Court File No.:

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

ALTERNA SAVINGS AND CREDIT UNION LIMITED

Applicant

- and –

1140402 ONTARIO INC. O/A EMERALD LODGE

Respondent

IN THE MATTER OF AN APPLICATION PURSUANT TO 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
(Application Returnable September 25, 2020)

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PART I - OVERVIEW

1. This Application is made by Alterna Savings and Credit Union Ltd. ("**Alterna**") for an Order under subsection 243(1) of the *Bankruptcy and Insolvency Act* (Canada) ("**BIA**") and section 101 of the *Courts of Justice Act* (Ontario) ("**CJA**") appointing Grant Thornton Ltd. ("**GTL**") as receiver (in such capacity, the "**Receiver**"), without security, of all the assets, undertakings and properties (the "**Property**") of 1140402 Ontario Inc. o/a Emerald Lodge (**"Emerald Lodge"**). Alterna is the largest and first-ranking secured creditor of Emerald Lodge.

2. Alterna made a mortgage loan to Emerald Lodge. Emerald Lodge is in default in respect of payments obligations to Alterna on the loan and has committed several other acts of default under its agreements with Alterna. Further, Alterna has serious concerns about the erosion of its security.

3. On August 28, 2020 Emerald Lodge filed a Notice of Intention to Make a Proposal with the Office of the Superintendent of Bankruptcy (the **"NOI"**), but has since agreed to abandon the NOI proceedings.

4. The appointment of GTL as Receiver is just and convenient in the circumstances and granting the charge in favour of the Receiver over the Property is appropriate (the “**Receiver’s Charge**”).

PART II - FACTS

5. The relevant facts in connection with this Application are more fully set out in the Affidavit of Umair Saleem, sworn 22, 2020 (the “**Saleem Affidavit**”). All capitalized terms not otherwise defined herein shall have the same definition as ascribed to them in the Saleem Affidavit.

PART III - ISSUES

6. This Application requires a resolution of the following issues:

(a) Should this Court lift the stay associated with the filing of the NOI pursuant to subsection 69.4 of the BIA?

(b) Should this Court make an Order pursuant to subsection 243(1) of the BIA and section 101 of the CJA appointing GTL as the Receiver over the Property of the Companies?

(c) Should this Court make an Order pursuant to subsection 243(6) of the BIA granting the Receiver’s Charge?

PART IV - LAW AND ARGUMENT

A. THE TEST FOR LIFTING THE STAY

7. Pursuant to subsection 69(1) of the BIA, on the filing of the NOI the rights of Alterna to seek to enforce its security against Emerald Lodge were stayed.

8. Pursuant to subsection 69.4 of the BIA, a creditor who is affected by the operation of a stay imposed by subsection 69(1) may apply to the court for a declaration that the stay no longer operates in respect of that creditor.

9. Subsection 69.4 spells out the two conditions which allow for a stay is to be lifted: (a) the creditor is likely to be materially prejudiced by the continuance of the stay, or (b) it is equitable on other grounds that the stay be lifted.

10. For the reasons discussed below, Alterna would be materially prejudiced by the continuance of the stay. Further, given that Emerald Lodge has agreed to abandon the NOI proceedings, and are no longer opposing the receivership application, it is equitable that the stay be lifted.

B. THE TEST FOR THE APPOINTMENT OF A RECEIVER

11. This Court has the power to appoint a receiver or a receiver and manager under subsection 243(1) of the BIA and section 101 of the CJA.

> *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended [BIA], subsection 243(1), Schedule B to this Factum.
>
> *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended [CJA], section 101, Schedule B to this Factum.

12. Pursuant to subsection 243(1) of the BIA, the court may appoint a receiver where it considers it to be just or convenient to do so. Subsection 243(1) provides:

> 243(1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> > (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
> >
> > (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
> >
> > (c) take any other action that the court considers advisable.
>
> BIA, subsection 243(1), Schedule B to this Factum.

13. As a threshold issue, where an appointment is to be made under section 243 of the BIA, the court must be satisfied that either: (i) the insolvent person received ten days' notice under section 244 of the BIA of the moving party's intention to enforce its security, (ii) the insolvent person consented to the appointment of a receiver prior to the expiry of the ten day period, or (iii) it is otherwise appropriate to order the appointment prior to the expiry of the ten day notice period.

> BIA, sections 243(1.1) and 244, Schedule B to this Factum.

14. Similarly, the test for the appointment of a receiver under section 101 of the CJA also involves the consideration of whether such appointment would be just or convenient. Subsection 101(1) of the CJA provides as follows:

> 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.
>
> CJA, subsection 101(1), Schedule B to this Factum.

