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JUDICIAL CENTRE	CALGARY	
PLAINTIFF	NATIONAL BANK OF CANADA	
DEFENDANTS	SUNRIDGE LANDING INC. and ZULFIKAR BOGA	
DOCUMENT	**BENCH BRIEF OF NATIONAL BANK OF CANADA**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCarthy Tétrault LLP Suite 4000, 421 7th Avenue SW Calgary AB T2P 4K9 Attention: Sean Collins, KC / Nathan Stewart Phone: 403-260-3531 / 3534 Fax: 403-260-3501 Email: scollins@mccarthy.ca / nstewart@mccarthy.ca	

BENCH BRIEF OF NATIONAL BANK OF CANADA

APPLICATION TO BE HEARD BY
THE HONOURABLE JUSTICE NEILSON

June 10, 2025 at 10:00 a.m.

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I. INTRODUCTION

1. This bench brief is submitted by National Bank of Canada (the "**Lender**") in support of the Lender's application (the "**Application**"), seeking an order (the "**Receivership Order**"): (i) appointing BDO Canada Limited ("**BDO**") as the receiver and manager (when referred to in such capacity, the "**Receiver**") of all of the present and after-acquired properties, assets, and undertakings (collectively, the "**Property**") of Sunridge Landing Inc. (the "**Debtor**"), pursuant to section 243(1) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 (the "**BIA**") and section 13(2) of the *Judicature Act*, R.S.A. 2000, c. J-2 (the "**Judicature Act**"); (ii) substituting BDO, in the place and stead of Colliers Macaulay Nicolls Inc. ("**Collier Macaulay Nicolls**"), as the Receiver of Rents (as defined below), pursuant to section 49(9) of the *Law of Property Act*, R.S.A. 2000, c. L-7 ("**Law of Property Act**") and section 13(2) of the Judicature Act; and, (iii) terminating the judicial listing agreement under the Redemption Order – Listing (the "**Redemption Order**"), granted by the Honourable Applications Judge Farrington on October 22, 2024, and authorizing the Receiver to enter into such agreements with the Realtor (as such term is defined in the Redemption Order) as the Receiver may deem necessary or advisable.

2. The Lender seeks the appointment of the Receiver as a result of, among other circumstances: (a) ongoing actions by the Debtor and Zulfikar Boga (the "**Guarantor**", and collectively with the Debtor, the "**Obligors**") which have had the effect of delaying, hindering, and frustrating various orders granted in these proceedings and interfering with the enforcement of the Lender's security interests, including refusing to provide access to the Lands (as defined below) to the judicially-appointed Realtor (as defined below), refusing to deliver documents and information requested by or on behalf of the Realtor under the Redemption Order and the Receiver of Rents Order (each as defined below), and generally delaying steps taken in these proceedings; (ii) the numerous ongoing defaults by the Debtor under the various loan and security agreements it has entered into with the Lender, and the failure of the Debtor's efforts to refinance the Indebtedness (as defined below) over a period of more than one year; and, (iii) the Lender's loss of confidence in the Debtor's management as a result of the aforementioned factors.

3. The Debtor has been in default of its obligations to the Lender, under the Mortgage and other Security (each as defined below), since approximately September 2023. As at October 22, 2024, the date of the Redemption Order (as defined below), the aggregate indebtedness owed by the Debtor, to the Lender, was $4,843,428.14, plus accruing interest, costs, fees (including legal fees, as between a solicitor and their own client, on a full indemnity basis), and expenses

(collectively, the "**Indebtedness**"). Interest, costs, and fees continue to accrue, and the Lender has received no payments from the Debtor, following the granting of the Redemption Order.

Affidavit of Richard Dean Chan, sworn on June 3, 2025 [Chan Affidavit], at para. 5.

4. The Security (as defined below) provides that the Lender may seek the appointment of a Receiver following default. There is no question that the Debtor has been in default for nearly two years. The Lands (as defined below) are the Debtor's only known material asset. As a result, the Lender faces significant prejudice as a result of the Obligors' failure to comply with their obligations in relation to the court-ordered Sales Process (as defined below), and in particular the obligation to provide access to and cooperate with the Realtor, which the Realtor has advised is likely to have a materially negative effect on the price realized in respect of the Lands.

5. The appointment of a Receiver is just, convenient, necessary, and appropriate, in order to ensure the fair treatment of all stakeholders and to preserve and maximize the value of the Debtor's Property.

II. FACTS

6. The factual background in relation to the Application is described in further detail in the Affidavit of Richard Dean Chan, sworn on June 3, 2025 (the "**Chan Affidavit**"). Capitalized terms used herein and not otherwise defined have the same meaning(s) as ascribed to such terms in the Chan Affidavit.

