

Court File No.

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**IN THE MATTER OF 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**

**B E T W E E N:**

**CALLIDUS CAPITAL CORPORATION**

Applicant

- and -

**JD NORMAN CANADA, ULC**

Respondent

**FACTUM OF THE APPLICANT**

**PART I – OVERVIEW**

**Introduction**

1. The Applicant is a secured lender to the Respondent, owed in excess of US\$146,000,000. The Respondent is in default of its obligations to the Applicant and consents to the appointment of a receiver by this Honourable Court. In addition, the Respondent's second largest secured creditor supports this application for the appointment of a receiver.

2. The Respondent's largest customer, representing close to 100 percent of its business, has terminated its business relationship with the Respondent. As a result, the Respondent is no longer

able to operate as a viable going concern. The Respondent has now terminated the majority of its employees, and the Union representing the employees is obstructing access to the plant, preventing the removal of any assets.

3. In the circumstances, the appointment by this Honourable Court of a receiver is necessary for the protection of the Applicant, and for the orderly wind-up of the Respondent's business and sale of its assets.

## PART II – SUMMARY OF FACTS

### Background

4. The Respondent, JD Norman Canada, ULC ("**JDN Canada**" or the "**Debtor**") is an unlimited liability company incorporated pursuant to the laws of British Columbia. JDN Canada carries on business in the City of Windsor, Ontario, as a manufacturer of highly engineered metal components for the automotive industry.<sup>1</sup>

5. JDN Canada is an affiliate of JD Norman Industries, Inc. (together with its subsidiaries and affiliates, "**JDN**"). JDN is a leading manufacturer of automotive metal components, with operations in Michigan, Illinois, Ontario, and Mexico.<sup>2</sup>

6. JDN Canada is the registered owner of the property located at 6845 Hawthorne Drive in the city of Windsor, Ontario (the "**Real Property**"). The Real Property is improved with an industrial building of approximately 50,000 square feet (the "**Plant**"). JDN Canada also leases storage space from Maden Industrial Ltd. at 2062 Manning Road, in Tecumseh, Ontario for CAD\$2,600 per month, plus HST.

7. Until Friday, February 5, 2021, JDN Canada employed approximately 83 employees in its operations at the Plant, including 72 members of Unifor, and its local 195, and 11 non-

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<sup>1</sup> JD Norman Canada, ULC Corporate Profile Report, **Exhibit A**, Affidavit of John Ho sworn February 10, 2021 (the "**Ho Affidavit**").

<sup>2</sup> JD Norman Canada, ULC Corporate Organization Chart, **Exhibit B**, the Ho Affidavit.

unionized employees, including 4 management personnel.<sup>3</sup> JDN Canada does not have a registered pension plan.<sup>4</sup>

### **The Loan and Security**

8. On or about July 10, 2018, Callidus, as an agent for certain lenders and as a lender itself, entered into a credit agreement and related loan documents with JDN pursuant to which Callidus provided secured term loans to JDN in the aggregate principal amount of \$95 million (collectively, the “**Term Loan**”), with a maturity date of July 10, 2022.<sup>5</sup>

9. As security for the Term Loan, Callidus holds, among other security, a first charge dated July 10, 2018 registered against title to the Real Property (the “**First Mortgage**”), and a general security interest in all of the personal property of JDN pursuant to a General Security Agreement dated as of July 10, 2018 (the “**GSA**”).<sup>6</sup>

### **Default and Forbearance**

10. By January 2020, JDN had experienced multiple events of default under the Term Loan. At the request of JDN, Callidus agreed to forbear from enforcing its rights and remedies against JDN upon the terms and conditions set out in a Forbearance Agreement dated February 18, 2020 (the “**Forbearance Agreement**”).<sup>7</sup>

11. The forbearance period under the Forbearance Agreement expired on December 31, 2020.

### **GM Business Dispute**

12. Until very recently, General Motors (“**GM**”) was a major OEM customer of JDN, accounting for approximately 50% of all of JDN’s business, and 100% of JDN Canada’s

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<sup>3</sup> Collective Agreement dated February 1, 2018 between JD Norman Canada, ULC, Unifor and local 195, **Exhibit C**, the Ho Affidavit.

<sup>4</sup> The Ho Affidavit at para 6.

<sup>5</sup> The Ho Affidavit at para 7.

<sup>6</sup> First charge dated July 10, 2018 registered against title to the Real Property, **Exhibit D**, the Ho Affidavit; General Security Agreement executed by the Debtor dated January 10, 2018, **Exhibit E**, the Ho Affidavit.

