

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

BETWEEN:

TRUIST BANK, AS AGENT

Applicant

- and -

KEW MEDIA GROUP INC. and KEW MEDIA INTERNATIONAL (CANADA) INC.

Respondents

**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 RECEIVER
(Returnable April 9, 2020)**

Date: April 6, 2020

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Court-appointed Receiver and Manager of
Kew Media Group Inc. and Kew Media
International (Canada) Inc.

PART I - OVERVIEW

1. Pursuant to an order of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) made on February 28, 2020 (the “**Receivership Order**”), FTI Consulting Canada Inc. (“**FTI**”) was appointed receiver (in such capacity, the “**Receiver**”) of all of the undertaking, property and assets of Kew Media Group Inc. (“**KMG**”) and Kew Media International (Canada) Inc. (together with KMG, the “**Kew Group**”) acquired for, or used in relation to a business carried on by the Kew Group.

2. The Receiver seeks two orders (the “**Orders**”) of this Honourable Court, consisting of:

(i) an order substantially in the form of the draft order included at Tab 3 of the Receiver’s Motion Record, being an order:

(a) approving the purchase and sale of the issued share capital of TCB Media Rights Ltd. currently owned by KMG (the “**Transaction**”) pursuant to a share purchase agreement dated March 31, 2020 (the “**SPA**”), between the Receiver and Beyond Entertainment Limited (the “**Purchaser**”);

(b) approving and authorizing the Receiver’s execution of the SPA and authorizing and directing the Receiver to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of KMG’s right, title and interest in and to the shares (the “**TCB Shares**”) of TCB Media Rights Ltd. (“**TCB**”), a wholly-owned subsidiary of KMG, pursuant to the SPA to the Purchaser;

- (c) vesting KMG's right, title and interest in and to the Purchased Shares free and clear of certain encumbrances upon delivery by the Receiver to the Purchaser of a certificate substantially in the form attached to the draft order confirming, among other things, that all terms and conditions under the SPA have been satisfied or waived by the Receiver and the Purchaser (the "**Receiver's Certificate**"); and
 - (d) declaring that, for greater certainty, the Receiver is not bound by any prior contractual agreement by KMG not to enter into or complete the Transaction or to do so only with the consent of a third party; and
- (ii) an order substantially in the form of the draft order included at Tab 5 of the Receiver's Motion Record, being an order:
 - (a) abridging the time for service of the Motion Record so that the motion is properly returnable on Thursday, April 9, 2020, dispensing with further service thereof, and validating in all respects service thereof;
 - (b) authorizing the Receiver to repay any portion of the principal sums advanced to it pursuant to a receiver's borrowing certificate, together with interest thereon and all reasonable expenses incurred by the holder or holders of such receiver's borrowing certificate, all in accordance with the Receivership Order;
 - (c) authorizing the Receiver, subject to the establishment of reasonable reserves in the discretion of the Receiver (including, without limitation, for any priority claims and the Receiver's costs of administration), to distribute from time to time any further proceeds of sale or other realizations by the Receiver, other than the

Purchase Price received for the TCB Shares, to Truist Bank, as administrative agent (in such capacity, the “**Agent**”) for Truist Bank, Bank of Montreal and Toronto-Dominion Bank (collectively, the “**Syndicate**”), provided that the aggregate amount so distributed shall not exceed the obligations of the Kew Group to such lenders;

- (d) amending the style of cause of the within proceedings to remove Architect Films Inc., as a respondent; and
- (e) providing such further and other relief as this Honourable Court deems just.

3. Capitalized terms not otherwise defined herein have the meaning given to such terms in the Receiver’s First Report dated April 6, 2020 (the “**First Report**”). The Receiver has filed its First Report to provide this Honourable Court with the background, basis for, and its request in respect of the relief requested herein. The First Report is located at Tab 2 of the Receiver’s Motion Record.

4. The Receiver requests issuance of the Orders for the factual and legal bases set forth herein and in the First Report.

