

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N :

**PS HOLDINGS 1 LLC, PS HOLDINGS 2 LLC
and PS HOLDINGS 3 LLC**

Applicants

- and -

**2738283 ONTARIO INC., 2738284 ONTARIO INC.
and 2738285 ONTARIO INC.**

Respondents

**IN THE MATTER OF THE RECEIVERSHIP OF 2738283 ONTARIO INC.,
2738284 ONTARIO INC. and 2738285 ONTARIO INC.**

**AND 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, RSO 1990, c C.43, as amended**

FACTUM OF THE APPLICANTS

November 4, 2021

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TO:

THE SERVICE LIST

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FACTUM OF THE APPLICANTS

PART I - OVERVIEW¹

1. The applicants sold to the respondents certain property in exchange for, among other consideration, a first charge on such property. Despite repeated demand, the respondents have never repaid any of the indebtedness secured by the charge and have complicated the applicants' enforcement prospects by granting five other mortgages on the property. The property is in the early stages of development. The charge entitles the applicants to appoint a receiver over the property, and it is just and convenient to do so.

¹ Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the affidavit of Paul Sadlon Jr., sworn on October 18, 2021 (the "**Sadlon Affidavit**"); Application Record, Tab 2.

2. The applicants, PS Holdings 1 LLC, PS Holdings 2 LLC and PS Holdings 3 LLC (collectively, “**PS Holdings**”) have brought this application for an order (the “**Receivership Order**”), among other things, appointing MNP Ltd. (“**MNP**”) as receiver (in such capacity, the “**Receiver**”), without security, of certain real property (the “**Real Property**”), other property related thereto described in PS Holdings’ first charge registered against such Real Property (the “**First Charge**”), and all proceeds thereof (collectively with the Real Property, the “**Property**”).

Sadlon Affidavit at paras 3, 18–20 & 30–31, & Exhibits “C”–“F” & “M”; Application Record, Tab 2.

3. The respondents, 2738283 Ontario Inc., 2738284 Ontario Inc. and 2738285 Ontario Inc. (each a “**Debtor**” and, collectively, the “**Debtors**”), are indebted to PS Holdings in respect of principal, interest and enforcement costs (the “**Indebtedness**”) pursuant to the terms of two promissory notes (the “**Notes**”), the First Charge, guarantees executed by each Debtor in favour of the other two Debtors (the “**Guarantees**”) and a general security agreement (the “**GSA**” and, collectively with the Notes, First Charge and Guarantees, the “**Loan Documents**”).

Sadlon Affidavit at paras 4 & 28–38, & Exhibits “K”–“P”; Application Record, Tab 2.

4. As at October 18, 2021, the amount of the Indebtedness totalled \$14,761,638.65 (exclusive of enforcement costs).

Sadlon Affidavit at para 4; Application Record, Tab 2.

5. Each Debtor unconditionally and irrevocably guaranteed the other two Debtors' obligations to repay the Indebtedness.

Sadlon Affidavit at paras 5 & 37(a), & Exhibit "O"; Application Record, Tab 2.

6. The Debtors' obligations to PS Holdings are secured by the First Charge and the GSA.

Sadlon Affidavit at paras 6, 30 & 37(b), & Exhibits "M" & "P"; Application Record, Tab 2.

7. The First Charge is registered in favour of PS Holdings on title to the Real Property, and PS Holdings' security interests created by the First Charge and the GSA are perfected by registration under the *Personal Property Security Act* (Ontario).

Sadlon Affidavit at paras 7, 31–32 & 38, & Exhibits "M"–"N"; Application Record, Tab 2.

8. The Debtors are in default of their obligations to PS Holdings because, among other reasons:

- (a) the Debtors have failed or refused to repay the Indebtedness; and
- (b) the Debtors have, contrary to the terms of the First Charge, granted certain unauthorized encumbrances or otherwise permitted such encumbrances to exist without obtaining the prior written consent of PS Holdings.