Background

7. The Debtor is a special purpose entity, incorporated solely for the purpose of purchasing the lands municipally described as 3385 and 3396 26th Avenue NE, Calgary, AB and legally described as PLAN CALGARY 8110296, THE MOST EASTERLY FIFTY TWO AND TWO HUNDRED AND SIXTY SIX THOUSANDTHS (52.266) METRES IN PERPENDICULAR WIDTH THROUGHOUT BLOCK THREE (3), CONTAINING 0.422 HECTARES MORE OR LESS, EXCEPTING THEREOUT ALL MINES AND MINERALS (the "**Lands**"), and developing two retail commercial buildings on the Lands (the "**Project**").

Chan Affidavit, at para. 3.

8. The Guarantor is the sole director of the Debtor.

Chan Affidavit, at para. 22.

9. Pursuant to the Commitment Letter, between the Lender, as lender, and the Debtor, as Borrower, and the Guarantor, as guarantor, the Lender made available to the Debtor: (i) a demand non-revolving loan facility, in the maximum amount of $5,006,642.45; (ii) a Canadian Emergency Business Account loan facility, in the maximum amount of $60,000; and, (iii) a Business Visa Credit Card, in the maximum amount of $30,000 (collectively, the “**Credit Facilities**”).

Chan Affidavit, at para. 24.

10. The Credit Facilities are due and payable upon the earlier of: (i) the Credit Facilities’ maturity date, being November 10, 2023; or, (ii) the Lender’s demand.

Chan Affidavit, at para. 25.

Guarantee

11. The Indebtedness and all other debts, liabilities, obligations, and indebtedness, due and owing by the Debtor to the Lender, are guaranteed pursuant to the $4,000,000 Limited Liability Guarantee, dated September 22, 2016 (the “**Guarantee**”), granted by the Guarantor, to and in favour of the Lender.

Chan Affidavit, at para. 26 and Exhibit “H”.

Security

12. As continuing security for the Debtor’s obligations to the Lender, the Debtor executed and delivered various security to the Lender, including, among others, the following:

(a) a General Security Agreement, dated September 22, 2016 (the “**GSA**”), granted by the Debtor, to and in favour of the Lender, which was registered against the Debtor in the Alberta Personal Property Registry on October 26, 2016, under registration number 16102612331;

(b) a Land Mortgage, dated September 22, 2016 (the “**Mortgage**”), granted by the Debtor, to and in favour of the Lender, in the principal amount of $6,500,000, which was registered against title to the Lands, on October 21, 2016, under instrument number 161 251 006; and,

(c) a General Assignment of Rents and Certain Lease Rights, dated September 22, 2016 (the “**GARL**”), granted by the Debtor, to and in favour of the Lender, which was registered against title to the Lands, on October 21, 2016, under instrument number 161 251 007,

(collectively, the “**Security**”).

Chan Affidavit, at para. 28 and Exhibits “I”, “J” and “K”.

13. The collateral under the Security consists of all of the Debtor’s Property; including all of the present and after-acquired personal property of the Debtor, the Debtor’s interest in the Lands, and the leases and rents relating to the same.

Chan Affidavit, at paras. 29, 32, and 35.

14. The GSA and the Mortgage contemplate that, upon the Debtor’s default, the Lender may appoint or seek the appointment of a receiver and manager over the applicable collateral.

Chan Affidavit, at paras. 31 and 34, and Exhibits “I” (GSA, s. 9(f), Bates No. 59) and “J” (Mortgage, s. 36, Bates No. 82).

15. The Lender perfected its security interests, under the Security and as against all of the Property, including by registering: (i) financing statements, in the Alberta Personal Property Registry (“**PPR**”), against the Obligors; (ii) a land charge, in the Alberta PPR, against the Debtor; and, (iii) the Mortgage and the GARL against the Certificate of Title of the Lands.

Chan Affidavit, at para. 38, and Exhibits “L” (PPR Search) and “M” (Certificate of Title).

<u>Defaults</u>

16. The Debtor initially committed various events of default under the Commitment Letter and the Security, including, among others: (i) failing to repay the Indebtedness due and owing under the Credit Facilities, on or before their maturity date of November 10, 2023; (ii) failing to make equal blended monthly payments for the months of: (A) September 2023, in the remaining amount of $13,246.54; (B) October 2023, in the amount of $41,882.02; and, (C) November 2023, in the amount of $41,882.02; (iii) failing to keep the Lands free and clear of any mortgage, hypothec, lien, charge, or other encumbrance upon the Lands; and, (iv) failing to pay the property taxes, when due (collectively, the “**Initial Default Events**”).

Chan Affidavit, at para. 39.

<u>Demand and 244 Notice</u>

17. As a result of the Initial Default Events committed by the Debtor, the Lender, through its counsel, delivered a demand letter dated January 4, 2024 (the "**Demand Letter**"), to the Obligors, which advised the Obligors of the occurrence of the Default Events and demanded that the Obligors immediately repay to the Lender all amounts outstanding under and pursuant to the Commitment Letter and the Security. The Demand Letter also enclosed a Notice of Intention to Enforce Security (the "**244 Notice**"), in accordance with section 244 of the BIA, to the Debtor.

Chan Affidavit, at para. 40 and Exhibit "N".

