

Court File No. CV-20-00648587-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

BANK OF MONTREAL

Applicant

and

**WESTBURY NATIONAL SHOW SYSTEMS LTD., FRANK GERSTEIN, and
WESTBURY NATIONAL SHOW SYSTEMS LTD. (NEW YORK)**

Respondents

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

**FACTUM OF THE APPLICANT
BANK OF MONTREAL
(Receivership Application)**

October 8, 2020

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PART I - INTRODUCTION

1. This Factum is filed by Bank of Montreal (“**BMO**” or the “**Applicant**”) in support of its application for the appointment of a receiver pursuant to subsection 243(1) 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**”) and if necessary an interim order under s 47 of the BIA. The Applicant seeks the appointment of Grant Thornton Limited (“**GTL**”) as receiver over (i) all of the undertakings, properties and assets of the respondents, Westbury National Show Systems Ltd. (variously hereinafter the “**Debtor**” and “**Westbury**”), Westbury National Show Systems Ltd. (New York) (“**Westbury NY**”), and all of the issued and outstanding shares owned by Frank Gerstein (“**Gerstein**”).

2. The requirements for such an appointment are a matter of well-settled law, and this application meets all such requirements. The factors for this Court to consider in exercising its discretion to make such an appointment are similarly well-settled, and this Factum considers these factors in the circumstances of this case, and in such circumstances, the Applicant submits that such appointment is just and convenient for the reasons set out herein.

3. First, the Loan Agreement (as defined below) and the related documents among the Applicant and the Debtor expressly entitle the Applicant to appoint a receiver in certain circumstances, including following the occurrence of an event of default by the Debtor thereunder. The Applicant now wishes to exercise this right, subject to this Honourable Court’s authority.

4. Second, the Loan Agreement between the Applicant and the Debtor is in default and the Applicant has accelerated the outstanding indebtedness, which amount was \$10,116,492.50, as of September 21, 2020.

5. Third, the status quo risks rapid deterioration of the Applicant's security position. The Debtor's properties and business need to be stabilized and preserved pending realization.

6. The sale of the Debtor's assets as a going concern or if necessary a liquidation via a court appointed receiver will preserve the greatest value for the Debtor's stakeholders and the Applicant as the secured creditor.

7. Fifth, the Applicant has lost confidence in the Debtor's management and is of the view that a receiver should be appointed to, among other things, (i) take possession of and exercise control over the assets, properties and undertakings of the Debtor (the "**Collateral**") and any and all receipts and disbursements arising thereof, (ii) protect the premises leased by the Debtor where the ongoing business, as well as the ongoing sales and liquidation processes are being conducted, (iii) protect the Debtor as far as possible from disintegration due to actions by suppliers and customers and thereby protect the possibility of a going concern sale which can potentially protect jobs and value as far as practical, (iv) complete an orderly and effective sales process with the capacity to convey title in an efficient manner acceptable to potential buyers; and (v) maximize recoveries and manage any other issues with respect to the business in an orderly fashion, and (vi) control and run a comprehensive sales and marketing process to sell the Collateral to ensure that the Applicant's recovery of the Debtor's indebtedness is maximized.

PART II - SUMMARY OF FACTS¹**Westbury, Westbury NY, Gerstein and 260**

8. Westbury is an Ontario corporation operating two businesses out of its main premises in Scarborough, Ontario. The first is a live events business (the “**Live Events Business**”), and the second is an audio-visual integration business (the “**AV Business**”). The Live Events Business rents audio, video, lighting, arena, rigging, staging, production and truss assets for live shows and special events. The AV Business specializes in designing and implementing more permanent lighting, audio-visual and other systems and installations for commercial clients.

Affidavit of Isaam Majeed, sworn October 2, 2020 “Majeed’s Affidavit”, at paras. 4-5.

9. The respondent, Westbury NY is a corporation incorporated pursuant to the laws of New York State. At the time of this application Westbury NY is inactive and has limited assets of value.

Majeed’s Affidavit, at para. 6.

10. The respondent Gerstein is a director, chief executive officer and 60% shareholder of the Debtor.

Majeed’s Affidavit, at para. 7.

¹ To the extent that capitalized terms are not defined herein, they have the meanings ascribed to them in Majeed’s Affidavit.