PART II - THE FACTS

(i) General Background

5. A detailed description of the facts relating to the Kew Group’s corporate and capital (including debt) structure, is set forth in the Affidavit of Juan De Jesus-Caballero sworn

February 27, 2020, in connection with the application for the Receivership Order (the “**De Jesus-Caballero Affidavit**”).

De Jesus-Caballero Affidavit, Application Record of the Applicants, Tab 2.

6. Copies of the Application Record and other court materials relating to these proceedings are found at: <http://cfcanada.fticonsulting.com/KMG/>.

7. The Kew Group is in the business of developing, producing and distributing multi-genre audiovisual content worldwide. KMG is the parent company of the Kew Group. In addition to the head office, through its subsidiaries, KMG has operations in Canada, the United States and the United Kingdom.

De Jesus-Caballero Affidavit, Application Record of the Applicant, Tab 2, para.

4.

(ii) The Kew Group’s Principal Indebtedness to the Syndicate

8. The application to appoint the Receiver was brought by the Agent, on behalf of the Syndicate. The Kew Group is indebted to the Syndicate in the amount of approximately US\$113.8 million, as at April 6, 2020 (excluding fees, costs and expenses), pursuant to an amended and restated revolving credit and term loan agreement dated July 23, 2018, as amended.

First Report, Motion Record of the Receiver, Tab 2, para. 37.

9. To the extent required, the Receivership Order authorizes the Receiver to borrow up to US\$2,200,000 pursuant to Receiver’s Certificates. Any such advances are secured by a charge

on the assets of the Kew Group subject only to the Receiver's Charge. As at the date of the First Report, the Receiver has borrowed approximately US\$800,000.

First Report, Motion Record of the Receiver, Tab 2, para. 88.

(iii) KMG's Sale and Marketing Process

10. A process for soliciting offers for the acquisition of KMG, its subsidiaries or their businesses and assets was commenced by KMG prior to the appointment on the Receiver and has been further advanced by the Receiver following its appointment, in consultation with the Syndicate. Details of these sale efforts with respect to the TCB Shares are set out in the Receiver's First Report.

First Report, Motion Record of the Receiver, Tab 2, para. 41.

(vi) Consent Rights

11. As described in the First Report, KMG originally acquired the TCB Shares pursuant to a Share Purchase Agreement made as of October 10, 2017, among KMG, as purchaser, Paul Heaney and Dina Subhani, as vendors, and TCB (the "**Original Acquisition Agreement**"). Section 6.8(b)(i) of the Original Acquisition Agreement states that:

"The Purchaser undertakes to the Vendors that, until the end of the Earn-out Period or the full Earn-out Amount being earned, whichever is earlier, save with the prior written consent of Paul [Heaney], it shall:

(b) (i) not sell, transfer or otherwise dispose of (which shall not restrict the granting of Liens) any of the shares in the capital of the Company (except to an

Affiliate of the Purchaser or pursuant to a sale of substantially all of the assets of the Purchaser)”

First Report, Motion Record of the Receiver, Tab 2, paras. 69-70.

12. The Earn-out Period has not yet ended and while the Receiver has been unable to confirm, it is likely that the Earn-out Amount has not yet been earned. Accordingly, the right of consent provided by section 6.8(1)(b) (the “**Heaney Consent Right**”) is likely extant.

First Report, Motion Record of the Receiver, Tab 2, para. 71.

13. On March 31, 2020, the Receiver requested that Mr. Heaney consent to the sale of the TCB Shares to the Purchaser pursuant to the TCB SPA. Mr. Heaney responded on April 1, 2020, by email, stating that he was unable to consent to the sale at that time and believed the Heaney Consent Right to be both valid and enforceable.

First Report, Motion Record of the Receiver, Tab 2, para. 74.

14. On April 2, 2020, the Receiver informed Mr. Heaney that the motion for the approval of the sale of the TCB Shares would be heard on Thursday April 9, 2020, and that copies of the materials would be provided when filed.

First Report, Motion Record of the Receiver, Tab 2, para. 75.