<sup>7</sup> Forbearance Agreement dated February 18, 2020, **Exhibit F**, the Ho Affidavit.

business. Specifically, JDN was GM's exclusive directed supplier of certain engine connecting rods (the "**GM Business**").<sup>8</sup>

13. In January 2020, JDN advised GM (and other JDN customers) that JDN was experiencing severe financial difficulty and would be unable to remain in business without obtaining certain financial accommodations and other commitments from GM, Callidus and others. On or about February 18, 2020, GM entered into a Long-Term Supply and Accommodation Agreement (the "**LTSA**") with JDN, Callidus, and others, pursuant to which GM agreed, among other things, that it would not resource any of the GM Business away from JDN to a different supplier until at least February 18, 2023.<sup>9</sup>

14. In November, 2020, GM claimed that JDN had breached its obligations to GM under the LTSA (a claim which both JDN and Callidus dispute), and notified JDN of its intention to resource a substantial portion of the GM Business to a new supplier.<sup>10</sup>

15. It is believed that GM has now resourced, or is in the process of resourcing, all of the GM Business away from JDN.<sup>11</sup>

16. As a result of GM's resourcing of the GM Business, JDN Canada is no longer in a position to operate as a viable going concern.<sup>12</sup>

17. With the exception of three key employees who have been retained to assist in the wind-up of JDN Canada's operations, JDN Canada has terminated all of its employees, effective as of Friday February 5, 2021.<sup>13</sup>

18. On Monday, February 8, 2021, representatives of the Unifor local 195 barricaded the entrance to the Plant, and prevented removal of any inventory from the Plant. Ensuring final

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<sup>8</sup> The Ho Affidavit at para 12.

<sup>9</sup> The Ho Affidavit at para 13.

<sup>10</sup> The Ho Affidavit at para 14.

<sup>11</sup> The Ho Affidavit at para 15.

<sup>12</sup> The Ho Affidavit at para 16.

<sup>13</sup> The Ho Affidavit at para 17.

inventory shipments from JDN Canada to GM is integral to completing an orderly wind-down of JDN Canada's business and operations.<sup>14</sup>

### Other Secured Creditors

19. In addition to the Term Loan, JDN was financed by a separate secured revolving loan agreement between JDN and Bank of America, N.A. ("**Bank of America**"). Pursuant to an Inter Creditor Agreement dated July 10, 2018 among Callidus, Bank of America, and JDN, the security in favour of Callidus ranks in priority to the security of Bank of America over equipment and fixtures, and Bank of America's security ranks in priority over inventory and accounts receivable.<sup>15</sup>

20. Bank of America is supportive of this application for the appointment of KSV Restructuring Inc. as receiver of JDN Canada.<sup>16</sup>

### PPSA Registrations

21. In addition to Callidus, the following parties have registered a security interest in the personal property of the Debtor:<sup>17</sup>

Secured Creditor	Date of Registration	Description of Collateral
Bank Of America	2013/06/21	Inventory, Equipment Accounts, Other, Motor Vehicle
CIT Financial Ltd.	2016/07/21	Equipment, Other Photocopiers and related equipment
Toyota Industries Commercial Finance Canada Inc.	2018/07/30	Equipment, Other Forming Equipment

<sup>14</sup> The Ho Affidavit at para 18.

<sup>15</sup> Inter Creditor Agreement among Callidus, Bank of America and JD Norman, ULC dated July 10, 2018, **Exhibit I**, the Ho Affidavit.

<sup>16</sup> The Ho Affidavit at para 21.

<sup>17</sup> Search report produced under the *Personal Property Security Act (Ontario)* Registration System in respect of registrations made against the personal property of JDN Canada, **Exhibit J**, the Ho Affidavit.

### **Notice of Intention to Enforce Security**

22. On February 10, 2021, Callidus delivered the requisite Notice of Intention to Enforce Security pursuant to s. 244 of the *Bankruptcy and Insolvency Act* (“**BIA**”). JDN Canada waived the ten day notice period and consented to the immediate appointment of a receiver over its assets, property, and undertakings.<sup>18</sup>

23. As of February 8, 2021, JDN Canada remains indebted to Callidus in an amount in excess of US\$146,000,000.<sup>19</sup>

## **PART III – LAW AND ARGUMENT**

### **A. Just and Convenient Test**

24. The Applicant seeks the appointment of a receiver pursuant to Section 243(1) of the *BIA* and Section 101 of the *Courts of Justice Act* (“**CJA**”).

25. Section 243(1) of the *BIA* and Section 101 of the *CJA* provide that the Court may appoint a receiver where it is “just or convenient” to do so.

26. In the facts at bar, it is just and convenient to appoint KSV as receiver over the assets, property and undertakings of the Debtor because: (a) the Applicant's security provides for the appointment of a receiver on default; and (b) a court-appointed receiver is the optimal remedy to ensure that the Applicant's interests are preserved and that the rights of all stakeholders are protected.

#### **(a) Just as of Contractual Right**

27. Where a debtor has *expressly* agreed to the appointment of a receiver in the event of default, the court should not ordinarily interfere with the contract between the parties.<sup>20</sup>

28. The significance of a contractual right to privately appoint a receiver was discussed by Justice Blair in *Bank of Nova Scotia v. Freure Village on Clair Creek*:<sup>21</sup>

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<sup>18</sup> *BIA* Notice dated February 8, 2021 and Acknowledgement and Consent executed by JDN Canada, **Exhibit K and Exhibit L**, the Ho Affidavit.

<sup>19</sup> The Ho Affidavit at para 24.

<sup>20</sup> [\*United Savings Credit Union v. F & R Brokers Inc.\*](#), 2003 BCSC 640 at para. 16.