Westbury's Indebtedness to the Applicant

11. In 2017, Gerstein wished to buy out two of Westbury's shareholders to increase his ownership in Westbury from 22.2% to 60%. On or about, November 30, 2017, following extensive negotiations, Westbury and BMO entered into a loan agreement, which was subsequently amended on October 23, 2018 and again on April 30, 2019 (the "**Loan Agreement**"). Pursuant to the Loan Agreement, BMO made available to Westbury the following credit facilities (the "**Credit Facilities**"):

- (a) a committed revolving facility in the principal amount of \$4,500,000 for, amongst other things, general working capital requirements;
- (b) a committed non-revolving term loan facility in the principal amount of \$12,000,000 which was fully drawn on the closing date to finance the management buy-out;
- (c) an uncommitted hedging facility;
- (d) an uncommitted Mastercard facility in the amount of \$100,000 for corporate credit cards; and
- (e) an uncommitted leasing facility in the principal amount of \$2,000,000 for corporate purposes.

Majeed's Affidavit, at paras. 9, 11; Loan Agreement, Application Record, Tab "D".

12. As security for its obligations to BMO under the Credit Facilities, Westbury and Gerstein (as applicable) executed and delivered:

- (a) a General Security Agreement ("**GSA**"), with respect to which a financing statement was duly registered over all of the assets of the Debtor pursuant to the *Personal Property Security Act* (Ontario) (the "**PPSA**");
- (b) an assignment of interest in the insurance policy issued by Travelers Insurance Company of Canada, bearing Policy No. ENT1003739; and

- (c) an assignment of two key man insurance policies (and/or any replacements thereof) in favour of BMO, bearing Policy Nos. 14811532 and 201736628, each from the Canada Life Assurance Company on the life of Gerstein in the aggregate amount of \$1,250,000.

Majeed’s Affidavit, at para. 13; GSA & PPSA, Application Record Tab “E”; Travelers Insurance, Application Record “F”; Key Man Insurance; Application Record “G”.

13. In addition to the above, Gerstein provided a limited recourse guarantee and securities pledge agreement dated November 30, 2017 in favour of BMO wherein he personally and unconditionally, guaranteed payment to BMO of all indebtedness and liabilities of Westbury to BMO, including under the Loan Agreement. Gerstein’s liability under their respective guarantees and share pledge is limited to the value of 5,777 Common Shares each in the capital of the Debtor, which Gerstein has pledged in favour of BMO.

Majeed’s Affidavit at para. 14; Gerstein Guarantee and Share Pledge, Application Record at Tab “H”.

14. Westbury NY provided a guarantee dated January 24, 2018 in favour of BMO wherein it guaranteed payment to BMO of all indebtedness, liabilities and obligations of the Debtor to BMO, including under the Loan Agreement (the “**Westbury NY Guaranty**”). The Westbury NY Guaranty is secured by a security agreement dated January 24, 2018 between Westbury NY and BMO.

Majeed’s Affidavit, at para. 14; Westbury NY Guarantee, Application Record at Tab “J”; Westbury NY Security Agreement, Application Record at Tab “K”.

15. In addition to Westbury NY and Gerstein who guaranteed the obligations of Westbury to BMO under their respective guarantees, 2601922 Ontario Inc. (“**260**”), which is a 40% shareholder of the Debtor and is not party to the within proceeding, also provided a limited

recourse guarantee to BMO with respect to Westbury's obligations under the Loan Agreement by pledging its shares in the capital of Westbury in favour of BMO ("**260 Guarantee and Share Pledge**"). BMO's recourse against 260 is limited to 260's shares in Westbury.

Majeed's Affidavit, at para. 8; 260 Guarantee and Share Pledge, Application Record at Tab "I".

16. Westbury NY, Gerstein and 260 will collectively be referred to as the "**Guarantors**" hereinafter.

17. On or about September 21, 2020, BMO declared all indebtedness under the Credit Facilities immediately due and payable and demanded payment thereof, pursuant to a demand letter dated September 21, 2020 (the "**Demand Letter**"). BMO also provided Westbury, Westbury NY and Gerstein with a notice of its intention to enforce its security pursuant to subsection 244(1) of the BIA (the "**BIA Notice**").