15. In determining whether it would be just, appropriate or convenient to appoint a receiver, Canadian Courts have historically considered a number of factors, including, but not limited to, whether:

(i) the applicant has the power to appoint a receiver under its security instrument;

(ii) the security held by the applicant is or may become insufficient to secure the indebtedness;

(iii) the debtor has broken or otherwise failed to carry out its obligations;

(iv) an appointment is necessary to protect the security from existing or realistically perceived jeopardy or danger;

(v) the debtor has failed to account;

(vi) the applicant will suffer irreparable harm or injury if a receiver is not appointed;

(vii) there is demonstrated urgency for the appointment of a receiver;

(viii) the cost to the parties of making the appointment is justified relative to the expected realization to be achieved from the appointment;

(ix) the balance of convenience favours the appointment; and

(x) the proposed appointee is capable of carrying out the purpose for which the appointment is sought.

> *Standard Trust Co. v. Pendygrasse Holdings Ltd.*, 1988 CarswellSask 27 (Sask. Q.B.) at para 10, Applicant's Book of Authorities, Tab 1.

16. In deciding whether to appoint a receiver, the court must have regard to all the circumstances, but in particular to the nature of the property and the rights and interests of all parties in relation thereto. Typically, the issues for a court to determine on a receivership application include the following:

(a) the existence of a debt and default;

(b) the quality of the security; and

(c) the need for the appointment of a receiver in view of alternate remedies available to the creditor, the nature of the property, the likelihood of maximizing the return to the parties, the costs associated with the appointment, and any need to preserve the property pending realization.

Bank of Montreal v. Carnival National Leasing Ltd., 2011 CarswellOnt 896 (Ont. S.C.J.) [*Carnival Leasing*] at para 24, Applicant's Book of Authorities, Tab 2.

Bank of Nova Scotia v. Freure Village on Clair Creek, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) [*Freure Village*] at para 11, Applicant's Book of Authorities, Tab 3.

Central 1 Credit Union v. UM Financial Inc. and UM Capital Inc., 2011 CarswellOnt 11979 (Commercial List) [*UM Financial*] at para 22, Applicant's Book of Authorities, Tab 4.

17. In deciding whether it is just or convenient to appoint a receiver, the court will consider matters including the preservation and protection of the property and the balance of convenience.

Citibank Canada v. Calgary Auto Centre, 1989 CarswellAlta 343 at para 31 (Alta. Q.B.), Applicant's Book of Authorities, Tab 5.

18. A court-appointed receiver is an officer of the court and acts in a fiduciary capacity with respect to all interested parties.

Ostrander v. Niagara Helicopters Ltd. (1973), 1 O.R. (2d) 281 at para 6 (Ont. H.C.), Applicant's Book of Authorities, Tab 6.

19. Additionally, the fact that the moving party has a right under its security documentation to appoint a receiver is an important factor to be considered. While the appointment of a receiver is generally viewed as an extraordinary remedy, in cases where the security documentation of the moving party provides for a private or court-appointed receiver, the issue is reduced to a consideration of whether it is in the interests of all concerned to have the receiver appointed by the court. This involves an examination of, *inter alia*, (i) the potential cost of the receivership, (ii) the relationship between the debtor and the creditors, (iii) the likelihood of maximizing the return on and preserving the subject property, and (iv) the best way of facilitating the work and duties of the receiver.

Carnival Leasing, supra at para 27, Applicant's Book of Authorities, Tab 2.

Freure Village, supra at para 13, Applicant's Book of Authorities, Tab 3.

20. It is not necessary for a creditor, whose security documentation provides for the appointment of a receiver, to demonstrate that it will suffer irreparable harm if the appointment of a receiver is not granted by the court.

Carnival Leasing, supra at para 28, Applicant's Book of Authorities, Tab 2.

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc., 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) at para 28, Applicant's Book of Authorities, Tab 7.

21. Further, as recently stated by the Ontario Superior Court of Justice [Commercial List]:

> Although receivership is generally considered to be an extraordinary remedy, there is ample authority for the proposition that its extraordinary nature is significantly reduced when dealing with a secured creditor who has the right to a receivership under its security arrangements …
>
> This relief becomes even less extraordinary when dealing with a default under a mortgage. … [citations omitted]

BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc., 2020 ONSC 1953 (CanLII) at para 43 – 44, Applicant's Book of Authorities, Tab 8.

C. THE APPOINTMENT OF A RECEIVER IS JUST AND CONVENIENT

22. Emerald Lodge is in default of its obligations under the Loan Documents. Alterna delivered a demand and a notice of intention to enforce its security and the ten day notice period under s. 244 of the BIA has elapsed. The defaults that have occurred are material and have not been waived by Alterna. Alterna is under no obligation, legal or otherwise, to continue to support the Company. Altera is entitled to seek the appointment of a receiver by the Court.

