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COURT FILE NUMBER 2201 - 03735

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

APPLICANT **THE BANK OF MONTREAL**

RESPONDENTS **THE INSTITUTE OF WELLNESS AND ADVANCED AESTHETICS LTD., WANDA LEE, THE ESTATE OF JONATHAN PATRICK LEE, 1608309 ALBERTA LTD., and MOUNT ROYAL SURGICAL CENTRE INC.**

DOCUMENT **BRIEF OF LAW OF THE APPLICANT**

ADDRESS FOR  
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**Hearing via Webex before the Honourable Justice J.T. Nielsen  
on the Commercial List, on April 1, 2022, commencing at 9:00A.M.**

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## **I. INTRODUCTION**

1. This is the Brief of Law of the Bank of Montreal ("**BMO**"), in support of its application (the "**Application**") to appoint Alvarez & Marsal Canada Inc. ("**A&M**") as the receiver and manager (the "**Receiver**") of all of the current and future assets, undertakings and property (collectively, the "**Property**") of The Institute of Wellness and Advanced Aesthetics Ltd. ("**IWAA**" or the "**Borrower**"), 1608309 Alberta Ltd., previously named Jonathan P. Lee Professional Corporation ("**Jonathan PC**") and Mount Royal Surgical Centre ("**MRSC**" and collectively, the "**Debtors**").
2. BMO extended credit facilities and related services (the "**Loans**") to the Borrower pursuant to, among others, a Letter of Agreement executed October 11, 2019, a Letter of Agreement—Amendment executed October 22, 2019, a Commercial Card Agreement Onboarding Documentation executed December 15, 2019 and a Letter of Agreement – Amendment dated October 14, 2021 (collectively, the "**Loan Agreement**").<sup>1</sup>
3. As at March 2, 2022, IWAA was indebted to BMO for \$2,246,056.33 in respect of funds borrowed pursuant to the Loans, plus interest, excluding costs and legal fees, which continue to accrue (the "**Indebtedness**").<sup>2</sup>
4. The terms of the Security (as defined below) include the right to appoint or apply to this Honourable Court to appoint a receiver and manager.<sup>3</sup>
5. A&M is qualified, prepared and has consented to act as Receiver.<sup>4</sup>
6. As the Debtors are in default of their obligations to BMO under both the Loan Agreement, the Security and the Forbearance Agreement, BMO seeks to enforce its contractual right to appoint a Receiver, and it is just and convenient to do so.

## **II. ISSUE**

7. There are two related issues in this application:
  - (a) should this Honourable Court appoint a receiver over the Property; and, if so
  - (b) should the Receiver have the power to assign the Debtors into bankruptcy?

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<sup>1</sup> Affidavit No. 1 of Trevor Bauer, sworn March 29, 2022 (the "**Bauer Affidavit**") at para 12.

<sup>2</sup> Bauer Affidavit at para 13.

<sup>3</sup> Bauer Affidavit at para 32.

<sup>4</sup> Bauer Affidavit at para 37.

### **III. BMO'S POSITION**

8. The appointment of a receiver over the Debtors is a contractual remedy that is available to BMO and BMO respectfully submits that it is just and convenient to appoint a Receiver of the Property in the present circumstances.

### **IV. FACTUAL BACKGROUND**

9. The facts in support of BMO's application are set forth in the Bauer Affidavit.<sup>5</sup>
10. The Debtors are corporations incorporated, pursuant to the laws of Alberta, with registered and records offices located in Calgary.<sup>6</sup>

#### **A. Security and Guarantees**

11. The Borrower granted the Borrower Security in favour of BMO, which includes, but is not limited to:
- (a) the IWAA GSA, a general security agreement granting security over all of IWAA's present and after-acquired personal property;
  - (b) an Assignment of Moneys Which May Become Payable under Fire Insurance Policies in respect of the Leased Premises; and
  - (c) an Assignment of Life Insurance Proceeds in the amount of \$1,500,000.<sup>7</sup>
12. The Guarantors granted the Guarantor Security in favour of BMO, which includes, but is not limited to:
- (a) the Bel-Aire Mortgage granted by Wanda over the real property legally described as Plan 5815HT Block 3 Lot 27;
  - (b) the Jonathan GSA, a general security agreement granting security over all of Jonathan PC's present and after-acquired personal property; and
  - (c) the MRSC GSA, a general security agreement granting security over all of MRSC's present and after-acquired personal property.<sup>8</sup>

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<sup>5</sup> Capitalized terms not otherwise defined herein have the meaning set forth in the Bauer Affidavit, BMO's Statement of Claim or BMO's Application.