<u>Forbearance Agreement and Default</u>

18. On April 8, 2024, the Lender filed an application (the "**Redemption Order Application**") seeking, among other relief, a redemption order with respect to the Lands and summary judgment against the Obligors, which was originally scheduled to be heard on April 16, 2024.

Chan Affidavit, at para. 41.

19. Following the filing of the Redemption Order Application, at the Obligors' request, the Lender and the Obligors engaged in discussions in an effort to resolve the outstanding Initial Default Events. Among other things, the Obligors advised the Lender, through their respective counsel, that the Obligors were in the process of seeking refinancing, in an amount sufficient to repay the Indebtedness owed to the Lender.

Chan Affidavit, at para. 42.

20. The Lender and the Obligors entered into a Forbearance Agreement, dated effective May 13, 2024 (the "**Forbearance Agreement**"). The Forbearance Agreement contemplated a one hundred and twenty (120) day forbearance period, commencing on May 13, 2024.

Chan Affidavit, at paras. 45, 47(a) and Exhibit "O".

21. The purpose of the Forbearance Agreement was to provide the Obligors a period of time within which to seek refinancing of the Indebtedness, subject to the terms and conditions therein.

Chan Affidavit, at para. 46.

22. The forbearance period under the Forbearance Agreement expired on September 10, 2024, which constituted a terminating event under the Forbearance Agreement (the "**Forbearance Default Event**", and together with the Initial Default Events, the "**Default Events**").

Chan Affidavit, at para. 50.

23. The Default Events have not been cured, the Debtor remains in default of its obligations to the Lender, and the Debtor has not made any payments, to the Lender, since the occurrence of the Initial Default Events.

Chan Affidavit, at para. 51.

Enforcement Proceedings

24. In connection with the Forbearance Agreement, the Obligors' then-counsel executed and delivered, for and on behalf of the Obligors, a consent listing order (the "**Consent Listing Order**") and a consent judgment (the "**Consent Judgment**", the Consent Judgment and the Consent Listing Order are collectively referred to as, the "**Consent Orders**").

Chan Affidavit, at para. 48.

25. Following the expiration of the forbearance period under the Forbearance Agreement, the previously-adjourned Redemption Order Application was rescheduled for hearing on October 9, 2024, with the Lender seeking entry of the Consent Orders.

Chan Affidavit, at para. 52.

26. On October 8, 2024, the Obligors' former counsel, who had previously served a Notice of Withdrawal of Lawyer of Record on June 11, 2024, wrote to the Lender's counsel to advise that she had been retained again, and to seek an adjournment of the Redemption Order Application. Following a contested adjournment request, the Redemption Order Application was adjourned to October 22, 2024.

Chan Affidavit, at paras. 49 and 53.

27. Despite having provided their consent to the Consent Orders, the Obligors opposed the entry of the Consent Orders and the Redemption Order Application proceeded on a contested basis. On October 22, 2024, the Honourable Applications Judge Farrington granted: (i) the Redemption Order – Listing (the "**Redemption Order**"), which, among other things, provided for the appointment of CMN Calgary Inc. (the "**Realtor**") as the judicial listing realtor in respect of the

Lands and directed the Realtor to undertake a specialized commercial marketing and sales process with respect to the Lands (the "**Sales Process**"); (ii) an order for summary judgment against the Obligors (the "**Summary Judgment Order**"); and, (iii) an order sealing the Affidavit of Value and Valuator's Report, sworn by Chris Chornohos on April 1, 2024 (the "**Affidavit of Value**") on the Court file until the earlier of the closing of a sale of the Lands, or further order of the Court (the "**Sealing Order**"). The Redemption Order and Summary Judgment Order were stayed, effective immediately upon their pronouncement, with such stay automatically terminating, without further order of the Court, at 12:00:01 a.m. on December 1, 2024.

Chan Affidavit, at paras. 8, 54- 57, and Exhibit "A" (Sales Process at Bates Nos. 6-8), "Q", and "R".

<u>Sales Process and Lack of Cooperation by Obligors</u>

28. The Redemption Order provided for the appointment of the Realtor as the judicial listing realtor in respect of the Lands and directed the Realtor to undertake the Sales Process with respect to the Lands. The Sales Process is based upon a marketing plan developed by the Realtor, with respect to the Lands, and is to include both broader distribution of marketing materials, as well as targeted outreach to specific potential strategic investors. The steps to be taken by the Realtor include a digital listing, alongside targeted outreach, and incorporating the Lands in other marketing streams (including by marketing the Lands in the Realtor's brochures, mail outs, and similar documents for commercial properties located in the City of Calgary). The primary rationale behind the development of the Sales Process was that the Lands involve two contiguous commercial properties, which the Lender believes requires a marketing process conducted with the assistance of an experienced commercial real estate marketing firm.

Chan Affidavit, at para. 9.

29. Paragraph 9 of the Redemption Order required the Obligors to cooperate with the Realtor:

> "9. During the period of the judicial listings ordered herein, the defendants and any person in possession of the Lands shall cooperate with the Realtor, and shall allow access to the Lands to the Realtor, any representative of the Realtor, and any other realtor approved by the Realtor."