Majeed's Affidavit, at para. 52; Demand Letter, Application Record at Tab "DD"; BIA Notice, Application Record at Tab "EE".

Deteriorating Financial Condition and Mismanagement of the Debtor

18. Westbury was struggling financially before the COVID-19 pandemic, but with the closure of its live events division and the struggles of its audio visual integration division due to the shutdowns and closures associated with the COVID-19 pandemic, the financial situation of the Debtor worsened through the Spring and Summer of 2020, and has gotten even worse since the beginning of the Fall 2020.

Majeed's Affidavit, at para. 45.

19. By October 31, 2018, Westbury had breached its financial covenants under the Loan Agreement. Further to the Loan Agreement, BMO was accordingly entitled to demand immediate repayment of all outstanding indebtedness owing to it under the Credit Facilities, and proceed to enforce its rights under its security.

Majeed's Affidavit, at para. 24; Loan Agreement, *supra* at para. 11.

20. From about January 2019 to October 2019 BMO worked with Westbury to try to restructure the financial covenants and reporting requirements for Westbury to more closely resemble a traditional Special Accounts Management Unit structure which included minimum monthly EBITDA covenant, monthly borrowing base revolver cap (reducing revolver availability), and monthly reporting. The Debtor nonetheless continued to struggle financially. The Debtor's attempts at expansion caused recurring liquidity issues. On multiple occasions, in order for Westbury to meet its payroll and tax obligations, BMO permitted Westbury to temporarily exceed its available credit under the Revolving Term credit facility.

Majeed's Affidavit, at paras. 25, 28.

21. On or about September 2019, the accounts of Westbury were transferred to BMO's Special Accounts Management Unit (SAMU) due to the Debtor drawing under the Revolving Facility in excess of the borrowing base cap, and an overall deteriorating financial position.

Majeed's Affidavit, at para. 25.

Default Under the Credit Facilities and Forbearance Agreements

22. As part of a continuing effort to work in good faith to support the debtor through its difficulties, BMO endeavoured to work with Westbury through what Westbury represented to be a temporary financial set-back, by agreeing to enter into a forbearance agreement. Accordingly, on or about September 25, 2019, Westbury, Guarantors and BMO entered into a forbearance agreement (the “**Forbearance Agreement**”²), whereby BMO agreed to forbear from exercising its rights and remedies against the Debtor and the Guarantors until December 18, 2019 (the “**Forbearance Period**”).

Majeed’s Affidavit, at para. 28; Forbearance Agreement, Application Record at Tab “P”.

23. Under the terms of the Forbearance Agreement, as amended, BMO agreed to extend further credit to Westbury in accordance with the cash flow projections and defer upcoming principal payments in response to Westbury’s urgent need for liquidity. In exchange, Westbury agreed to, amongst other things, provide BMO with weekly cash flow projections, monthly financial statements and adhere to minimum EBITDA requirements.

Majeed’s Affidavit, at para. 28; First Amendment to the Forbearance Agreement, Application Record at Tab “Q”.

24. The Forbearance Period under the Forbearance Agreement was extended from December 18, 2019 to March 31, 2020 pursuant to the Amended and Restated Forbearance Agreement dated December 12, 2019. One of the conditions upon which BMO’s agreed to continue to forbear, extend credit and defer principal payments, was the capital raise provisions of section 7.05 of the Amended and Restated Forbearance Agreement whereby Westbury and the Guarantors agreed to secure committed debt or equity financing in the principal amount of \$2

² The Forbearance Agreement was amended pursuant to the First Amendment to the Forbearance Agreement, dated November 14, 2019 [Majeed’s Affidavit, at para. 31]

million on or before February 1, 2020. Westbury and the Guarantor failed to do so, which in turn resulted in an event of default under the Amended and Restated Forbearance Agreement. As a result, BMO sent a Notice of Default and reservation of rights letter dated February 3, 2020 to Gerstein.

Majeed's Affidavit, at para. 29; Amended and Restated Forbearance Agreement at Tab "R"; Notice of Default and Reservation of Rights, Application Record at Tab "S".