23. The appointment of a Receiver is just and convenient in this case. The GSA signed by Emerald Lodge provides Alterna with the right to appoint a receiver at Section 6(2) thereof.

General Security Agreement, section 6(2), Exhibit "H" to the Saleem Affidavit.

24. Further, the obligations of Emerald Lodge of which they are in default are secured by the Mortgage granted by Emerald Lodge to Alterna.

25. As well, the appointment of the Receiver is just and convenient for the following reasons:

(a) Emerald Lodge has further encumbered the Property and granted security, including a further charge on the Property, to another lender, KLN, without Alterna's knowledge or consent, in breach of its obligations under the Loan documents;

Saleem Affidavit, para 24.

(b) Emerald Lodge filed a NOI, and Alterna has advised of its intention to move to terminate the NOI proceedings;

Saleem Affidavit, para 43 and 46.

(c) Emerald Lodge is in arrears in respect of its property taxes and remittances to CRA in respect of deductions at source;

Saleem Affidavit, para 27.

(d) Emerald Lodge and certain other Companies seem to move funds around as between the Companies that NALC oversees, as required; and

Saleem Affidavit, para 20.

(e) A court-appointed receiver will secure the Emerald Lodge assets and take steps to ensure that same are disposed of in a commercially reasonable manner, under the supervision of the Court.

26. Accordingly, a court-appointed receiver is the only feasible method by which the Emerald Lodge's Property can be dealt with in an orderly fashion, having regard to the interests of all stakeholders.

D. THE TERMS OF THE REQUESTED ORDER ARE APPROPRIATE

27. Subsection 243(6) of the BIA provides as follows with respect to granting a receiver's charge:

> (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.

BIA, section 243(6), Schedule B to this Factum.

28. In this case, it is appropriate for the Court to grant the Receiver's Charge over the Property of Emerald Lodge to ensure that GTL and its counsel are able to recover any fees and disbursements owed to them. As previously stated, Alterna is the largest secured creditor of Emerald Lodge. Alterna is agreeable to the Receiver's Charge being granted. Furthermore, all secured creditors have been given reasonable notice of this Application and have been provided with an opportunity to make representations.

PART V - CONCLUSION

29. For the foregoing reasons, it is both just and convenient to appoint GTL as Receiver over the Property of Emerald Lodge in the circumstances and to grant the Receiver's Charge.

30. It is respectfully submitted that the relief requested by Alterna should be granted and GTL ought to be appointed as Receiver over the Property of Emerald Lodge and the Receiver's Charge ought to be granted, on the terms of the Order sought.

PART VI - ORDER REQUESTED

31. The Applicant requests that this Court issue an Order substantially in the form attached at Tab 3 to the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

September 23, 2020

Roger Jaipargas /Douglas O. Smith
Lawyers for the Applicant

SCHEDULE "A" – AUTHORITIES CITED

1. *Standard Trust Co. v. Pendygrasse Holdings Ltd.,* 1988 CarswellSask 27 (Sask. Q.B.)
2. *Bank of Montreal v. Carnival National Leasing Ltd.,* 2011 CarswellOnt 896 (Ont. S.C.J.)
3. *Bank of Nova Scotia v. Freure Village on Clair Creek,* [1996] OJ No 5088 (Gen. Div.)
4. *Central 1 Credit Union v. UM Financial Inc. and UM Capital Inc.,* 2011 CarswellOnt 11979 (Commercial List)
5. *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.,* 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List])
6. *Citibank Canada v. Calgary Auto Centre,* 1989 CarswellAlta 343 (Alta. Q.B.)
7. *Ostrander v. Niagara Helicopters Ltd.* (1973), 1 O.R. (2d) 281 at 286 (Ont. H.C.)
8. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.,* 2020 ONSC 1953

SCHEDULE "B" – LEGISLATION CITED

***Bankruptcy and Insolvency Act*, R.S.C., 1985, C. B-3, as amended**

Section 69(1)

Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

(i) the insolvent person's insolvency,

(ii) the default by the insolvent person of an obligation under the security agreement, or

(iii) the filing by the insolvent person of a notice of intention under section 50.4,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect,

Section 69.4

A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

Section 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

Section 243(1.1)

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

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

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

Section 243(6)

(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.

Section 244

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

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

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

Period of notice

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

No advance consent

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

Exception

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

> (a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or
>
> (b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

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

Courts of Justice Act, R.S.O. 1990, c. C.43, as amended

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

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PROCEEDINGS COMMENCED AT TORONTO

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