(vi) Repayment of Borrowings and Distribution to the Bank

15. The facts with respect to the Receiver’s borrowings and its seeking authority to repay same and to make distributions to the Agent from net proceeds obtained by the Receiver from its realization efforts to date, subject to appropriate reserves, are set out in detail in the First Report.

First Report, Motion Record of the Receiver, Tab 2, paras. 87-99.

PART III - ISSUES

16. The Receiver's request for approval of the Orders raises the following issues for this Honourable Court:

- i) What is the legal test for approval of the TCB SPA and has it been met in the present circumstances?
- ii) Does the Heaney Consent Right preclude approval of the Orders?
- iii) Is repayment of the existing borrowings of the Receiver and the making of distributions to the Syndicate appropriate at this time?

PART IV - LAW AND ARGUMENT

i) **What is the legal test for approval of the SPA?**

17. Court-appointed receivers have the powers set out in the order appointing them. Receivers are consistently granted the power to sell property of a debtor, which is, indeed, the case under the Receivership Order.

18. Under Section 100 of the *Courts of Justice Act* (Ontario), this Honourable Court has the power to vest in any person an interest in real or personal property that the Court has authority to order be conveyed.

Courts of Justice Act, [R.S.O. 1990](#), c. C-43, s. 100.

19. It is settled law that where a Court is asked to approve a sales process and transaction in a receivership context, the Court is to consider the following principles (collectively, the “*Soundair Principles*”):

- (a) whether the party made a sufficient effort to obtain the best price and to not act improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which the party obtained offers; and
- (d) whether the working out of the process was unfair.

Royal Bank of Canada v. Soundair Corp. (1991), [4 O.R. \(3d\) 1 \(C.A.\)](#),
para. 16.

Skyepharm PLC v. Hyal Pharmaceutical Corp. (1999), 12 C.B.R. (4th) 87
([Westlaw](#)) (Ont. S.C.J., appeal quashed, (2000), [47 O.R. \(3d\) 234 \(C.A.\)](#)),
para. 3.

20. Absent clear evidence that a proposed sale is improvident or that there was an abuse of process, a Court is to grant deference to the recommendation of a receiver to sell a debtor’s assets. Only in such exceptional circumstances will a Court intervene and proceed contrary to the recommendation of its officer, the Receiver.

Soundair, para. 21.

Skyepharm PLC, para 3.

Integrated Building Corp. v. Bank of Nova Scotia (1989), [75 C.B.R. \(N.S.\) 158](#) (Alta. C.A.), paras. 1-3.

Battery Plus Inc. (Re.), [2002] O.J. No. 731 (S.C.J.) ([Quicklaw](#)), paras. 2-3 and 22-23.

21. Moreover, if a sale process leading up to a proposed asset sale is determined to be fair and reasonable, “a court will not lightly interfere with the exercise of...commercial and business judgment in the context of an asset sale.”

Re AbitibiBowater Inc., [2010 QCCS 1742](#), para. 71.

22. It is not necessary for a court to approve a receiver’s sale process before the receiver undertakes to market and sale the debtor’s property. In the case of *Montrose Mortgage Corp*, Justice Brown, in the context of a motion to approve “quick flip” transaction which did not proceed on the basis of a court-approved marketing and sale process, held that “[i]n such situations the court still will assess the need for a receiver and the reasonableness of the proposed sale against the standard criteria set out in decisions such as [*Soundair*],” albeit with a heightened sense of scrutiny.

Montrose Mortgage Corp v Kingsway Arms Ottawa Inc., [2013 ONSC 6905](#) [Comm. List], para. 10.

23. Furthermore, the Alberta Court of Queen’s Bench held that “[i]n assessing the receiver’s actions, the court relies on the evidence contained in the receiver’s various reports to the court ...

the court is entitled to assume that the receiver has acted properly unless the contrary is clearly demonstrated.”

Royal Bank of Canada v. Wapiti Waste Management Inc., [2014 ABQB 361](#), para.

3.

24. The Receiver is satisfied that the Sale Process was fair, transparent and reasonable. There was also appropriate consultation with the Syndicate prior to and throughout the Sale Process.