Chan Affidavit, at paras. 57-58, and Exhibit "A".

30. The Mortgage, GSA, and Commitment Letter contain, among others, the following covenants of the Debtor regarding access to information, documents, and the Lands:

(a) Section 19 of the Mortgage:

“19. THAT the Mortgagee or agent of the Mortgagee may, at any time and from time to time, enter upon the land to inspect the land or any portion thereof.”

(b) Sections 6(o) and 6(r) of the GSA:

“6. **COVENANTS OF THE DEBTOR**

The Debtor covenants:

[…]

(o) at all reasonable times, to allow the Bank access to its premises in order to view the state and condition of its property and to inspect its books and records and make extracts therefrom;

[…]

(r) to deliver to the Bank from time to time promptly upon request:

[…]

(ii) all books of account and all records, ledgers, reports, correspondence, schedules, documents, statements, lists and other writings relating to the Collateral,

(iii) all financial statements prepared by or for the Debtor regarding its business, or, where the Debtor is an individual, all tax returns and such personal financial statements as the Bank may request,

(iv) all policies and certificates of insurance relating to the Collateral, and

(v) such further information concerning the Collateral, the Debtor and the Debtor’s business and affairs as the Bank may request;”

(c) Section 12 of the Commitment Letter and section 1.8 of Schedule “F” to the Commitment Letter:

“12. STANDARD LOAN TERMS AND DEFINITIONS:

The attached Schedule “F” forms part of this Agreement.

1.8 **Information requirements.** We may from time to time reasonably require you to provide further information about your business. We may require information from you to be in a form acceptable to us."

(collectively, the "**Access and Information Covenants**").

Chan Affidavit, at para. 37, and Exhibits "G" (Commitment Letter, Bates Nos. 30 and 41), "I" (GSA, Bates No. 56), and "J" (Mortgage, Bates No. 78).

31. Following the granting of the Redemption Order, the Realtor provided the Lender with a list of documents and information required in order to prepare for and commence the Sales Process (collectively, the "**Documents and Information**"), and advised the Lender that the Realtor or its agent would require access to the Lands for that purpose. In particular, the Realtor required access to the Lands in order to take photographs for marketing purposes as part of the Sales Process, and to inspect the Lands.

Chan Affidavit, at paras. 59-60.

32. Beginning in January, 2025 and continuing through February, 2025, the Lender made requests to the Debtor, through their respective counsel, to confirm the date on which the Realtor could access the Lands, and to provide the Documents and Information, including:

(a) on January 28, 2025, following various communications in January 2025, the Lender's counsel delivered an email to the Debtor's counsel, including a specific list of the requested Documents and Information and advising that if the requested Documents and Information were not provided, the Lender intended to proceed with an application seeking the appointment of a Receiver;

(b) on January 29, 2025, the Debtor delivered a portion of the requested Documents and Information to the Lender, through their respective counsel, by email, proposed February 10, 2025 as the date for the Realtor's access to the Lands, and advised that certain additional Documents and Information would be delivered in the near term; and,

(c) on February 11, 2025, the Debtor's counsel delivered an email, to the Lender's counsel, which advised, among other things, that: (i) the Debtor had received a financing term sheet and anticipated receiving a commitment letter from the prospective lender "late this week or early next week"; and, (ii) access to the Lands could no longer be arranged as the Guarantor was not available for religious reasons following the death of the Aga

Khan, but intended to be in touch "within two days about re-scheduling Colliers' attendance at the property to take photos".

Chan Affidavit, at paras. 11, 12(a)-(c), and 59-61, and Exhibits "B", "C" and "S".

33. The Lender did not immediately press for further information or access to the Lands, in light of the explanation given regarding the Guarantor's absence. However, there was no further update from the Obligors over the course of the following weeks, and to date there has been no offer to provide access, and no further update from the Obligors. The remaining Documents and Information referred to in the January 28 Email and the January 29 Email have not been provided.

Chan Affidavit, at paras. 15 and 62.

34. The Realtor was unable to commence the Sales Process, in the manner contemplated by the Redemption Order, without access to the Lands and the Documents and Information.

Chan Affidavit, at para. 64.

35. On March 31, 2025, counsel for the Obligors served a notice of withdrawal on the Lender's counsel. As it then appeared that the promised Documents and Information would not be forthcoming, and as access to the Lands had not been provided, the Lender proceeded to file the Receiver of Rents Application, on April 10, 2025. The Receiver of Rents Application was initially scheduled to be heard on April 24, 2025.

Chan Affidavit, at para. 65, and Exhibit "D".

36. On April 23, 2025, counsel to the Lender was contacted by new counsel to the Obligors, who advised that they would be seeking an adjournment of the Receiver of Rents Application. Following a contested adjournment hearing on April 24, 2025, the Receiver of Rents Application was adjourned to be heard on May 9, 2025, on a peremptory basis.

Chan Affidavit, at paras. 66-67, and Exhibit "T".