<sup>6</sup> Bauer Affidavit at paras 3, 5, and 6.

<sup>7</sup> Bauer Affidavit at para 14.

<sup>8</sup> Bauer Affidavit at para 19.

13. In addition to granting the Security, the Guarantors executed the Guarantees whereby each Guarantor guaranteed the obligations of the Borrower owing to BMO under the Loans.<sup>9</sup>

**B. Defaults and Demand**

14. The Borrower is in default of its obligations to BMO, including but not limited to, by reason of the failure to:

- (a) make payments against the Loans as required by the Loan Agreement;
- (b) remit amounts owing to Canada Revenue Agency when due;
- (c) grant the Bel-Aire Mortgage against the Bel-Aire Property with a second priority ranking in accordance with the terms of the Loan Agreement;
- (d) comply with all material agreements, including but not limited to the April 12, 2018 Lease Agreement between the Borrower as tenant and Certus Developments Inc. as landlord in respect of the Leased Premises.<sup>10</sup>

15. As a result of the Defaults, on or about February 10, 2022, BMO issued:

- (a) the Borrower Demand, demanding repayment of the Indebtedness (as it then was) from the Borrower and concurrently delivered a 244 Notice pursuant to section 244 of the *BIA*;<sup>11</sup> and
- (b) the Guarantor Demands, demanding repayment of the Indebtedness from the Guarantors together with separate 244 Notices to each Guarantor.<sup>12</sup>

16. Despite the issuance of the Demands, the Borrower and the Guarantors have failed, refused or neglected to repay the Indebtedness.<sup>13</sup>

17. In addition to the defaults under the Loan Agreement and Security, the Debtors are in default of their obligations under the Forbearance Agreement as a result of, among other things, a material

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<sup>9</sup> Bauer Affidavit at paras 16-17.

<sup>10</sup> Bauer Affidavit at para 21.

<sup>11</sup> *Bankruptcy and Insolvency Act*, RSC 1985 c B-3 (as amended, the "*BIA*") [**Book of Authorities** ("**Authorities**") **Tab 1**].

<sup>12</sup> Bauer Affidavit at paras 22-23.

<sup>13</sup> Bauer Affidavit at para 24.

adverse change in the status of the Borrower, the particulars of which include, but are not limited to:

- (a) Wanda has resigned, or is in the process of resigning, as an officer of IWAA and MRSC;
  - (b) IWAA has terminated all but one of its employees;
  - (c) one of IWAA's surgeons has resigned; and
  - (d) the Landlord has locked IWAA and MRSC out from the Leased Premises,
- (the "**Forbearance Defaults**").<sup>14</sup>

## V. LAW AND ARGUMENT

### A. BMO is entitled to appoint a receiver

- 18. BMO satisfied the procedural prerequisite to seeking the appointment of the Receiver in February 2022 when it served the 244 Notice on the Borrower.
- 19. Each of section 243 of the *BIA*<sup>15</sup>, section 13(2) of the *Judicature Act*<sup>16</sup> and section 65(7)(a) of the *PPSA*<sup>17</sup> vest this Honourable Court with the authority to appoint a Receiver where it is just and convenient to do so.
- 20. BMO respectfully submits that this Honourable Court ought to exercise its discretion to appoint a Receiver over the Property, because it is just, convenient and otherwise appropriate in the circumstances and would be in accordance with the contractual terms agreed upon by BMO and the Borrower under the Security.

### B. Considerations when Appointing a Receiver

- 21. Traditionally, when considering an application to appoint a receiver, Courts have used the same test used to determine if an interlocutory injunction is appropriate,<sup>18</sup> but have loosened the test in cases where "the dictates of fairness are so overwhelming".<sup>19</sup> In *Murphy*, Justice Veit confirmed

<sup>14</sup> Bauer Affidavit at para 27.

<sup>15</sup> *BIA* at s. 243 [**Authorities, Tab 1**].

<sup>16</sup> *Judicature Act*, RSA 2000 c J-2, as amended (the "*Judicature Act*") at s. 13(2) [**Authorities, Tab 2**].

<sup>17</sup> *Personal Property Security Act*, RSA 2000 c P-7 ("*PPSA*") at s. 65(7)(a) [**Authorities, Tab 3**].

<sup>18</sup> The applicant must establish that there is a serious issue to be tried, that it will suffer irreparable damage if the relief is not granted, and that the balance of convenience favours the granting of the relief (the "**Injunction Test**")<sup>18</sup> *RJR — MacDonald Inc v Canada (Attorney General)* [1994] 1 SCR 311 at paras 83-85 [**Authorities, Tab 4**].