25. The Forbearance Period was extended again from March 31, 2020 to June 30, 2020 pursuant to the Second Amended and Restated Forbearance Agreement dated March 23, 2020. Pursuant to Section 7.06 of the Second Amended and Restated Forbearance Agreement, in exchange for BMO agreeing to continue to forbear from exercising its rights under the capital raise default, Westbury and the Guarantors agreed to an additional capital raise where Gerstein agreed to secure committed debt or equity financing in the minimum amount of \$200,000 on or before 5 pm EST on May 29, 2020. This did not materialize and resulted in another event of default by the Debtor.

Majeed's Affidavit, at para. 31; Second Amended and Restated Forbearance Agreement, Application Record at Tab "T".

26. A final forbearance agreement was entered into on June 19, 2020 being the Third Amended and Restated Forbearance Agreement. Under the Third Amended and Restated Forbearance Agreement, BMO agreed to extend the Forbearance Period to September 30, 2020 and defer the July 31, 2020 principal payment, conditional upon Gerstein advancing \$150,000 to Westbury in the form of an unsecured subordinated loan on or before 2 pm EST on June 30, 2020. No funds were advanced on June 30, 2020. By email dated June 30, 2020, to BMO and its counsel, Gerstein advised that the Toronto Dominion Bank had committed to funding early the next week.

Relying on Gerstein’s representation in this regard, BMO in good faith agreed to extend the due date for the injection of \$150,000 to July 15, 2020.

Majeed’s Affidavit, at paras. 32-33; Third Amended and Restated Forbearance Agreement, Application Record at Tab “U”; Email of June 30, 2020, Application Record at Tab “V”.

27. As a result, on July 1, 2020, the deadline by which Gerstein was obligated to advance \$150,000 under the Third Amended and Restated Forbearance Agreement was extended to July 15, 2020, pursuant to the First Amendment to the Third Amended and Restated Forbearance Agreement dated July 1, 2020, entered into among BMO, the Debtor and the Guarantors. Gerstein did not advance \$150,000 to the Debtor and as a result the Forbearance Period ended on June 30, 2020.

Majeed’s Affidavit, at paras. 34 - 35; First Amendment to the Third Amended and Restated Forbearance Agreement, Application Record at Tab “W”.

28. The chart below summarizes the details and the extensions provided to Westbury under the various forbearance agreements and the amendments thereto (if any):

Forbearance Agreement / Amendments	Date	Amount of Required Cash Injection by Gerstein (if any)	Deadline for Cash Injection
Forbearance Agreement	September 25, 2019	N/A	N/A
First Amendment to the Forbearance Agreement	November 14, 2019	N/A	N/A
Amended and Restated Forbearance Agreement	December 12, 2019	\$2,000,000 via debt or equity financing	February 1, 2020
Second Amended and Restated Forbearance Agreement	March 23, 2020	\$200,000 shall be secured via debt or equity financing by Gerstein. If the amount is raised from BDC, Gerstein to guarantee this amount	May 29, 2020

Forbearance Agreement / Amendments	Date	Amount of Required Cash Injection by Gerstein (if any)	Deadline for Cash Injection
Third Amended and Restated Forbearance Agreement	June 19, 2020	\$150,000 shall be secured via debt or equity financing by Gerstein. Upon Lender request frank will advance a further \$50,000	2 pm EST on June 30, 2020; injection of an additional \$50,000 if requested by BMO
First Amendment to the Third Amended and Restated Forbearance Agreement	July 1, 2020	\$150,000 from Gerstein via an unsecured subordinated loan	2 pm EST on July15, 2020

Majeed’s Affidavit, at paras. 28 – 34; Forbearance Agreement *supra* at para, 22; First Amendment to the Forbearance Agreement *supra* at para. 23; Amended and Restated Forbearance Agreement *supra* at para. 24; Second Amended and Restated Forbearance Agreement *supra* at para. 25; Third Amended and Restated Forbearance Agreement *supra* at para. 26; First Amendment to the Third Amended and Restated Forbearance Agreement, *supra* at para. 27.