First Report, Motion Record of the Receiver, Tab 2, para. 8.

25. In the present case, evidence has been presented in the First Report to demonstrate that each of the *Soundair* Principles has been satisfied, and that the economic realities of the business vulnerability and financial position of the Kew Group militate in favour of approval of the issuance of the Orders.

(a) *Efforts to Obtain the Best Price*

26. As detailed above, there has been a sale process ongoing since January 2020, which has been completed by the Receiver and culminated in the TCB SPA. The goal of the sale process was to obtain the best price possible in the circumstances and within a reasonable period of time. The Receiver is of the view that the market for the TCB Shares was sufficiently canvassed through these sales and marketing processes, and that parties who may have an interest were given a reasonable opportunity to review the opportunity, conduct due diligence and make an offer. The Receiver believes that the purchase price under the TCB SPA is fair and reasonable under the current circumstances.

First Report, Motion Record of the Receiver, Tab 2, paras. 41, 58 and 79-80.

(b) *The Interests of All Parties*

27. The Transaction provides for the best outcome for all parties with an economic interest in these proceedings. The Syndicate are the only secured creditors of the Kew Group and will suffer a very large shortfall on its indebtedness. No other creditor could reasonably expect a more favourable outcome from another process or manner of proceeding.

First Report, Motion Record of the Receiver, Tab 2, para. 58, 80.

(c) *The Efficacy and Integrity of the Process*

28. The TCB Shares were extensively marketed. All interested parties were given the opportunity to participate in the Sale Process and were provided with access to information required to perform their due diligence upon executing the appropriate confidentiality arrangements. The TCB SPA was negotiated in good faith and is the best and highest price under the circumstances. The appropriateness of this is evidenced by the First Report. No one objected to the sale process or the bidding procedures (although Mr. Heaney, a participant in an unsuccessful bid, has objected to the selection of the successful bidder based on a contractual consent right previously granted by KMG at the time that it first acquired the TCB Shares).

First Report, Motion Record of the Receiver, Tab 2, paras. 43, 58.

(d) *Whether the Process was Unfair*

29. The Receiver negotiated the terms and conditions of the TCB SPA, and believes they are fair and reasonable under the current circumstances. The purchase price obtained for the TCB

Shares under the SPA is the highest price that was obtained pursuant to the sale process, and was 5% higher than the other offer submitted.

First Report, Motion Record of the Receiver, Tab 2, para. 54, 58.

30. The Receiver afforded the unsuccessful bidder every opportunity to participate in the process, even though it did not adhere to the established deadlines and process requirements.

First Report, Motion Record of the Receiver, Tab 2, paras. 47-58.

31. Based on the foregoing, it is clear that the proposed Sale Transaction contemplated under the SPA satisfies the *Soundair* Principles.

ii) Does the Heaney Consent Right preclude approval of the Orders?

32. The existence of the Heaney Consent Right does not preclude approval of the Orders for the following reasons: (a) Mr. Heaney does not have standing to challenge the proposed sale pursuant to the SPA insofar as he is a “bitter bidder”; and (b) the Heaney Consent Right is a contractual restriction on the sale of property that is subject to a court-appointed receivership and, as such, is not effective as against a receiver.

(a) *No Standing*

33. To the extent that Mr. Heaney is disgruntled at not being selected as the purchaser of the TCB Shares, he is a “bitter bidder”. Courts have consistently held that “an unsuccessful prospective purchaser does not have an interest that allows for standing on a sale approval motion.”

Fifth Third Bank v MPI Packaging Inc., [2010 ONSC 73](#), para. 13.

34. In the case of *Skyepharma PLC*, the Ontario Court of Appeal discussed the importance of parties participating in the sale approval process having an interest in the proceeds of the sale. A disappointed potential purchaser has no entitlement to participate in a sale approval motion, and a mere commercial interest is not sufficient. As the Ontario Court of Appeal held in *Skyepharma PLC*:

The fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of the sale, primarily the creditors. The unsuccessful would be purchaser has no interest in this issue. Indeed, the involvement of unsuccessful prospective purchasers could seriously distract from this fundamental purpose by including in the motion other issues with the potential for delay and additional expense.

