HMW-Bennett & Wright Contractors Ltd. v. BWV Investments Ltd.* (1991), 95 Sask. R. 211, 7 C.B.R. (3d) 216, 1991 CarswellSask 42 (Sask. Q.B.)

See also *Ontario Development Corp. v. Ralph Nicholas Enterprises Ltd.* (1985), 57 C.B.R. (N.S.) 186, 1985 CarswellOnt 206 (Ont. H.C.) where the court, after considering that the debtor's financial situation was desperate, appointed a receiver and manager.

In *Churchill (Local Government District) v. Costa Cartage Ltd.* (1994), 94 Man. R. (2d) 216, 1994 CarswellMan 286 (Man. Q.B.) where the debtor threatened to remove the furniture and furnishings of a hotel.

See also *Wilson v. Marine Drive Properties Ltd.* (2008), 51 C.B.R. (5th) 74, 2008 BCSC 1431 (CanLII), 2008 CarswellBC 2240 (B.C. S.C.).

See also *Loblaw Brands Ltd. v. Thornton*, 2009 CanLII 12803, 2009 CarswellOnt 1588 (Ont. S.C.J.) where the unsecured creditor's right to recovery money in a fraud situation is in serious jeopardy.

(4) the rights of the parties thereto;[55]
(5) the apprehended or actual waste of the debtor's assets;
(6) the preservation and protection of the property pending the judicial resolution;[56]
(7) the balance of convenience to the parties;
(8) the fact that the creditor has the right to appoint a receiver under its security;[57]

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55 *Nat. Trust Co. v. Yellowvest Holdings Ltd. et al.* (1979), 24 O.R. (2d) 11, 98 D.L.R. (3d) 189, 1979 CarswellOnt 1364 (Ont. H.C.); applied in *Third Generation Realty Ltd. v. Twigg Holdings Ltd.* (1991), 6 C.P.C. (3d) 366, 1991 CarswellOnt 469 (Ont. Gen. Div.). See also *Royal Trust Corp. of Can. v. D.Q. Plaza Holdings et al.* (1984), 36 Sask. R. 84, 53 C.B.R. (N.S.) 18, 1984 CarswellSask 38 (Sask. Q.B.).

See also *BG International Ltd. v. Canadian Superior Energy Inc.* (2009), 53 C.B.R. (5th) 161, 2009 ABCA 127 (CanLII), 2009 CarswellAlta 469 (Alta. C.A.) where the court stated that an appointment should not lightly be granted and that the rights of both parties should be carefully balanced before an appointment is made.

In *MTM Commercial Trust v. Statesman Riverside Quays Ltd.* (2010), 70 C.B.R. (5th) 233, 2010 ABQB 647 (CanLII) (Alta. Q.B.) the court reviewed the test for the appointment of a receiver as being comparable to the test for an injunction, namely whether there is a serious issue to be tried, irreparable harm if not granted, and the balance of convenience: *RJR MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.).

56 For example, the court has the discretion to appoint a receiver in a mortgage action where the mortgagor fails to manage the buildings properly and make repairs: *Alpha Investments & Agencies Ltd. v. Maritime Life Assurance Company* (1978), 23 N.B.R. (2d) 261, 1978 CarswellNB 96 (N.B. C.A.); *J. P. Capital Corp. (Trustee of) v. Perez* (1996), 38 C.B.R. (3d) 301, 1996 CarswellOnt 430 (Ont. Gen. Div.); *Farallon Investments Ltd. v. Bruce Pallet Fruit Farms Ltd.*, 1992 CarswellOnt 4933, 31 A.C.W.S. (3d) 1283 (Ont. Gen. Div.).

See also *McLennan Ross v. Paramount Life Ins. Co.* (1986), 44 Alta. L.R. (2d) 375, 63 C.B.R. (N.S.) 265, 1986 CarswellAlta 448 (Alta. Q.B.). When a mortgagee applies for a court appointment, the order does not create any new rights; it only protects existing rights. In this case, the court held that the receiver is entitled to collect rent arrears after the appointment, but the receiver cannot collect rent already collected by the mortgagor.

See also *Standard Trust Co. v. Pendygrasse Hldg. Ltd.* (1988), 71 C.B.R. (N.S.) 65, 1988 CarswellSask 27 (Sask. Q.B.) where the court, in referring to many of these factors, refused the appointment on the basis that the mortgagee already had significant control over the management board of a condominium complex and, therefore, its security was not in danger.