29. Subsequently on or about July 20, 2020, by way of a letter entitled ‘Notice of Default and Reservation of Rights’, BMO issued to the Debtor a formal notice of default advising the Debtor, amongst other things, that:

- (a) the Debtor was in default under the Loan Agreement;
- (b) the Forbearance Period had terminated effective June 30, 2020;
- (c) the Debtor was in default of numerous provisions under the Third Amended and Restated Forbearance Agreement including for failure to raise capital, then further capital, then additional capital, all being the reason why BMO agreed to forbear and continue to extend credit;
- (d) BMO’s obligation to extend credit terminated immediately and automatically;
- (e) Default interest began to accrue on the outstanding obligations owed by the Debtor to BMO;

Majeed's Affidavit, at para. 37; Notice of Default and Reservation of Rights (June 20, 2020), Application Record at Tab "Y".

Liquidation and Sales Process

30. As of July 2020, BMO had lost confidence that Gerstein was capable of "righting the ship" and rescuing Westbury from the impending financial ruin. BMO and Westbury agreed that a more formal process was required and that it was properly the time to bring in a professional financial advisor.

Majeed's Affidavit, at para. 38.

31. On or about August 18, 2020, with the consent of BMO, Westbury engaged the services of Grant Thornton Corporate Finance Inc. ("GTCFI") to act as the Debtor's financial advisor. GTCFI was tasked to evaluate and market the Debtor for a potential sale of its assets or business divisions. As at the time of this application, GTCFI continues to advise the Debtor. GTCFI has prepared a Confidential Information Memorandum and provided same to potential purchasers.

Majeed's Affidavit, at paras. 39-40; GTCFI Retainer Agreement, Application Record at Tab "Z".

32. As a result of the ongoing global Covid-19 pandemic, Westbury's already struggling Live Events Business collapsed. As a result, Westbury, with GTCFI's assistance, decided to liquidate the assets of the Live Events Business. Westbury engaged a separate financial advisor to identify a liquidator to sell off the assets of the Live Events Business. Tiger Asset Solutions Canada, ULC ("**Tiger**") was retained pursuant to an Auction Agreement dated September 8, 2020 between the Debtor and Tiger. BMO consented to this process and executed a Subordination Agreement in regards to the Live Event Business' assets on September 8, 2020.

Majeed's Affidavit, at paras. 30, 41-42; Auction Agreement, Application Record at Tab "AA"; Subordination Agreement, Application Record at Tab "BB".

33. The Auction Agreement authorizes Tiger to sell the Live Event assets on behalf of the Debtor. Under the Auction Agreement Tiger has agreed to pay the Debtor a guaranteed amount.. In addition, for any amount in excess of a specified threshold, such amounts shall be divided in an agreed split between the Debtor and Tiger. If, in the alternative, GTCFI locates a suitable buyer for the Live Events Business as a going concern or bulk sale, the Auction Agreement entitles Tiger to a modest break fee plus HST and expenses. The specific financial details of this agreement are confidential and as such are described in Schedule A of confidential Exhibit AA to the Majeed Affidavit.

Majeed's Affidavit, at para. 42; Auction Agreement Schedule A (Exhibit AA), supra at para. 32.

34. The Debtor has irrevocably redirected any and all of the funds that it would be entitled to under the Auction Agreement to BMO, on account of its indebtedness under the Credit Facilities. On September 11, 2020 the Applicant received from Tiger the first installment of the guaranteed amount under the Auction Agreement. While this amount was applied against the Debtor's indebtedness to BMO, the outstanding amount remains in excess of \$10 million. The specific amount of the first installment is described in Schedule A of Confidential Exhibit AA of the Majeed Affidavit.

Majeed's Affidavit, at paras. 42, 52; Auction Agreement Schedule A (Exhibit AA), supra at para. 32; Irrevocable Consent, Release and Subordination Agreement, Application Record at Tab "CC"; Demand Letter, supra at para. 17.

35. Given the magnitude of the outstanding indebtedness owing under the Credit Facilities, BMO deemed it necessary to enforce its security under the Loan Agreement. As such, by way of a

letter dated September 21, 2020, BMO made a written demand on the Debtor and Gerstein for payment of the entirety of Westbury's indebtedness to BMO. A notice of intention to enforce security pursuant to subsection 244(1) of the BIA accompanied the demand letter. On the same day the Applicant made demands against the Guarantors under their respective limited recourse guarantees (recourse is limited only to the pledge of their shares in Westbury).