37. On May 9, 2025, the Honourable Applications Judge Farrington pronounced the Order (Receiver of Rents and Preservation of Property) (the "**Receiver of Rents Order**"), which, among other things, provided for the appointment of Colliers Macaulay Nicolls as the receiver of all of the rents and profits due and accruing due, now or hereafter (collectively, the "**Rents**"), arising from the Lands (in such capacity, the "**Receiver of Rents**").

Chan Affidavit, at para. 68.

38. The form of the Receiver of Rents Order was not settled prior to service of the Third Notice of Withdrawal by counsel to the Obligors. The Honourable Applications Judge Farrington has advised the Lender that an application will be required to settle the form of order.

Chan Affidavit, at para. 13.

39. Certain relief sought by the Lender under the Receiver of Rents Application was not granted, as the Court expressed concern that Colliers Macaulay Nicolls is not a licensed insolvency trustee and as a result, the granting of any management- or possession-related powers to Colliers Macaulay Nicolls may be prohibited by section 243(4) of the BIA. Accordingly, the Receiver of Rents Order, as granted, limited the powers of the Receiver of Rents to the collection of rents and the authority to distrain for rent. The Receiver of Rents Order also reaffirmed and amended the access and cooperation provisions of the Redemption Order.

Chan Affidavit, at para. 69.

40. On May 20, 2025, the Realtor began the Sales Process. On the same day, the Realtor delivered an email (the "**May 20 Realtor's Email**"), to the Guarantor, as the Obligors' representative, copying the Obligors' then-counsel and the Lender's counsel, requesting access to the Lands and setting out the list of Documents and Information required by the Realtor.

Chan Affidavit, at para. 70 and Exhibit "U".

41. On May 22, 2025, having received no response to the May 20 Realtor's Email, the Realtor followed up with a subsequent email to the same recipients (the "**May 22 Realtor's Email**"). The May 22 Realtor's Email also advised that the Realtor had been in contact with a number of interested parties who had requested to tour the Lands, and enquired as to whether the Realtor might obtain a set of keys to the buildings, or be able to arrange access to the buildings.

Chan Affidavit, at para. 71 and Exhibit "V".

42. Later on May 22, 2025, the Obligors then counsel replied to the May 22 Realtor's Email (the "**May 22 Response**"), advising that he was no longer acting for the Obligors and would be delivering a Notice of Withdrawal of Lawyer of Record. On May 23, 2025, the Lender's counsel received service of the Third Notice of Withdrawal.

Chan Affidavit, at para. 72 and Exhibits "W" and "X".

43. The Realtor has received no further response to the May 20 Realtor's Email or the May 22 Realtor's Email, and has not been contacted by any person on behalf of the Obligors.

Chan Affidavit, at para. 73.

Appraisals

44. The Lender has obtained an appraisal report, attached to the Affidavit of Value, which is subject to the Sealing Order, pronounced by the Honourable Applications Judge Farrington on October 22, 2024. Based on the Affidavit of Value, the Lender anticipates that the value of the Lands may be less than the outstanding Indebtedness.

Chan Affidavit, at paras. 55(c) and 74, and Exhibit "R".

45. The Obligors have also obtained an appraisal report (the "**Obligors' Appraisal**"). The Lender believes that the value of the Lands in the Obligors' Appraisal is inaccurate, as the Obligors have actively sought refinancing for a significant period of time, without success.

Affidavit of Zulfikar Boga, sworn on December 18, 2024, at Exhibit "A";
Chan Affidavit, at paras. 75-76.

III. ISSUES

46. The issue to be determined on the within Application is whether it is just and convenient to appoint the Receiver over the Property.

IV. LAW

Subsection 243(1) of the BIA Provides Jurisdiction to Appoint the Receiver

47. Section 243 of the BIA contemplates the appointment of a receiver and states, in pertinent part:

> **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.

BIA, ss. 243(1) [emphasis added] [Book of Authorities ("BOA") TAB 1].

<u>Subsection 13(2) of the Judicature Act Provides Jurisdiction to Appoint the Receiver</u>

48. Subsection 13(2) of the Judicature Act also contemplates the appointment of a receiver and states, in pertinent part:

> **Part performance**
>
> 13 (2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be **<u>just or convenient that the order should be made</u>**, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

Judicature Act at s. 13(2) [emphasis added] [BOA TAB 2].

<u>The Law of Property Act Provides Jurisdiction to Substitute a Receiver</u>

49. Subsection 49(9) of the *Law of Property Act* provides that, following the appointment of a receiver of rents, another person may be substituted as receiver of rents, where appropriate:

> **Appointment of receiver**
>
> 49 (9) When and so often as the circumstances require, the Court may, without discharging the order appointing the receiver, substitute another person for the person originally appointed by the order appointing a receiver, and the substituted receiver shall perform all the duties and has all the powers given by the order or this section to the person originally appointed.