<sup>19</sup> *Murphy v Cahill*, 2013 ABQB 335 ("*Murphy*") at para 8 [**Authorities, Tab 5**].

that the interim relief of appointing a receiver may be justified even where one or more terms of the Injunction Test are not met.<sup>20</sup>

22. The requirement to meet the Injunction Test is less relevant where a secured creditor is simply seeking to enforce its contractual rights.<sup>21</sup>
23. There are a number of factors that are considered by a Court in appointing a receiver. In *Schendel*,<sup>22</sup> this Court affirmed the non-exhaustive list of factors set forth in *Bennett on Receiverships*, originally set forth by Justice Romaine in *Paragon* (the "**Paragon Factors**").<sup>23</sup>

***BMO is not required to meet the Injunction Test***

24. In *Kasten*, a secured creditor brought an application to appoint a receiver pursuant to the terms of its security documentation and this Honourable Court held that:

The security documentation in the present case authorizes the appointment of a Receiver [...]. Thus, even if I accept the argument that the Applicant Kasten has not been able to demonstrate irreparable harm, that itself would not be determinative of whether or not a Receiver should be appointed in this matter. It is not essential for a creditor to establish irreparable harm if a receiver is not appointed.<sup>24</sup>

25. In *Paragon*, Justice Romaine confirmed that parties' contractual interests should be honored above strict interpretation of the branch of the Injunction Test that requires imminent irreparable harm in the absence of a Court appointing a receiver:

In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry.<sup>25</sup>

26. This approach was also confirmed by the Ontario Superior Court in *RMB*:

...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

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<sup>20</sup> *Murphy* at para 62 [**Authorities, Tab 5**].

<sup>21</sup> *Paragon Capital Corporation Ltd. v Merchants & Traders Assurance Co.*, 2002 ABQB 430 ("*Paragon*") at para 28 [**Authorities, Tab 6**].

<sup>22</sup> *Re Schendel Management Ltd.*, 2019 ABQB 545 ("*Schendel*") at para 44 [**Authorities, Tab 7**].

<sup>23</sup> *Lindsey Estate v Strategic Metals Corp.*, 2010 ABQB 242 ("*Lindsey*") at para 32 [**Authorities, Tab 8**]. *Paragon* at para 27 [**Authorities, Tab 6**]. Among the *Paragon* Factors are two of the three elements of the Injunction Test, with the "serious issue to be tried" question omitted. The five factors from *Lindsey* are also captured in the *Paragon* Factors.

<sup>24</sup> *Kasten Energy Inc. v Shamrock Oil & Gas Ltd.* ("*Kasten*") 2013 ABQB 63 at para 21 [**Authorities, Tab 9**].

<sup>25</sup> *Paragon* at para 28 [**Authorities, Tab 6**].

receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.<sup>26</sup>

27. In *Can-Pacific Farms*, the British Columbia Supreme Court took this reasoning further, essentially reversing the onus as to whether or not a receiver should be appointed. The Court confirmed that, where a secured creditor is seeking a receivership order and default under the security is proven, a receiver should be granted as a right unless there are compelling commercial or other reasons to not grant the order.<sup>27</sup>
28. Having regard for the *Paragon* Factors and the Security, BMO respectfully submits that it is just and convenient to appoint A&M as Receiver over the Property for, among others, the following reasons:
  - (a) it is an express term of the Security that, upon default, one of the remedies available to BMO is the appointment of a receiver;<sup>28</sup>
  - (b) it is not necessary for BMO to provide the existence of irreparable harm in the event a receiver is not appointed;
  - (c) BMO has lost confidence in the Debtors' management;<sup>29</sup>
  - (d) the Borrower has committed numerous defaults under the Security and the Loan Agreements; and
  - (e) there are no compelling commercial or other reasons to not appoint A&M as receiver.
29. BMO respectfully submits that it is just and convenient to appoint the Receiver over the entirety of the Property to ensure that the Receiver has full authority over the Debtors' business and to maximize recovery for stakeholders.
- C. The Receiver ought to have the authority to assign the Borrower into bankruptcy**
30. BMO's proposed form of Receivership Order would empower the Receiver to assign the Debtors into bankruptcy.

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<sup>26</sup> *RMB Australia Holdings Ltd. v Seafeld Resources Ltd.*, 2014 ONSC 5205 ("*RMB*") at para 29 [Authorities, Tab 10].

<sup>27</sup> *Canadian Imperial Bank of Commerce v Can-Pacific Farms Inc.*, 2012 BCSC 437 ("*Can-Pacific Farms*") at para 14 [Authorities, Tab 11].

