

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**EQUITABLE BANK**

Applicant

- and -

**ASHCROFT HOMES - CAPITAL HALL INC.**

Respondent

**APPLICATION UNDER SUBSECTION 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, EQUITABLE BANK  
(returnable February 24, 2025)**

February 19, 2025

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## **PART I – NATURE OF THE APPLICATION**

1. The Applicant, Equitable Bank (“**EQ Bank**”), makes an application for an Order (the “**Receivership Order**”), in substance, appointing KSV Restructuring Inc. (“**KSV**”) as receiver (in such capacity, the “**Receiver**”), without security, of all the assets, properties and undertakings of Ashcroft Homes - Capital Hall Inc. (the “**Debtor**”) acquired for, or used in relation to a business carried on by the Debtor and all proceeds thereof (collectively, the “**Property**”), including, without limitation, the real property at the address municipally known as 105 Champagne Avenue South, Ottawa, Ontario (the “**Real Property**”).

2. The Debtor is a real property holding company which owes EQ Bank more than \$24 million. EQ Bank holds security over the assets of the Debtor including, without limitation, a general security agreement and charge over the Real Property, which give EQ Bank the right to apply to court for the appointment of a receiver.

3. EQ Bank made formal demand on the Debtor on October 9, 2024, which demand has not been honoured. Instead, the Debtor initiated an application under the *Companies’ Creditors Arrangement Act* (the “**CCAA**”) without notice to EQ Bank. As described herein, the CCAA proceedings were ultimately dismissed and KSV was appointed as interim receiver of the Debtor.

4. EQ Bank is justified in having lost confidence in the Debtor and its management, and it is respectfully submitted that it is just and convenient for the Receiver to be appointed.

## PART II – SUMMARY OF FACTS

5. The Debtor is a privately-owned Ontario corporation. Its directors and officers are David Choo and Manny DiFilippo. The Debtor is the registered owner of the Real Property.

**Affidavit of Robert Gartner sworn January 23, 2025 [Gartner Affidavit] at paras. 3-5, Tab 4 of EQ Bank’s Application Record dated February 18, 2025 [Application Record].**

6. The Debtor is indebted to EQ Bank in connection with the loan that EQ Bank advanced to the Debtor (the “**Loan**”) pursuant to and under the terms of the first mortgage commitment dated September 1, 2022, as amended by a first amendment to commitment letter dated September 26, 2022 (together, the “**Credit Agreement**”).

**Gartner Affidavit, *supra* at para. 6.**

7. To secure its obligations to EQ Bank, the Debtor provided security to EQ Bank (the “**Security**”), including, without limitation:

- (a) the first charge/mortgage in the principal amount of \$28,750,000 in respect of the Real Property, which was registered on title as Instrument No. OC2561168 on December 7, 2022 (the “**Mortgage**”);
- (b) the general assignment of rents in respect of the Real Property, which was registered on title as Instrument No. OC2561169 on December 7, 2022; and
- (c) the general security agreement dated December 7, 2022 (the “**GSA**”), registration in respect of which was made under the *Personal Property Security Act* (Ontario) (the “**PPSA**”).

**Gartner Affidavit, *supra* at para. 7.**

8. EQ Bank is the senior secured creditor registered under the PPSA against the Debtor. Other than EQ Bank's PPSA registration against the Debtor, the PPSA search results also show a registration in favour of Aviva Insurance Company of Canada ("**Aviva**"). This registration has been postponed to EQ Bank's registration pursuant to a priority agreement between EQ Bank, Aviva, Westmount Guarantee Services Inc. (as agent of Aviva), and the Debtor dated November 29, 2022 (the "**Subordination Agreement**").

**Gartner Affidavit, *supra* at paras. 10-11.**

9. Likewise, EQ Bank holds a first-ranking Mortgage over the Real Property. In addition to EQ Bank's Mortgage, a sample of parcel registers reflects a charge in favour of Aviva, registered as Instrument No. OC1798180 on June 22, 2016, which has been postponed to EQ Bank's Mortgage pursuant to the Subordination Agreement.

**Gartner Affidavit, *supra* at para. 12.**

10. Beginning in June 2024, the Debtor ceased to make regular payments as they became due under the Credit Agreement and the Mortgage (together, the "**Financing Agreements**"), and failed to pay municipal property taxes when due, which constituted events of default under the Financing Agreements. As a result, the total amounts owing under the Financing Agreements became due.