***Law of Property Act*, RSA 2000, c L-7, at s. 49(9) [BOA TAB 3].**

V. ARGUMENT

<u>The Statutory Prerequisites to the Appointment of the Receiver Have Been Met</u>

50. All statutory prerequisites for the appointment of the Receiver have been met. The Demand Letter and the 244 Notice were issued to the Debtor on January 4, 2024, and the Lender subsequently commenced this action to enforce its Security. The requirement for a ten (10) day notice period, pursuant to subsection 243(1) of the BIA, is more than satisfied.

Chan Affidavit at para. 40 and Exhibit "N".

It Is Just and Convenient to Appoint the Receiver

51. Subsection 243(1) of the BIA and subsection 13(2) of the Judicature Act each authorize this Honourable Court to appoint a receiver where it is "just or convenient" to do so. In the circumstances, it is just and convenient to appoint the Receiver over the Debtor's Property.

52. In *Paragon Capital Corporation Ltd. v Merchants & Traders Assurance Co.* ("***Paragon***"), the Honourable Justice B.E.C. Romaine set out a non-exhaustive list of factors that the Court ought to consider in determining whether it is just or convenient to appoint a receiver:

> "[27] The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:
>
> 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, particularly where the appointment of a receiver is authorized by the security documentation;
>
> 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;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;
>
> m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

p) the goal of facilitating the duties of the receiver.

Bennett, Frank, *Bennett on Receiverships*, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases)"

***Paragon Capital Corporation Ltd. v Merchants & Traders Assurance Co.*, 2002 ABQB 430 at paras. 27 – 28 [*Paragon*] [BOA TAB 7].**

The superior courts of other provinces have adopted the same test as in *Paragon*: *Textron Financial Canada Limited v Chetwynd Motels Ltd.*, 2010 BCSC 477 at paras. 50 – 52, 55 [BOA TAB 8]; *Affinity Credit Union 2013 v Vortex Drilling Ltd.*, 2017 SKQB 228 at para. 19 [BOA TAB 4]; *Canadian Equipment Finance and Leasing Inc. v The Hypoint Company Limited*, 2022 ONSC 6186 at paras. 24 – 25 [BOA TAB 5].

53. In assessing *Paragon* factors:

(a) the "factors are not a checklist but are to be viewed holistically" to determine whether it is just or convenient to appoint the receiver; and,

***Vancouver Coastal Health Authority v Seymour Health Centre Inc.*, 2023 BCSC 1158 at para. 53 [BOA TAB 9].**

(b) "[i]n cases where the security documentation provides for the appointment of a receiver," as in the present circumstances, "the extraordinary nature of the remedy sought is less essential to the inquiry".

***Paragon* at para. 28 [BOA TAB 7].**

54. In the current circumstances, it is just and convenient to appoint the Receiver, as substantially all of the *Paragon* factors are in favour of granting the relief. Specifically:

(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, particularly where the appointment of a receiver is authorized by the security documentation**: The GSA and Mortgage specifically authorize the Lender to seek appointment of a Receiver upon the Debtor's default. There is no question that the Debtor is in default under the GSA and the Mortgage, has been in default for approximately 21 months, and that such defaults are serious; including a maturity default and ongoing payment defaults, as well as the Debtor's failure to comply with the Access and Information Covenants, among others. There is also a risk of significant prejudice to the Lender, such as: (i) the erosion of its collateral, given the lengthy delays in the commencement of the Sales Process caused by the Obligors, the Debtor's refusal to provide the requested Documents and Information and access to the Lands, and the Realtor's advice that the Sales Process is likely to be materially negatively impacted by same; (ii) the Debtor's inability or failure to cure the Default Events since September 2023; and, (iii) the Debtor's failure to obtain refinancing over a period of more than one year.

Chan Affidavit at Exhibits "I" (GSA, s. 9(f), Bates No. 59) and "J" (Mortgage, s. 36, Bates No. 82).

Furthermore, any potential alternative means of seeking the Debtor's compliance with the Sales Process, such as further applications in relation to the Redemption Order and Receiver of Rents Order or the enforcement of the Lender's Security, are unlikely to solve the underlying issues with the Debtor's continued management and possession of the Lands as efficiently and effectively as appointment of the Receiver.

(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**: There is no reasonable prospect of the Debtor repaying the Indebtedness, and the Lender's collateral is at risk. First, the Debtors have been unable to refinance or repay the Indebtedness to date. Second, the Obligors have failed to provide access to the Realtor to the Lands, and have failed to provide the requested Documents and Information for the Realtor to proceed with the Sales Process in a timely fashion. Third, the Lender's appraisal indicates that there is a risk that recoveries from the Lands will be less than the outstanding Indebtedness. The Debtor's appraisal is optimistic at best: while the appraised value significantly exceeds the Indebtedness, the Debtor has been unable to refinance the Indebtedness despite having initially commenced refinancing efforts in May 2024 in connection with the Forbearance Agreement. There is a clear need for the appointment of a receiver to protect the Property and enable a value-maximizing sales process to be carried out without interference.

Chan Affidavit at paras. 74-76.