Skyepharma PLC, para. 29.

Nortel Networks Corporation, Re, [2010 ONSC 126](#), paras. 10 and 11.

Consumers Packaging Inc., Re, (2001), [150 O.A.C. 384 \(CA\)](#), para. 7.

BDC Venture Capital Inc. v. Natural Convergence Inc., 2009 CarswellOnt 5098, [2009 ONCA 637](#), para. 20.

35. The sale of the TCB Shares in breach of section 6.8(b)(i) of the Original Acquisition Agreement would give rise, at most, to a claim for damages against KMG, which claim would be unsecured and subordinate to the indebtedness of the Syndicate. This was expressly contemplated by the parties in Section 6.10 of the Original Acquisition Agreement. Considering

the shortfall to the Syndicate, there would be no recovery for unsecured creditors. Mr. Heaney, as an unsecured creditor, therefore does not have an economic interest in the proceeds of sale.

First Report, Motion Record of the Receiver, Tab 2, para. 73.

36. Short of any evidence of unfairness in the process itself, any objection by a disgruntled unsuccessful bidder, such as Mr. Heaney, is not a valid reason to deny approval of a proposed sale. As the court found in the case of *AbitibiBowater*, creditors are “entitled to prefer a bird in the hand to two in the bush” in such situations and “[a] court will not lightly interfere with the exercise of this commercial and business judgment in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient.”

Re AbitibiBowater Inc., [2010 QCCS 1742](#), paras. 49, 56-57 and 71-72.

37. As is described in the First Report, Mr. Heaney, acting both in his own right in the TD sale process and with another party (“**Party 2**”) during the Receivership, was one of several parties who expressed interest in acquiring the TCB Shares. Mr. Heaney submitted an expression of interest at the EOI Deadline, but with a purchase price that was unacceptable to KMG or its stakeholders. Furthermore, the consideration confirmed by the Purchaser in its March 28, 2020 offer was 5% higher than the consideration confirmed by Party 2 on its March 29, 2020 offer.

First Report, Motion Record of the Receiver, Tab 2, para. 47-48 and 54.

(b) Contractual restrictions are not effective as against a receiver

38. To the extent that the Heaney Consent Right confers upon Mr. Heaney a right to restrict the sale of the TCB Shares, this right is a mere contractual right effective only as against KMG

and not as against the Receiver. The courts have consistently held in the context of pre-receivership contracts that “the law is clear to the effect that in a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor.”

Bank of Montreal v Scaffold Connection Corp., [2002 ABQB 706](#), para. 11.

39. As described above, a breach of section 6.8(b)(i) of the Original Acquisition Agreement would put Mr. Heaney, at most, in the position of an unsecured creditor with a claim for damages against KMG. The law rejects the proposition that such a contractual claim against a debtor has the effect of restricting a receiver from discharging its duties, including the sale of the debtor’s assets:

...it is impossible to suggest that the receiver and manager is under any liability to the persons who have entered into [pre-receivership contracts]. In my opinion they are not contracts with him; they are contracts made with the company, which is still a company, and has not yet been wound up... to say that he is under any personal liability with regard to the contracts and that he ought to be indemnified or relieved in respect of them is entirely to misunderstand the position of a receiver and manager.

Bayhold Financial Corp. v Clarkson Co., [\[1991\] 86 DLR \(4th\) 127](#) (Sup. Ct.), para. 48, quoting *Newdegate v The Company*, [1912] 1 Ch 468 (C.A.).