It is conceded, in effect, that if the loans are in default... - which they are the Bank is entitled to move under its security and appoint a receiver-manager privately.

...

*While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not.*

29. This principle has been extended in instances where a secured creditor applies for the Court-appointment of a receiver notwithstanding that its security instrument provides only for the appointment of a private receiver.<sup>22</sup>

30. The Applicant submits that there is nothing in the circumstances of this case that should cause the Court to interfere with the parties' private contractual ordering or to view the appointment of a receiver, which was explicitly contemplated by that contractual ordering, as an extraordinary remedy.

(b) The Appointment of a Receiver is the Optimal Remedy

31. It is well established that a court-appointed receiver is an officer of the court, acting in a fiduciary capacity to all parties having an interest in the subject matter of the receivership:<sup>23</sup>

A court-appointed receiver is an officer of the court. It has a fiduciary duty to act honestly and fairly on behalf of all claimants with an interest in the debtor's property, including the debtor (and, where the debtor is a corporation, its shareholders). It must make candid and full disclosure to the court of all material facts respecting pending applications, whether favourable or unfavourable

32. A secured creditor need not demonstrate that other remedies are ineffective before applying for the appointment of a court-appointed receiver.<sup>24</sup>

33. A court-appointed receivership is the most effective and fair remedy and will allow for the utmost flexibility in responding to various contingencies because it facilitates the orderly and efficient realization of assets, judicial determination of creditor claims and priorities, and the fair distribution of proceeds to creditors by reference to their legal rights. Furthermore, a stay of

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<sup>21</sup> [Bank of Nova Scotia v. Freure Village on Clair Creek](#), 1996 CanLII 8258 (ON SC) at paras. 9 and 12.

<sup>22</sup> [Romspen Investment Corp. v. 1514904 Ontario Ltd.](#), 2010 ONSC 1339 at paras. 23 to 26.

<sup>23</sup> [Regal Constellation Hotel Ltd., Re](#), 2004 CanLII 206 (ON CA) at para. 26.

<sup>24</sup> [Bank of Nova Scotia v. D.G. Jewelry Inc.](#), 2002 CanLII 12477 (ON SC) at para. 3.

proceedings will prevent any precipitous creditor action that may undermine the realization process.<sup>25</sup>

34. In light of the number of secured creditors, and former JDN Canada employees affected by the insolvency of JDN Canada (including the need to administer the *Wage Earners Protection Program Act* for the benefit of the former employees, including the Union's members), the Union's efforts to prevent access to the Plant, and the substantial amounts owing by JDN Canada to the Applicant, and others, it is just, convenient and necessary for the protection of the Applicant, and other creditors of the Respondent, that a Court-supervised officer be appointed to take possession and control of JDN Canada's assets, conduct an orderly wind-up of its business, market and sell its assets and ensure that the proceeds of sale are distributed to the stakeholders in accordance with their legal priorities, and further order of the Court.

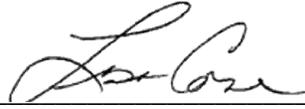
#### **PART IV – ORDER REQUESTED**

35. For the reasons set out above, the Applicant respectfully requests an order appointing KSV as receiver of the assets, property and undertakings of the Debtor.

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<sup>25</sup> [\*Pope & Talbot Ltd., Re.\*](#), 2009 BCSC 1552 at para. 131; [\*Canada \(Attorney General\) v. Reliance Insurance Co.\*](#), 2007 CanLII 41899 (ON SC) at para. 26.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**, this 10ths day of February, 2021.

A handwritten signature in black ink, appearing to read "John Leslie and Lisa S. Corne", written in a cursive style.

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John Leslie and Lisa S. Corne  
**Lawyers for the Applicant**

**SCHEDULE “A”**  
**LIST OF AUTHORITIES**

1. [\*United Savings Credit Union v. F & R Brokers Inc.\*](#), 2003 BCSC 640.
2. [\*Bank of Nova Scotia v. Freure Village on Clair Creek\*](#), 1996 CanLII 8258 (ON SC).
3. [\*Romspen Investment Corp. v. 1514904 Ontario Ltd.\*](#), 2010 ONSC 1339.
4. [\*Regal Constellation Hotel Ltd., Re\*](#), 2004 CanLII 206 (ON CA).
5. [\*Bank of Nova Scotia v. D.G. Jewelry Inc.\*](#), 2002 CanLII 12477 (ON SC).
6. [\*Pope & Talbot Ltd., Re\*](#), 2009 BCSC 1552.
7. [\*Canada \(Attorney General\) v. Reliance Insurance Co.\*](#), 2007 CanLII 41899 (ON SC).

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

***Bankruptcy and Insolvency Act, RSC 1985, c B-3***

**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.

***Courts of Justice Act, R.S.O. 1990, c. C.43***

**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. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

**Terms**

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

**CALLIDUS CAPITAL CORPORATION**

Applicant

-and- **JD NORMAN CANADA, ULC**

Respondent

Court File No.

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**PROCEEDING COMMENCED AT  
TORONTO**

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