See also *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, [1991] O.J. No. 2613, 1991 CarswellOnt 1511 (Ont. Gen. Div.), where the court, in referring to many of these factors, appointed a receiver to complete a large construction project of an office building and to lease out space. Here, the debtor had no substantial equity in the project, its loans were in default and they had matured.

See also *Bank of N.S. v. Marbeck Well Servicing Ltd.; Bank of N.S. v. Becker* (1986), 43 Alta. L.R. (2d) 453 (M.C.) (headnote only).

See also *Yukon v. B.Y.G. Natural Resources Inc.* (2007), 31 C.B.R. (5th) 100, 2007 YKSC 2 (CanLII), 2007 CarswellYukon 1 (Y.T. S.C.) where the court concluded that an interim receiver was needed where there were dangerous and unsafe conditions in a mine site that had been abandoned.

If the property is not in peril or the creditor is unable to demonstrate that, the court will not appoint a receiver: *Tim v. Lai and Harry Invts. Ltd.* (1984), 53 C.B.R. (N.S.) 80, 1984 CarswellBC 575, 1984 CanLII 446 (B.C. S.C.).

Instead of appointing a receiver, the security holder can request an injunction and a preservation order against the debtor pending a declaration that the security holder is entitled to enforce its security.

57 Where this clause is present, the extraordinary nature of the remedy is less essential as a determining factor: *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328, 1996 CanLII 8258 (Ont. Gen. Div. [Commercial List]); *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.* (2009), 60 C.B.R. (5th) 142, 2009 BCSC 1527 (CanLII), 2009 CarswellBC 2982 (B.C. S.C.); *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.* (2010), 67 C.B.R. (5th) 97, 2010 BCSC 477 (CanLII), 2010 CarswellBC 855 (B.C. S.C. [In Chambers]).

(9) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;[58]

(10) that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;[59]

(11) whether a court appointment is necessary to enable a private receiver to carry out its duties more efficiently;[60]

(12) the effect of the order on the parties. If a receiver is appointed, its effect may be devastating upon the parties and their business and, where the business has to be sold, the appointment of a receiver may have a detrimental effect upon the price;[61]

(13) the conduct of the parties;[62]

(14) the length of time that a receiver may be in place. Usually, a receiver appointed by the court remains in place until after judgment and realization of assets. This could last several years depending upon the nature of the business. However, where a claimant moves for an order appointing a receiver for a short

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See also *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 CarswellOnt 896, 2011 ONSC 1007 (CanLII) (Ont. S.C.J.).

See also below in text (10) extraordinary relief.

See also *Confederation Trust Co. v. Dentbram Developments Ltd.*, [1992] O.J. No. 3870, 1992 CarswellOnt 474 (Ont. Gen. Div.).

58 *STN Labs Inc. v. Saffron Rouge Inc.* (2010), 68 C.B.R. (5th) 287, 2010 ONSC 3042 (CanLII), 2010 CarswellOnt 3588 (Ont. S.C.J.); *Uvalde Investment Co. v. 754223 Ontario Ltd.* (1997), 45 C.B.R. (3d) 315, 1997 CarswellOnt 365 (Ont. Gen. Div.).

59 *Canadian Imperial Bank of Commerce v. Jack*, 1990 CarswellOnt 3055, [1990] O.J. No. 670, 20 A.C.W.S. (3d) 416 (Ont. Gen. Div.) referring to *Fisher Investments Ltd. et al. v. Nusbaum* (1988), 71 C.B.R. (N.S.) 185, 1988 CarswellOnt 180 (Ont. H.C.). While the remedy is extraordinary, the fact that a creditor has the right to appoint a receiver by instrument under its security makes the "extraordinary" nature of the remedy less essential in the consideration: *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328, 1996 CanLII 8258 (Ont. Gen. Div. [Commercial List]).

See also *Royal Bank of Canada v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, 46 C.B.R. (3d) 267, 1997 CarswellOnt 988 (Ont. Gen. Div.).

See also *O.W. Waste Inc. v. EX-L Sweeping & Flushing Ltd.*, [2003] O.J. No. 3766, 2003 CanLII 34187, 2003 CarswellOnt 3598 (Ont. S.C.J.), appeal dismissed 2004 CarswellOnt 810 (Ont. C.A.); *WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.* (2009), 59 C.B.R. (5th) 303, 2009 CanLII 55120 (Ont. S.C.J. [Commercial List]).