40. Given that the Original Acquisition Agreement does not bind the Receiver, the Receiver properly exercised its business judgment in electing to proceed with this motion to approve the sale of the TBC Shares despite the absence of a consent from Mr. Heaney. As described above,

the sale process was conducted fairly and consistently with the *Soundair* Principles, and the Receiver's decision to ignore the Heaney Consent Right in executing the TCB SPA, which is conditional upon the approval of the Court, was necessary to ensure the best price possible was obtained for the TCB Shares. These actions are consistent with the principles articulated by the British Columbia Court of Appeal:

...the receiver [cannot] arbitrarily break a contract. The receiver must exercise proper discretion in doing so since ultimately the receiver may face the allegation that it could have realized more by performing the contract than terminating it or that the receiver breached the duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a material contract, the receiver should seek leave of the court. The debtor remains liable for any damages as a result of the breach.

New Skeena Forest Products Inc., Re v Don Hull & Sons Contracting Ltd., [2005 BCCA 154](#), para. 17, quoting *Bennett on Receiverships*, 2d ed (Toronto: Carswell, 1999), p. 341; First Report, Motion Record of the Receiver, Tab 2, para. 83.

iii) **Are the repayment of the Receiver's borrowings and the Distributions appropriate at this time?**

41. The Receiver submits that both the repayment of the Receiver's borrowings and the Distributions are appropriate at this time.

(a) Repayment of the Receiver's Borrowings

42. On March 4, 2020, the Receiver borrowed US\$800,000 from the Syndicate to fund the receivership expenses in accordance with the authority conferred upon it by paragraph 21 of the Receivership Order. These borrowings are secured by the Receiver's Borrowing Charge.

Receivership Order para 21; First Report, para 88.

43. The Receiver submits that where an order of the court authorizes a court-appointed receiver to borrow monies for the purpose of funding the exercise of its powers and duties, such an order implicitly authorizes these borrowed monies to be repaid as and when the Receiver has the funds to do so, in accordance with the terms of the order. Notwithstanding this implicit authority, out of an abundance of caution, the Receiver now seeks explicit authority to make such repayment.

44. It is appropriate for the Receiver to repay its borrowings at this time. The Receiver's Borrowings Charge, provided for under the Receivership Order, provides security for the payment of the monies borrowed, together with interest and charges thereon. As detailed in the First Report, the Receiver is of the view that there are no claims ranking in priority to the Receiver's Borrowing Charge, other than amounts secured by the Receiver's Charge. As such, the repayments are consistent with the Receivership Order and would not prejudicially impair the security of any creditor of the Kew Group.

Receivership Order para 21; First Report paras. 89-95.

(b) Distributions

45. The Receiver submits that the Distributions are appropriate because, with the appropriate reserves, there would be sufficient funds remaining to provide for the ongoing administration of the receivership and completion thereof, as set out in the First Report.

First Report, Motion Record of the Receiver, Tab 2, para. 11.

46. Specifically, the aggregate funds on hand held by the Receiver at March 31, 2020, were approximately \$3.4 million, with an additional £2.1 million (approximately \$3.6 million) following closing of the Transaction.

First Report, Motion Record of the Receiver, Tab 2, paras. 30, 60.

47. The Orders sought also to authorize the Receiver to make additional distributions to the Agent without further Court Order, provided that the total amount so distributed shall not exceed the aggregate obligations owing by the Kew Group to the Agent. This request is intended to eliminate the costs that would otherwise be incurred to return to Court for the sole purpose of authorizing the Receiver to make further distributions to the Agent. The Receiver will continue to be mindful of the costs to completion of these proceedings prior to making any such distributions to the Bank.

First Report, Motion Record of the Receiver, Tab 2, para. 98.

48. The Receiver is not aware of any claim that may rank in priority to the Syndicate for which there would not be sufficient funds remaining in the Receiver's accounts after funding the Distribution. In addition:

- The Receivership Order provides for a charge on the property in favour of the Receiver and its counsel for their fees and disbursements. The Receiver is satisfied that the remaining funds and the realizable value of the excluded assets from the Transaction are sufficient to pay the obligations covered by the Receiver's Charge;
- The Receivership Order Authorizes the Receiver to borrow up to US\$2,200,000 and provides for a corresponding charge on the property in favour of the Receiver. As at the date of the First Report, the Receiver has borrowed approximately US\$800,000. As set out above, the Receiver intends to repay these borrowings if so authorized by this Court. Accordingly, the making of the Distribution does not impair the ability to repay these borrowed funds; and
- Based on the Kew Group's books and records, the Receiver understands that there are no potential deemed trust amounts for employee claims, source deductions or harmonized sales tax owing to Canada Revenue Agency relating to the pre-filing and/or post-filing periods.