(c) **The nature of the property:** The Debtors' Property includes two commercial properties, which the Lender believes will require a specialized marketing process conducted with the assistance of an experienced commercial real estate marketing firm, such as the Sales Process approved by the Redemption Order. However, without access to the Lands, and the requested Documents and Information requested by the Realtor, the Realtor is unable to conduct the Sales Process with efficiency and obtain the best possible offer. The appointment of a Receiver over the Property is a more efficient option to ensure the value of the Lands and other Property is maximized. The nature of the Property, being commercial real estate, and the Debtor's business as a landlord, also means that a Receiver is capable of continuing operations with minimal difficulty.

Chan Affidavit at paras. 11, 12, 15, 16, and 18.

(d) **The preservation and protection of the property pending judicial resolution:** As described above, the Lender has serious concerns that the value of the Lands will deteriorate or fail to be maximized if the Sales Process, or a similar process under the oversight of the Receiver, is not able to be completed in the manner contemplated. Additionally, the Court-appointed Receiver will have the mandate to preserve and protect the Property, including the Lands, to the benefit of all stakeholders. While the Lender is unable to obtain access to the Lands to confirm the state of the Property, the Debtor is insolvent and its only known source of revenue is now subject to the Receiver of Rents Order. The Debtor does not appear to have the resources required to maintain the Lands and make them attractive for leasing, and has failed to lease the Lands despite having made efforts to do so since at least October 2024.

Chan Affidavit at paras. 4(b)-(c), 18, 19(b)-(c).

(e) **The balance of convenience to the parties:** This factor favours the appointment of the Receiver, because: (i) the Obligors are and remain unable to comply with their obligations to the Lender, have committed the Default Events under the Commitment Letter, and have committed further defaults after the issuance of the Demand Letter and the Forbearance Agreement; (ii) despite having had an opportunity, the Obligors have been unable to complete any transaction(s) for their business and assets, or to lease the Lands and obtain additional revenue; (iii) the Obligors have been unable to cure the Default Events; and, (iv) the Lender will suffer significant, irreparable, prejudice if the Receiver is not appointed, as described herein, including as a result of the Obligors' failure to allow the Realtor access to the Lands to complete the Sales Process. The fact that there ***may*** ultimately be sufficient equity in the Lands to pay the Indebtedness, if the Debtor's appraisal is taken at face value (despite the array of facts indicating that it should not be, which include the failure of the Debtor's refinancing efforts to date and the significant delta between the value ascribed to the Lands in the Debtor's and Lender's respective appraisals), is not a compelling reason on its own to avoid the appointment of a receiver when a mortgagor has defaulted under a mortgage.

***Citibank Canada v. Calgary Auto Centre,* 1989 CanLII 3440 (AB KB), at para. 22 [BOA TAB 6];**
Chan Affidavit at paras. 5-7, 16, 39-40, and 45-51.

(f) **The fact that the creditor has the right to appoint a receiver under the documentation provided for the loan**: The GSA and Mortgage include provisions granting the Lender the right to appoint a receiver following the Default Events.

Chan Affidavit at Exhibits "I" (GSA, s. 9(f), Bates No. 59) and "J" (Mortgage, s. 36, Bates No. 82).

(g) **The enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others:** The Lender has already encountered difficulty in the enforcement of the Mortgage; including, in particular, the Debtor's failure or refusal to provide access to the Lands and to cooperate with the Receiver, as required under the Redemption Order and the Receiver of Rents Order. Furthermore, the Debtor has failed to comply with the requirements of the Access and Information Covenants and paragraph 9 of the Redemption Order, in relation to providing records and information to the Lender and the Realtor, respectively. Given the difficulty encountered to date, the Lender is unable to fully exercise its rights under the Security, despite the fact that the Mortgage (being the most material of the Security held by the Lender) has been declared to be valid and enforceable against the Lands, pursuant to the Redemption Order. Additionally, this Court has already determined that the appointment of a Receiver of Rents was appropriate in order to permit the Lender to exercise its rights in relation to the rents due and payable from the Lands. The appointment of the Receiver is necessary in order to resolve these issues and permit the realizable value of the Property to be maximized.

Chan Affidavit at Exhibit "A" (Redemption Order, paras. 3 and 9, Bates Nos. 3 and 4).

(h) **The principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly:** As stated by Justice Romaine, because the GSA and Mortgage provide an express right to appoint a receiver, "the extraordinary nature of the remedy sought is less essential to the inquiry".

***Paragon*, *supra* at para. 28 [BOA TAB 7];**
Chan Affidavit at Exhibits "I" (GSA, s. 9(f), Bates No. 59) and "J" (Mortgage, s. 36, Bates No. 82).

(i) **The consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently:** For substantially the same reasons as described above in relation to the difficulty encountered by the Lender in enforcing the Security to date, and in light of the Debtor's non-cooperation with the Court-appointed Realtor, any privately appointed receiver would likely face similar difficulty in carrying out its mandate. Furthermore, Court appointment of the Receiver will provide the Receiver with the authority required to obtain any required Documents and Information, to engage with utilities providers, tenants, and other interested parties concerning the operation of the Debtor's business and the Lands, to enter into and approve leases, to effect and facilitate any necessary repairs or maintenance, and to carry out a marketing and sales process without further interference from the Debtor or any other person. None of these duties can be carried out efficiently by a private receiver or similar person, in circumstances where the Debtor has refused to engage or cooperate to date.