60 *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CanLII 8258 (Ont. Gen. Div. [Commercial List]); referred to in *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.* (2007), 27 C.B.R. (5th) 1, 2007 CanLII 297 (Ont. S.C.J.); and followed in *GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co.*, 2011 ONSC 3851 (CanLII) (Ont. S.C.J.).

61 *Fisher Investments Ltd. et al. v. Nusbaum* (1988), 71 C.B.R. (N.S.) 185, 1988 CarswellOnt 180 (Ont. H.C.). In this case, the court was also concerned about the receiver's capabilities as the proposed receiver lacked experience in operating a nursing home. See also *Royal Bank of Canada v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, 46 C.B.R. (3d) 267, 1997 CarswellOnt 988 (Ont. Gen. Div.).

62 *Royal Bank of Canada v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565, 46 C.B.R. (3d) 267, 1997 CarswellOnt 988 (Ont. Gen. Div.) where the court in rejecting the appointment reviewed the effect of the order on the parties as well as their conduct.

period, say six weeks, the court is reluctant to make such an appointment as it has devastating effects on the parties;[63]

(15) costs to the parties;

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

(17) facilitating the duties of the receiver;[64] and

(18) the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity.[65]

In many cases, a security holder whose instrument charges all or substantially all of the debtor's property provides for a court-appointed receivership if the debtor is in default and fails to pay following a demand for payment.[66] *Prima facie*, the security holder is entitled to enforce its security by applying for a court-appointed receiver and manager.

If the creditor who applies for the appointment of a receiver is neither a judgment creditor nor a secured creditor, the court will be more cautious in reviewing the factors listed above as they may not readily apply. As has been pointed out in case law, the appointment of a receiver is intrusive and can have disastrous effects on the debtor. The creditor must show that there is a serious issue to be tried, that irreparable harm will occur if an appointment is not made, and that the balance of convenience must be in the creditor's favour. In effect, the court focuses on the test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*.[67]

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63 In Ontario, the security holder seldom obtains judgment before the receiver sells the debtor's business. But see *First Pacific Credit Union v. Grimwood Sports Inc.* (1984), 59 B.C.L.R. 145, 56 C.B.R. (N.S.) 7, 16 D.L.R. (4th) 181 (B.C. C.A.) where the court commented about the creditor first obtaining judgment before it could sell.

64 *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328, 1996 CanLII 8258 (Ont. Gen. Div. [Commercial List]) where the court reviewed many of the above circumstances. In this case, the debtor had been attempting to re-finance real properties for one and a half years and was at odds with the security holder as to marketing them. In postponing the appointment for a short time to give the debtor a further opportunity to re-finance, the court concluded that a court-appointed receiver could resolve that impasse.

65 *Priority 1 Security Inc. v. Phasys Ltd.* (2006), 9 P.P.S.A.C. (3d) 203, 22 C.B.R. (5th) 258, 2006 ABQB 332 (CanLII) (Alta. Q.B.).

66 The above passage as it was written in the first edition was cited in *Citibank Can. v. Calgary Auto Centre* (1989), 75 C.B.R. (N.S.) 74, 1989 CarswellAlta 343, 1989 CanLII 3440 (Alta. Q.B.).

See *Royal Bank v. Brodak Construction Services Inc.* (2002), 34 C.B.R. (4th) 107, 2002 CarswellOnt 1774, 2002 CanLII 49590 (Ont. S.C.J. [Commercial List]) referring to *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]).

67 [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 1994 CanLII 117 (S.C.C.). In *Anderson v. Hunking*, 2010 ONSC 4008 (CanLII), 2010 CarswellOnt 5191 (Ont. S.C.J.), the Ontario court summarized the factors in dismissing an application for the appointment of a receiver where the creditors were neither judgment creditors nor secured creditors at paras. 15 and 16:

> "[15] Section 101 of the *Courts of Justice Act* provides that the court may appoint a receiver by interlocutory order 'where it appears to a judge of the court to be just or convenient to do so.' The following principles govern motions of this kind:
>
> (a) the appointment of a receiver to preserve assets for the purposes of execution is extraordinary relief, which prejudges the conduct of a litigant, and should be granted sparingly: *Fisher Investments Ltd. v. Nusbaum* (1988), 31 C.P.C. (2d) 158, 71 C.B.R.

PEAKHILL CAPITAL INC.	- and-	**METAMORE INC.**	
Applicant		*Respondent*	Court File No.: CV-25-00735381-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
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PROCEEDING COMMENCED AT **TORONTO**

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