Sadlon Affidavit at paras 8, 28–29, 34, 39–46, & Exhibits "K"–"M" and "Q"–"Y"; Application Record, Tab 2.

9. PS Holdings have given the Debtors proper notice of such defaults and have made demand upon the Debtors for repayment of the Indebtedness; the Debtors have failed or refused to repay the Indebtedness.

Sadlon Affidavit at paras 9, 47 & 50–51, & Exhibits “Z” & “CC”; Application Record, Tab 2.

10. PS Holdings have also delivered to the Debtors notices of intention to enforce security pursuant to section 244 of the *Bankruptcy and Insolvency Act* (Canada) (the “**BIA**”) and notices of sale under mortgage pursuant to the *Mortgages Act* (Ontario) in respect of the First Charge.

Sadlon Affidavit at paras 10, 48–49 & 51–52, & Exhibits “AA”–“DD”; Application Record, Tab 2.

11. PS Holdings is entitled to appoint a receiver under the Loan Documents.

Sadlon Affidavit at paras 11, 35 & 60, & Exhibits “M” & “P”; Application Record, Tab 2.

12. The Real Property is in the process of being developed for residential, commercial and institutional uses, and elements thereof may be leased.

Sadlon Affidavit at paras 12, 23 & 27, & Exhibits “H” & “J”; Application Record, Tab 2.

13. The appointment of the Receiver is just in the circumstances; it will allow for, among other things, (i) an orderly marketing and sale of the Property under court supervision for the benefit of all stakeholders; and (ii) a transparent platform for the distribution of the proceeds of sale to subsequent encumbrancers.

Sadlon Affidavit at para 59; Application Record, Tab 2.

PART II - FACTS

14. Please refer to the Sadlon Affidavit for a more fulsome description of the parties, the Property, the Loan Documents, and PS Holdings' enforcement steps to date.

PART III - ISSUE

15. This application raises a single issue: whether the Receivership Order should be granted.

PART IV - LAW & ARGUMENT

16. Section 243(1) of the BIA and section 101 of the *Courts of Justice Act* (the "CJA") each provide a court with the authority to appoint a receiver if the court finds such an appointment to be just and convenient.

Bankruptcy and Insolvency Act, RSC 1985, c B-3, as amended [BIA], s 243(1); Factum of the Applicant, Schedule "B".

Courts of Justice Act, RSO 1990, c C.43, as amended, s 101(1); Factum of the Applicant, Schedule "B".

17. PS Holdings has complied with the technical requirements of section 244 of the BIA by sending a notice of its intention to enforce its security and by waiting the prescribed notice period.

BIA, supra, s 244; Factum of the Applicant, Schedule "B".

18. There are no pre-conditions for the exercise of a court's discretion to appoint a receiver. Each case depends on its own facts.

[Degroote v DC Entertainment Corp et al, 2013 ONSC 7101 at para 53.](#)

19. Factors to consider in determining whether it is appropriate to appoint a receiver include, among others:

- the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
- the nature of the property;
- the conduct of the parties; and
- the likelihood of maximizing return to the parties.

[Textron Financial Canada Ltd v Chetwynd Motels Ltd, 2010 BCSC 477 at para 50.](#)

The First Charge contemplates the relief sought

20. In determining what is just or convenient under section 243(1) of the BIA or section 101 of the CJA, the court must have regard to all 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. 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, because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.

[RMB Australia Holdings Ltd v Seafield Resources Ltd, 2014 ONSC 5205 at paras 28-29.](#)

[Potentia Renewables Inc v Deltro Electric Ltd, 2018 ONSC 3437 at para 50.](#)

21. As mentioned above, the First Charge provides that, upon the occurrence of an event of default thereunder, PS Holdings may appoint a receiver of the Property.

Sadlon Affidavit at paras 35 & 60, & Exhibit “M”; Application Record, Tab 2.

22. The relief that PS Holdings seeks is not extraordinary and should not come as a surprise to the respondents: it was squarely contemplated by the First Charge.