(j) **The effect of the order upon the parties:** The potential for some operational disruption as a result of the appointment of the Receiver must be balanced against the available alternatives, which are effectively limited to more intrusive and potentially value-limiting enforcement action through enforcement of the GSA and the Mortgage. The Obligors have failed or been unable to resolve their financial difficulties over multiple years, and have been unable or unwilling to cooperate with the Realtor in the Sales Process. The nature of the Debtor's business, and the fact that the Lands have only a single tenant, minimizes the potential prejudice to the Debtor resulting from the appointment of the Receiver; which is an experienced Licensed Insolvency Trustee and capable of managing commercial properties in an efficient manner.

Chan Affidavit, at paras. 4, 16, 19(d)-(e), 81.

(k) **The likelihood of maximizing return to the parties:** The Receiver is a neutral third party and best placed to maximize returns to all of the Debtor's stakeholders, including the Lender. Appointing the Receiver will allow an experienced court officer to seek the highest and best offers available in the circumstances. The existing Sales Process, which was intended to accomplish the same goal, has been hindered and delayed due to the Debtor's conduct, and the Realtor has expressed concern that such conduct will result in lower bids than might otherwise be received. As a result, the appointment of the Receiver is required in order to maximize the value of the Property.

Chan Affidavit, at paras. 16, 19(d)-(e).

(l) **The goal of facilitating the duties of the receiver:** This factor militates in favour of appointment of the Receiver for the same reasons as set forth above in relation to the difficulties encountered by the Lender to date, and the benefits of a Court-appointed (rather than privately appointed) Receiver to the Debtor's estate and stakeholders.

55. The appointment of the Receiver is to the benefit of the Lender and the Debtor's creditors and stakeholders, generally, as it will: (i) permit the Receiver to take possession and control of the Property and preserve the same (potentially including locating additional lessees for the Property, as well as repairs, maintenance and preservation of the Lands); (ii) allow the Receiver (and, if engaged by the Receiver, the Realtor) to conduct an open and transparent marketing and sales process, with the benefit of authority to allow the Realtor access to the Lands, apply for vesting orders, sealing orders, and such other relief as may be necessary or desirable to obtain the highest and best offer(s) in respect of the Property, along with the "breathing room" provided by a stay of proceedings to enable an orderly process; (iii) allow for the injection of working capital, if and as required, by way of a receiver's borrowings facility, in turn enabling the Receiver to continue operations and complete a sales process of an appropriate length of time without the time constraints inherent in a Redemption Order which apply to the previous Sales Process; and, (iv) ensure that the proceeds of the Property, following realization, are distributed in accordance with legal rights and entitlements of the Debtor's creditors.

Regarding the proposed Receiver's borrowings facility, see the Chan Affidavit, at paras. 82-83, 85.

56. The proposed form of Receivership Order would also: (i) substitute BDO as the Receiver of Rents, and permit BDO to exercise its powers as the Receiver of Rents and as Receiver, concurrently; and (ii) terminate the existing judicial listing under the Redemption Order and grant the Receiver authorization to enter into such agreements with the Realtor concerning the marketing and sale of the Lands as the Receiver may determine necessary or advisable. These provisions are intended to increase efficiency, and centralize the administration of the Debtor's estate and all marketing and sale efforts, in the Receiver, without duplication of effort, while permitting the Receiver to retain the Realtor and build upon the sale and marketing efforts undertaken to date.

VI. ORDER REQUESTED

57. The Lender respectfully submits that it is just and convenient to appoint the Receiver, over the Property.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3rd DAY OF JUNE, 2025

Sean Collins, KC / Nathan Stewart
Counsel to National Bank of Canada

VII. LIST OF AUTHORITIES

<u>Statutes</u>

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, at s. 243(1);

2. *Judicature Act*, R.S.A. 2000, c. J-2, at s. 13(2);

3. *Law of Property Act*, RSA 2000, c L-7, at s. 49(9);

<u>Case Law</u>

4. *Affinity Credit Union 2013 v Vortex Drilling Ltd.*, 2017 SKQB 228;

5. *Canadian Equipment Finance and Leasing Inc. v The Hypoint Company Limited*, 2022 ONSC 6186;

6. *Citibank Canada v. Calgary Auto Centre*, 1989 CanLII 3440 (AB KB);

7. *Paragon Capital Corporation Ltd. v Merchants & Traders Assurance Co.*, 2002 ABQB 430;

8. *Textron Financial Canada Limited v Chetwynd Motels Ltd.*, 2010 BCSC 477; and,

9. *Vancouver Coastal Health Authority v Seymour Health Centre Inc.*, 2023 BCSC 1158.