Majeed's Affidavit, at paras. 52-53; Demand Letter, *supra* at para. 17; BIA Notice, *supra* at para. 17.

36. Under the Loan Agreement and the forbearance agreements, the Debtor is obligated to promptly satisfy any demand for payment of the outstanding indebtedness made by BMO. The Debtor has failed to comply with BMO's demands as set out in the Demand Letter.

Loan Agreement, *supra* at para 11; Forbearance Agreement, *supra* at para. 22.

37. The Applicant is of the view that if a receiver is appointed on the terms sought, the receivership will provide the Debtors' property and business with much-needed stability and supervision. If appointed by this Court, the Receiver will take steps to supervise the Live Event Business' asset liquidation by Tiger, or in the alternative, find a purchaser for the Live Event Business. In addition, if appointed, the Receiver will be authorized to manage the marketing and sale of the AV Business as a going concern. The order sought requests that the Auction Agreement continue post receivership and that the Receiver's charge be subordinate to Tiger's security for its entitlements under that agreement. It is similarly anticipated that the receiver, once appointed, would continue the offer solicitation process commenced by GTCFI so long as the receiver considers it as the best solution to realize value. It is anticipated that the Receiver will pursue the foregoing all with a view to maximizing recoveries for the Debtor's stakeholders..

Majeed's Affidavit, at para. 54.**PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

38. 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?

PART IV - LAW AND ARGUMENT**(a) This Court has jurisdiction to appoint the Receiver**

39. Subsection 243(5) of the 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, and if the debtors are insolvent.

BIA, s. 2, Schedule "B"; BIA, s. 243(5), Schedule "B".

40. The Debtor is an Ontario corporation with a registered head office in Ontario. The business carried on by the Debtor and Westbury NY that is subject to the proposed receivership is located in Scarborough, Ontario. The locality of the Debtor is, therefore, Ontario, and this application is properly brought before the Ontario Superior Court of Justice (Commercial List). The Debtor and Westbury NY are insolvent as set out in the Majeed Affidavit.

41. 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.

BIA, s. 2, Schedule “B”; BIA, s. 243(4), Schedule “B”.

42. GTL 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

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

BIA, s. 244(1), Schedule “B”.

44. The Applicant sent the Demand Letter together with its Notice to Enforce Security pursuant to such section of the BIA, to the Respondents on September 21, 2020, and this application is being heard on a date that is after the date on which any applicable notice periods expired.

Majeed’s Affidavit, at paras. 52-53: Demand Letter, *supra* at para. 17; BIA Notice, *supra* at para. 17.

45. Section 101 of 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 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.

CJA, s. 101, Schedule “B”; BIA, s. 243(1), Schedule “B”.

46. Where the loan agreement and related transaction documents contemplate the appointment of a receiver, this Court should consider the principles summarized by Justice Newbould in *RMB Australia Holdings Ltd. 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]).

***RMB Australia Holdings Limited v. Seafield Resources Ltd.*, 2014 ONSC 5205 (Commercial List), paras. 28-29.**

47. 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 a relief that is extraordinary to a relief that should be granted as a matter of course, especially in cases where the circumstances further support such an appointment. This case is precisely such a case.

48. In addition, the appointment of a receiver is justified when doing so will prevent post-transaction litigation. Justice Morawetz in *Bank of Montreal v. Sherco Properties* justified the appointment of a receiver in the process of a sale/liquidation on the basis that the “involvement in the process of the court officer will minimize the fallout of litigation between the parties, which could result in further delay and protracted post-transaction litigation.”

***Bank of Montreal v. Sherco Properties*, 2013 ONSC 7023 at para. 48.**

49. Avoiding undue delay, and litigation is key in the decision to market the AV Business as a going concern and to retain the maximum value for the Applicant and other stakeholders in Westbury. The value of the business is predicated on its ability to operate day to day. Any undue delay or costly litigation would prejudice this possibility. This supports the appointment of the Receiver.