The Real Property is in the early stages of development, and elements thereof may be leased

23. Contemporaneously with the transfer of the Real Property from PS to the Debtors, PS Holdings assigned to the Debtors PS Holdings' respective interests under four leases respecting elements of the Real Property, being two leases for residential houses and two leases for billboard signs.

Sadlon Affidavit at para 22, & Exhibit "H"; Application Record, Tab 2.

24. Since the Debtors' acquired the Real Property from PS Holdings, plans for its development have been pursued. According to a notice of public meeting dated November 19, 2020 (the "**Notice of Public Meeting**"), applications for an amendment to the City of Barrie's Official Plan and zoning by-law have been submitted in respect of the Real Property. The Notice of Public Meeting explains that such applications are intended to facilitate the development of a high-density, mixed-use development containing 12 buildings that integrate a variety of residential, commercial and institutional uses.

Sadlon Affidavit at para 27, & Exhibit "J"; Application Record, Tab 2.

25. If the Receiver is appointed, it could assess the state of such leases and development and determine the most beneficial and efficient process to maximize value for all stakeholders.

A transparent, court-supervised process would serve the interest of all stakeholders

26. The Property is encumbered by the registered interests of multiple secured parties, some of whom may be related to the Debtors, and it would benefit all parties for the Property to be sold in a transparent, court supervised process and to have a platform to determine the ultimate distribution of the proceeds of realization.

Sadlon Affidavit at paras 43–46, & Exhibits “Q”–“Y”; Application Record, Tab 2.

27. The advantage of a receiver is that it owes duties and obligations to the Court and to all the stakeholders. A receivership is the best way to protect the interests of all stakeholders, with a view to maximizing value for all.

[Business Development Bank of Canada v Pine Tree Resorts Inc, 2013 ONSC 1911 at paras 52 & 57.](#)

28. The appointment of the Receiver will not only benefit PS Holdings. The Receiver will owe duties to the Debtors, other impacted stakeholders and the Court, which will ensure that interests of the Debtors and other stakeholders will be protected.

PART V - ORDER REQUESTED

29. PS Holdings respectfully requests that this Honourable Court grant:

- (a) the Receivership Order substantially in the form attached as Schedule “A” to the notice of application in the within proceeding, *inter alia*:

- (i) abridging the time for service of the notice of application and the application record in the within proceeding, if necessary, and validating service thereof;
 - (ii) appointing MNP as receiver, without security, of Property pursuant to section 243(1) of the BIA and section 101 of the CJA;
 - (iii) empowering the Receiver, if appointed, to, *inter alia*:
 - (1) take possession of and exercise control over the Property;
 - (2) market and sell any or all of the Property; and
 - (3) to borrow funds on a priority basis to fund the costs of the receivership; and
 - (iv) awarding PS Holdings its costs of this proceeding, including HST charged thereon; and
- (b) such further and other relief as counsel may advise and this Honourable Court may deem just.

RESPECTFULLY SUBMITTED THIS 4th DAY OF NOVEMBER, 2021



Daniel Richer & Aubrey Kauffman

Lawyers for the applicants

SCHEDULE "A"

AUTHORITIES CITED

1. [*Degroote v DC Entertainment Corp et al*, 2013 ONSC 7101;](#)
2. [*Textron Financial Canada Ltd v Chetwynd Motels Ltd*, 2010 BCSC 477;](#)
3. [*RMB Australia Holdings Ltd v Seafield Resources Ltd*, 2014 ONSC 5205;](#)
4. [*Potentia Renewables Inc v Deltro Electric Ltd*, 2018 ONSC 3437;](#) and
5. [*Business Development Bank of Canada v Pine Tree Resorts Inc*, 2013 ONSC 1911.](#)

SCHEDULE “B”

LEGISLATION

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Court may appoint receiver

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

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
- (c) take any other action that the court considers advisable.

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

Injunctions and receivers

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

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**Proceeding commenced at
Toronto**

FACTUM OF THE APPLICANT

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