**Gartner Affidavit, *supra* at para. 13.**

11. On October 9, 2024, EQ Bank made formal written demand on the Debtor for the payment of the amounts owed to EQ Bank under the Financing Agreements (the "**Demand Letter**"). A notice of intention to enforce security (the "**BIA Notice**") pursuant to subsection 244(1) of the *Bankruptcy and Insolvency Act* (Canada) accompanied the Demand Letter.

**Gartner Affidavit, *supra* at para. 14.**

*Bankruptcy and Insolvency Act (Canada) [BIA], s. 244(1).*

12. As particularized in more detail in the Demand Letter, as of October 9, 2024, \$24,296,446.76 was owing by the Debtor to EQ Bank for principal, interest and costs, plus accruing interest and costs (collectively, the “**Demanded Indebtedness**”).

*Gartner Affidavit, supra at para. 15.*

13. On November 7, 2024, Mr. DiFilippo advised EQ Bank that the Debtor had repaid its outstanding property taxes (\$917,246.26) and HST (\$1,635,254.07) using proceeds from the sale of an unrelated property. However, Mr. DiFilippo also advised that the Debtor would not be able to remain current on the payments coming due under the Mortgage. Indeed, the Debtor has not made a full monthly payment towards the Mortgage since June 2024. The arrears under the Mortgage now exceed \$1 million.

*Gartner Affidavit, supra at paras. 18-19.*

14. Despite paying down its tax liabilities, the Debtor used funds from the sale of an alternate asset to make those payments. In the past, when the Debtor has been unable to meet its obligations to EQ Bank, it has also fallen delinquent in payment of priority payables. As such, and given the Debtor’s ongoing financial struggles, EQ Bank is concerned that the Debtor will not be able to keep its taxes current on a go-forward basis, thereby compromising EQ Bank’s security position.

*Gartner Affidavit, supra at para. 20.*

15. The Demanded Indebtedness has still not been repaid, and the Debtor has not made any arrangements satisfactory to EQ Bank.

*Gartner Affidavit, supra at para. 21.*

16. On December 5, 2024, the Debtor and certain affiliated entities (together, the “**Ashcroft Entities**”) obtained an initial order under the CCAA without any prior notice to EQ Bank in proceedings bearing Court File No. CV-24-00098058-0000.

**Gartner Affidavit, *supra* at paras. 24-25.**

17. At the comeback hearing on December 12, 2024, EQ Bank opposed the CCAA proceedings and instead supported the appointment of an interim receiver.

**Gartner Affidavit, *supra* at para. 25.**

18. Within the CCAA proceedings, the Ashcroft Entities filed a cash flow projection which did not keep secured creditors current and reflected that proceeds from certain projects were being used to fund shortfalls in other projects. It is concerning to EQ Bank that funds may have flowed out of the Debtor to other of the Ashcroft Entities while EQ Bank was not receiving the payments it was and remains owed. The Receiver will need to consider these transfers as reviewable transactions.

**Gartner Affidavit, *supra* at para. 26.**

**Gartner Affidavit, *supra* at Exhibit “N”.**

19. On December 20, 2024, The Honourable Justice Mew granted an Order (the “**IR Order**”) appointing KSV as interim receiver over certain of the Ashcroft Entities, including the Debtor. The IR Order provides for a transition from the interim receivership to a receivership including, without limitation, provision with respect to the Property-specific costs incurred during the course of the interim receivership. Specifically, paragraph 19 of the IR Order states that a mortgagee may seek the appointment of a receiver upon payment of such Property-specific costs. Accordingly,

EQ Bank proposes a form of Order in these proceedings which would port the Property-specific costs of the interim receivership into the new receivership proceedings.

**Gartner Affidavit, *supra* at paras. 27-28.**

### **PART III – ISSUE**

20. The sole issue to be determined on this application is whether it is just and convenient for this Court to appoint KSV as Receiver over the Property.

### **PART IV – LAW AND ARGUMENT**

#### *The Test for Appointing a Receiver*

21. EQ Bank seeks the appointment of a receiver pursuant to subsection 243(1) of the BIA and section 101 of the *Courts of Justice Act* (Ontario) (the “CJA”). Both statutes enable the Court to appoint a receiver and manager where such appointment is “*just or convenient*.”