<sup>28</sup> Bauer Affidavit at para 32.

<sup>29</sup> Bauer Affidavit at para 34.



***The Court has the authority to grant the power sought***

31. Alberta's Template Receivership Order the ("**Template**"), does not explicitly grant a receiver the authority to bankrupt a debtor. However, the explanatory notes to the Alberta Template Order (the "**Explanatory Notes**") provide that:

There is no specific provision allowing the Receiver to make an assignment in bankruptcy or to consent to the making of a Bankruptcy Order under the BIA. While some case law permits Receivers to take such steps, typically Receivers seek prior Court approval even where the specific power to do so is included in the Order. Bankrupting the debtor may reverse priorities and prejudice or favour certain creditors over others. Bankruptcy is a sufficiently material substantive and final act that, if a Receiver is empowered to bankrupt the debtor, it should be expressly brought to the Court's attention.<sup>30</sup>

32. *Gustin*, a recent decision of the Ontario Superior Court, addresses this very issue.<sup>31</sup> In determining that a Receiver had the authority to assign a debtor into bankruptcy, Justice Rady stated:

...the Court is empowered to authorize the Receiver to file an assignment in bankruptcy. There is ample authority supporting that conclusion ... There is no sound basis to distinguish the cases because the debtors were corporations.<sup>32</sup>

33. The Court referenced, among others, its prior decisions *Sun Squeeze*<sup>33</sup> and *Owen Sound*.<sup>34</sup>

34. In *Sun Squeeze*, Justice Farley concluded that he "...did not see that there is any dispute that this Court has the power to authorize the Court-appointed Receiver and Manager to either file an assignment in bankruptcy or consent to the Petition" and that:

Courts in Canada have specifically held that the Court has jurisdiction to authorize and direct a Court-appointed [Receiver and Manager] or liquidator to put a debtor company into bankruptcy.<sup>35</sup>

35. Similarly, in *Owen Sound*, Justice Brown, in concluding that a receiver-manager had the authority to wind-up a debtor company, confirmed that "[i]t is well settled that a court possesses the power to authorize a receiver to file an assignment in bankruptcy or consent to a bankruptcy order".<sup>36</sup>

36. In *Sun Squeeze*, Justice Farley cited the following from the Manitoba Court of Appeal's decision in *Brandon Packers*:

<sup>30</sup> Alberta Template Receivership Order Explanatory Notes, January 2019 at 4 [Authorities, Tab 12].

<sup>31</sup> *RBC v Gustin*, 2019 ONSC 5370 ("*Gustin*") [Authorities, Tab 13].

<sup>32</sup> *Gustin* at para 15 [Authorities, Tab 13].

<sup>33</sup> *Royal Bank v Sun Squeeze Juices Inc.*, [1994] OJ No 567 ("*Sun Squeeze*") [Authorities, Tab 14]; aff'd *Royal Bank v Sun Squeeze Juices Inc.*, 28 CBR (3d) 201.

<sup>34</sup> *Bank of Montreal v Owen Sound Golf & Country Club Ltd.*, 2012 ONSC 557 ("*Owen Sound*") [Authorities, Tab 15].

<sup>35</sup> *Sun Squeeze* at paras 6 and 10 [Authorities, Tab 14].

<sup>36</sup> *Owen Sound* at para 7 [Authorities, Tab 15].

Must the Court then close its eyes to the facts as reported by its own officer? It is my feeling that no amount of bankruptcy or winding-up legislation can fetter the Court to the extent that it must remain blind to the reality of bankruptcy.

In this case the Court directed its appointee to make an assignment in bankruptcy. It is true the Court might have suggested to a creditor that he launch a petition to have the company declared bankrupt: but this, surely, is asking the Court to shirk its plain responsibility and place that responsibility on some third party. When the affairs of the company are under the jurisdiction of the Court, it must accept and fulfill its duty and give judgment "according to the very right and justice of the case".<sup>37</sup>

37. In *Bresea Resources*, the Alberta Court of Appeal set aside an order which directed the interim receiver-manager to assign the debtor company into bankruptcy because the debtor was not actually insolvent.<sup>38</sup> However, the Court expressly endorsed *Sun Squeeze*, holding that, in the appropriate circumstances, the Court has authority to direct that a receiver-manager assign a company into bankruptcy:

