

Court File No.:

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

BETWEEN:

**ROSEJACK INVESTMENTS LTD.**

Applicant

- and -

**DAVIDS FOOTWEAR LTD.**

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**

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**FACTUM OF THE APPLICANT**  
(Application Returnable August 2, 2019)

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**PART I - OVERVIEW**

1. This Application is made by Rosejack Investments Ltd. ("**Rosejack**") 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 Richter Advisory Services Inc. ("**Richter**") as receiver (in such capacity, the "**Receiver**"), without security, of all the assets, undertakings and properties (the "**Property**") of Davids Footwear Ltd. ("**Davids**" or the "**Company**"). Rosejack is the sole secured creditor of Davids.
2. Rosejack seeks the appointment of Richter as Receiver over the Property of the Company, in order to: (1) protect the Property and have same turned over to the Receiver to deal with same in an orderly manner, subject to further Orders of the Court; and (2) maximize value for the benefit of all of the stakeholders.
3. The appointment of Richter 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

4. The relevant facts in connection with this Application are more fully set out in the Affidavit of Larry Rosen, sworn July 31, 2019 (the "**Rosen Affidavit**").

## PART III - ISSUES

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

- (a) Should this Court make an Order pursuant to subsection 243(1) of the BIA and section 101 of the CJA appointing Richter as the Receiver over the Property of the Company?
- (b) Should this Court make an Order pursuant to subsection 243(6) of the BIA granting the Receiver's Charge?

## PART IV - LAW AND ARGUMENT

### 1. THE TEST FOR THE APPOINTMENT OF A RECEIVER

6. 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.

7. 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.

8. 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.

9. Similarly, the test for the appointment of a receiver under section 101 of the CJA is also 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.

10. 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.

11. 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.

12. 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.

13. 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 5.

## 2. THE APPOINTMENT OF A RECEIVER IS JUST AND CONVENIENT

14. The appointment of a Receiver is just and convenient in this case. The general security agreement granted by Davids in favour of Rosejack (the "**Rosejack GSA**") dated November 6, 2017, provides Rosejack with the right to appoint a receiver at Section 5.03(i).

Rosejack GSA, section 5.03(i), Exhibit "H" to the Rosen Affidavit.

15. 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 6.

16. 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 7.

17. Rosejack delivered demands and notices of intention to enforce its security. Rosejack is under no obligation, legal or otherwise, to continue to support the Company. Rosejack is entitled to seek the appointment of a receiver by the Court.

18. The appointment of the Receiver is just and convenient for the following reasons:

- (a) the Company has committed various events of default; and
- (b) the Company has ceased operations.

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

### **3. THE TERMS OF THE REQUESTED ORDER ARE APPROPRIATE**

20. 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.

21. In this case, it is appropriate for the Court to grant the Receiver's Charge over the Property of the Company to ensure that Richter and its counsel are able to recover any fees and disbursements owed to them. As previously stated, Rosejack is the sole secured creditor of the Company. Rosejack is agreeable to the Receiver's Charge being granted.

### **PART V - CONCLUSION**

22. For the foregoing reasons, it is both just and convenient to appoint Richter as Receiver over the Property of the Company in the circumstances and to grant the Receiver's Charge.


23. It is respectfully submitted that the relief requested by Rosejack should be granted and Richter ought to be appointed as Receiver over the Property of the Company and the Receiver's Charge ought to be granted, on the terms of the Order sought.

**PART VI - ORDER REQUESTED**

24. The Applicant requests that this Court issue an Order substantially in the form attached at Tab 4 to the Application Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

July 31, 2019

  
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Roger Jaipargas  
Lawyers for the Applicant



## SCHEDULE "A" – AUTHORITIES CITED

1. *Standard Trust Co. v. Pendencygrasse 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.)

## SCHEDULE "B" – LEGISLATION CITED

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

#### 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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