**BIA, *supra* s. 243(1).**

***Courts of Justice Act* (Ontario) [CJA], [s. 101](#).**

22. In determining whether it is “*just or convenient*” to appoint a receiver under either the BIA or CJA, Ontario courts have applied the decision of The Honourable Mr. Justice Blair in *Freure Village*. In that case, His Honour confirmed that, in deciding whether the appointment of a receiver is just or convenient, the court “*must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto,*” which includes the rights of the secured creditor under its security.

***Bank of Nova Scotia v. Freure Village of Clair Creek*, [40 C.B.R. \(3d\) 274, \[1996\] O.J. No. 5088](#) at [para. 10](#) (Gen. Div. [Comm. List]) [*Freure Village*].**

23. When the rights of the secured creditor under its security include a specific right to the appointment of a receiver (as in the present case), the burden on the applicant seeking the relief is relaxed. Indeed, The Honourable Mr. Chief Justice Morawetz held in *Elleway Acquisitions* that:

... while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.

*Elleway Acquisitions Limited v. The Cruise Professionals Limited*, [2013 ONSC 6866](#) at [para. 27](#) [*Elleway Acquisitions*].

24. More recently, The Honourable Mr. Chief Justice Morawetz's holding in *Elleway Acquisitions* was further affirmed in *iSpan Systems* by The Honourable Mr. Justice Osborne:

Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties [citations omitted].

*iSpan Systems LP*, [2023 ONSC 6212](#) at [para. 31](#) [*iSpan Systems*].

25. Furthermore, the appointment of a receiver becomes less extraordinary still when dealing with a default under a mortgage, as in the present case.

*BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, [2020 ONSC 1953](#) at [paras. 43-44](#).

*It is Just and Convenient to Appoint the Receiver*

26. EQ Bank submits that the test for the appointment of a receiver is met. EQ Bank is contractually entitled to have a receiver appointed over the Debtor upon default. Such default has



occurred and the appointment of KSV as Receiver is not an extraordinary remedy; it is simply the result of enforcing a contractual term that was mutually assented to by the Debtor and EQ Bank.

**Gartner Affidavit, *supra* at Exhibit “D”, Standard Charge Terms 201619, s. 15.1.**

**Gartner Affidavit, *supra* at Exhibit “D”, GSA, s. 12(1).**

27. EQ Bank wishes to take any and all steps necessary to enforce its Security and realize on same, and the appointment of KSV as Receiver is necessary for the protection of the Debtor’s estate and the interests of EQ Bank as a secured creditor.

**Gartner Affidavit, *supra* at para. 23.**

28. KSV is a licensed insolvency trustee. As stated above, KSV was appointed as interim receiver over the Debtor on December 20, 2024 and is therefore familiar with the circumstances of the Debtor. KSV has consented to act as the Receiver should the Court so appoint it.

**Gartner Affidavit, *supra* at para. 30.**

## **PART V – RELIEF REQUESTED**

29. In light of the foregoing, it is respectfully submitted that this Court should grant the Receivership Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 19th day of February, 2025.



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**SCHEDULE “A”  
AUTHORITIES CITED**

Jurisprudence

1. *Bank of Nova Scotia v. Freure Village of Clair Creek*, [40 C.B.R. \(3d\) 274](#), [\[1996\] O.J. No. 5088](#) (Gen. Div. [Comm. List]).
2. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, [2020 ONSC 1953](#).
3. *Elleway Acquisitions Limited. v. The Cruise Professionals Limited.*, [2013 ONSC 6866](#).
4. *iSpan Systems LP*, [2023 ONSC 6212](#).

**SCHEDULE “B”  
TEXT OF STATUTES, REGULATIONS & BY-LAWS**

**Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended, s. 243**

**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.

**Restriction on appointment of receiver**

(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.

**Definition of receiver**

(2) Subject to subsections (3) and (4), in this Part, receiver means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — 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 — under
  - (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
  - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

**Definition of receiver — subsection 248(2)**

(3) For the purposes of subsection 248(2), the definition receiver in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

**Trustee to be appointed**

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

**Place of filing**

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

**Orders respecting fees and disbursements**

(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.

**Meaning of disbursements**

(7) In subsection (6), disbursements does not include payments made in the operation of a business of the insolvent person or bankrupt.

**Advance notice**

**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.

**Courts of Justice Act, R.S.O. 1990, c. C-34, as amended, s. 101****Injunctions and receivers**

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

**EQUITABLE BANK**

- and - **ASHCROFT HOMES - CAPITAL HALL INC.**

Applicant

Respondent

Court File No. CV-25-00098805-0000

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**ONTARIO  
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**Proceedings commenced at Ottawa**

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