50. In addition, marketing the AV Business (and potentially the Live Events Business) as a going concern further mandates the appointment of a Receiver. In *Montrose Mortgage Corp. v Kingsway Arms Ottawa Inc.* (“*Montrose*”), Justice Brown was satisfied that the applicants had provided sufficient evidence that “the appointment of a receiver was necessary to preserve the opportunity to continue to operate”. *Montrose* was regarding the potential sale of a retirement home business where the need to continue to provide a place to live for the residents and maintain

employment were cited as factors in favour of appointing the requested receiver. Similarly, in the instant case, it is crucial that a receiver be appointed to take over the affairs of Westbury.

***Montrose Mortgage Corp. v Kingsway Arms Ottawa Inc.*, 2013 ONSC 6905 at para. 11.**

51. Managing the sale of the Debtor as a going concern is further mandated by the specialized nature of the Debtor's operations and equipment. In *Patt Technologies Inc.*, the trustee submitted that an interim receiver was necessary so that greater value could be achieved by the creditors by continuing to operate the company as a going concern. The justification for the Trustee's opinion was:

- (a) The debtor's inventory and equipment was so specialized it would be worth little upon liquidation;
- (b) The collectability of receivables would be materially more difficult if the business ceased to function as a going concern;
- (c) Upcoming major sales would not be concluded if the business closed.

Justice Peacock agreed with the opinion of the trustee that "it would be in the interests of creditors generally to have an interim receiver appointed".

***Patt Technologies Inc., Re*, 2008 QCCS 218 at para. 11.**

52. The Applicant and the Debtor have acknowledged that a sale of the Debtor is in best interests of stakeholders. The nature of the Debtor's business is such that the sale of the AV Business as a going concern, or if necessary via liquidation, is necessary to retain the greatest value for BMO. GTL's appointment is additionally necessary to supervise the orderly sale of the Live Event Business under the Auction Agreement with Tiger.

53. When these factors are applied to the 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 where:

- (a) ***The Debtor contractually agreed to the appointment of a receiver.*** The Loan Agreement and the related transaction documents among the Applicant and the Debtor expressly entitle the Applicant to appoint a receiver under certain circumstances, including the present circumstances. The Applicant now exercise this entitlement, subject to the Court's authority.
- (b) ***The Loan Agreement is in default.*** As set out above, events of default have occurred and are continuing under the Loan Agreement and the related documents thereto. The Operating Line is in default and the Applicant has accelerated the outstanding indebtedness under the term loan, which they are entitled to do under such documents. The Applicants have made a demand on the Debtor with respect to the indebtedness. The Applicant provided the Debtor with statutory notice of their intention to enforce their security, and the applicable notice periods have elapsed.
- (c) ***Westbury's business needs to be sold.*** Westbury has retained GTCFI to market and manage the sale of the AV Business and/or the entire business as a going concern if possible. Appointing GTL as a receiver will give them with the ability to effectively oversee and manage such a sale efficiently while avoiding conflict with management which no longer has an effective economic interest in the business . If the Debtor's business continues to deteriorate by management's operation of same outside of receivership, the realizable value of the business as a going concern will continue to diminish..
- (d) ***The Applicant has lost confidence in the Debtor's management.*** The Applicant has made efforts to explore the alternatives to a receivership, without success, and they have justifiably lost confidence in the management of the Debtors due to the events described above and in Majeed's Affidavit.
- (e) ***The balance of convenience as between the parties.*** GTL has consented to be appointed as the receiver in this case. Further, the Debtor has already retained GTCFI as a financial advisor to market and sell the business. The Applicant wishes to empower GTL, a related entity to GTCFI, with the full authority of a court officer to effectively and efficiently manage the sale of the Debtor. As GTCFI is currently familiar with the operations of the Debtor for the purpose of marketing

the business, the balance of convenience favours empowering GTL to fully oversee the sale.

Majeed’s Affidavit, at paras. 57; Loan Agreement, *supra* at 11; GTL’s Consent, Application Record, Tab “FF”

54. As at the date of this Factum, the Applicant is not aware of any restructuring efforts by the Respondents that stand any reasonable chance of success. Such efforts have been attempted over many months without success.