Where a company is insolvent within the meaning of the [BIA], and is unwilling or incapable of making a voluntary assignment, and there is no creditor qualified or willing to petition the company into bankruptcy, and where bankruptcy is desirable in order to protect the interests of creditors and shareholders, then it may be proper for a court to make an order placing the affairs of the company under the supervision of a receiver/manager or other officer of the court with directions to assign the company into bankruptcy.<sup>39</sup> [emphasis added]

38. The Borrower has failed to pay its obligations in the ordinary course of business and has ceased to meet its liabilities each as they generally become due. Upon review of the aforementioned authorities, the Template and the Explanatory Notes, it is clear that this Court has the authority to authorize and empower the Receiver to assign the Borrower into bankruptcy.
39. Accordingly, it is BMO's respectful submission that should this Honourable Court appoint the Receiver as its officer, the Receiver would be best-positioned to assign either of the Borrower into bankruptcy should the circumstances warrant.

## VI. CONCLUSION

40. For the reasons set forth above, BMO seeks a Receivership Order, substantially in the form appended as Schedule "A" to the Application in order to maximize value for all of the Borrower's stakeholders.

<sup>37</sup> *Re Brandon Packers Ltd.*, 33 DLR (2d) 503, ("*Brandon Packers*") at paras 52-53, leave to appeal to SCC refused [Authorities, Tab 16].

<sup>38</sup> *Chow v Bresea Resources Ltd.*, 75 ACWS (3d) 1006 ("*Bresea Resources*") at para 13 [Authorities, Tab 17].

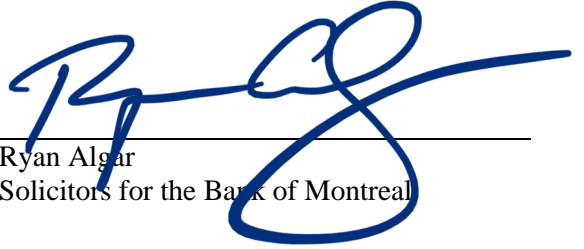
<sup>39</sup> *Bresea Resources* at para 13 [Authorities, Tab 17].

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30<sup>TH</sup> DAY OF MARCH, 2022**

**BURNET, DUCKWORTH & PALMER LLP**

Per: \_\_\_\_\_

Ryan Algar  
Solicitors for the Bank of Montreal

A handwritten signature in blue ink, appearing to read 'R. Algar', is written over a horizontal line. The signature is stylized with a large loop at the end.

# BOOK OF AUTHORITIES

TAB	DOCUMENT
1.	<a href="#"><i>Bankruptcy and Insolvency Act</i>, RSC 1985, c B-3.</a>
2.	<a href="#"><i>Judicature Act</i>, RSA 2000, c J-2.</a>
3.	<a href="#"><i>Personal Property Security Act</i>, RSA 2000 c P-7.</a>
4.	<a href="#"><i>RJR — MacDonald Inc. v Canada (Attorney General)</i> [1994] 1 SCR 311 (SCC).</a>
5.	<a href="#"><i>Murphy v Cahill</i>, 2013 ABQB 335.</a>
6.	<a href="#"><i>Paragon Capital Corporation Ltd. v Merchants &amp; Traders Assurance Co.</i>, 2002 ABQB 430.</a>
7.	<a href="#"><i>Re Schendel Management Ltd.</i>, 2019 ABQB 545.</a>
8.	<a href="#"><i>Lindsey Estate v Strategic Metals Corp.</i>, 2010 ABQB 242.</a>
9.	<a href="#"><i>Kasten Energy Inc. v Shamrock Oil &amp; Gas Ltd.</i>, 2013 ABQB 63.</a>
10.	<a href="#"><i>RMB Australia Holdings Ltd. v Seafield Resources Ltd.</i>, 2014 ONSC 5205.</a>
11.	<a href="#"><i>Canadian Imperial Bank of Commerce v Can-Pacific Farms Inc.</i>, 2012 BCSC 437.</a>
12.	<a href="#"><i>Alberta Template Receivership Order Explanatory Notes</i>, January 2019.</a>
13.	<a href="#"><i>RBC v Gustin</i>, 2019 ONSC 5370.</a>
14.	<i>Royal Bank v Sun Squeeze Juices Inc.</i> , [1994] OJ No 567 aff'd 28 CBR (3d). (not available on CanLII)
15.	<a href="#"><i>Bank of Montreal v Owen Sound Golf &amp; Country Club Ltd.</i>, 2012 ONSC 557.</a>
16.	<a href="#"><i>Re Brandon Packers Ltd.</i>, 33 DLR (2d) 503.</a>
17.	<a href="#"><i>Chow v Bresea Resources Ltd.</i>, 75 ACWS (3d) 1006.</a>