First Report, Motion Record of the Receiver, Tab 2, para. 36, 89-95.

49. Based on the foregoing, the Receiver submits that the Distributions are appropriate.

PART V - ORDER REQUESTED

50. For the reasons set forth herein and in the First Report, the Receiver respectfully requests the granting of the Orders in the form contained in the Receiver's Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6 day of April, 2020.

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Court-appointed Receiver and Manager of Kew
Media Group Inc. and Kew Media International
(Canada) Inc.

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *AbitibiBowater Inc., Re*, [2010 QCCS 1742](#).
2. *Battery Plus Inc. (Re.)*, [2002] O.J. No. 731 (S.C.J.) ([Quicklaw](#)).
3. *Bayhold Financial Corp. v Clarkson Co.*, [\[1991\] 86 DLR \(4th\) 127](#) (Sup. Ct.)
4. *BDC Venture Capital Inc. v. Natural Convergence Inc.*, 2009 CarswellOnt 5098, [2009 ONCA 637](#).
5. *Consumers Packaging Inc., Re*, (2001), [150 O.A.C. 384 \(CA\)](#).
6. *Integrated Building Corp. v. Bank of Nova Scotia (1989)*, [75 C.B.R. \(N.S.\) 158](#) (Alta. C.A.).
7. *Montrose Mortgage Corp v Kingsway Arms Ottawa Inc.*, [2013 ONSC 6905](#) [Comm. List].
8. *Newdegate v The Company*, [1912] 1 Ch 468 (C.A.).
9. *New Skeena Forest Products Inc., Re v Don Hull & Sons Contracting Ltd.*, [2005 BCCA 154](#).
10. *Nortel Networks Corporation, Re*, [2010 ONSC 126](#).
11. *Royal Bank of Canada v. Soundair Corp. (1991)*, [4 O.R. \(3d\) 1 \(C.A.\)](#).
12. *Royal Bank of Canada v. Wapiti Waste Management Inc.*, [2014 ABQB 361](#).
13. *Skyepharma PLC v. Hyal Pharmaceutical Corp. (1999)*, 12 C.B.R. (4th) 87 ([Westlaw](#)) (Ont. S.C.J., appeal quashed, (2000), [47 O.R. \(3d\) 234 \(C.A.\)](#)).

**SCHEDULE “B”
RELEVANT STATUTES**

1. *Bankruptcy and Insolvency Act* (R.S.C., 1985, c. B-3), 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.

2. *Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 100, 101.

Vesting orders

[100.](#) A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

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.

<p>TRUIST BANK, AS AGENT</p> <p>-and-</p> <p>KEW MEDIA GROUP INC. and KEW MEDIA INTERNATIONAL (CANADA) INC.</p>	<p>Applicant</p> <p>Court File No: CV-20-00637081-00CL</p> <p>Respondents</p>
	<p>ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST)</p> <p>FACTUM OF THE RECEIVER (Returnable April 9, 2020)</p> <p>TORYS LLP 79 Wellington St. W., Suite 3000 Box 270, TD Centre Toronto, Ontario M5K 1N2 Canada</p> <p>David Bish (LSUC#: 41629A) Tel: 416.865.7353 Fax: 416.865.7380 Email: dbish@torys.com</p> <p>Tony DeMarinis (LSUC#: 29451Q) Tel: 416.865.8162 Fax: 416.865.7380 Email: tdemarinis@torys.com</p> <p>Adam Slavens (LSO#:54433J) Tel: 416.865.7333 Email: aslavens@torys.com</p> <p>Lawyers for FTI Consulting Canada Inc., the Court-appointed Receiver and Manager of Kew Media Group Inc. and Kew Media International (Canada) Inc.</p>