The Terms of the Proposed Receivership Order are Appropriate

55. The terms of the proposed Receivership Order are substantially the same as the terms of the Commercial List’s model receivership order, and the modifications to same are indicated in the redline provided. The most material change is that Tiger’s security for its rights under the Auction Agreement would be given priority over the Receiver’s charge under the proposed order

56. In addition a sealing order is requested in respect of

- (a) the Brief of Confidential Exhibits which contain sensitive financial information that could impact the effort at a going concern sale process,
- (b) the unredacted Application Record already filed, in order to maintain the confidentiality of paragraph 42 of the Majeed Affidavit and Exhibit AA to the Majeed Affidavit (both of which reference the financial terms of the Tiger deal in Schedule A to the Auction Agreement, disclosure of which could otherwise impact the Tiger liquidation process).

Blackline of the draft Order against the Model Receivership Order (filed separately)

PART V: ORDER REQUESTED

57. For the reasons set forth herein and in the Application Record, the Applicant respectfully requests the granting of the Receivership Order in the amended form served on the service list and provided to the court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of October, 2020.

CBesant

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SCHEDULE “A”

LIST OF AUTHORITIES

1. *RMB Australia Holdings Limited v. Seafield Resources Ltd.* 2014 ONSC 5205
2. *Bank of Montreal v. Sherco Properties*, 2013 ONSC 7023.
3. *Montrose Mortgage Corp. v Kingsway Arms Ottawa Inc.* 2013 ONSC 6905.
4. *Patt Technologies Inc., Re* 2008 QCCS 218.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

Appointment of interim receiver

47 (1) If the court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates until the earliest of

- (a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,
- (b) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and
- (c) the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.

Directions to interim receiver

47 (2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

- (a) take possession of all or part of the debtor's property mentioned in the appointment;
- (b) exercise such control over that property, and over the debtor's business, as the court considers advisable;
- (c) take conservatory measures; and
- (d) summarily dispose of property that is perishable or likely to depreciate rapidly in value.

When appointment may be made

47 (3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

- (a) the debtor's estate; or
- (b) the interests of the creditor who sent the notice under subsection 244(1).

Place of filing

47 (4) An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Appointment of interim receiver

47.1 (1) If a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1), the court may at any time after the filing, subject to subsection (3), appoint as interim receiver of all or any part of the debtor's property,

- (a) the trustee under the notice of intention or proposal;
- (b) another trustee; or
- (c) the trustee under the notice of intention or proposal and another trustee jointly.

Duration of appointment

47.1 (1.1) The appointment expires on the earliest of

- (a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,
- (b) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and
- (c) court approval of the proposal.

Directions to interim receiver

47.1 (2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

- (a) carry out the duties set out in subsection 50(10) or 50.4(7), in substitution for the trustee referred to in that subsection or jointly with that trustee;
- (b) take possession of all or part of the debtor's property mentioned in the order of the court;
- (c) exercise such control over that property, and over the debtor's business, as the court considers advisable;
- (d) take conservatory measures; and
- (e) summarily dispose of property that is perishable or likely to depreciate rapidly in value.

When appointment may be made

47.1 (3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

- (a) the debtor's estate; or

(b) the interests of one or more creditors, or of the creditors generally.

Place of filing

47.1 (4) An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and expenses

47.2 (1) If an appointment of an interim receiver is made under section 47 or 47.1, the court may make any order respecting the payment of fees and disbursements of the interim receiver that it considers proper, including an order giving the interim receiver security, ranking ahead of any or all secured creditors, over any or all of the assets of the debtor in respect of the interim receiver's claim for fees or disbursements, but the court shall not make such an order unless it is satisfied that all secured creditors who would be materially affected by the order were given reasonable advance notification and an opportunity to make representations to the court.

Meaning of disbursements

47.2 (2) In subsection (1), "disbursements" do not include payments made in operating a business of the debtor.

Accounts, discharge of interim receivers

47.2 (3) With respect to interim receivers appointed under section 46, 47 or 47.1,

- (a) the form and content of their accounts, including their final statement of receipts and disbursements,
- (b) the procedure for the preparation and taxation of those accounts, and
- (c) the procedure for the discharge of the interim receiver shall be as prescribed.

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

- (d) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (e) 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) 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.

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

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.

1992, c. 27, s. 89 1994, c. 26, s. 9(E)

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

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

BANK OF MONTREAL
Applicant

-and- WESTBURY NATIONAL SHOW SYSTEMS LTD. et al.
Respondents

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

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RCP-E 4C (May 1, 2016)