

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

BETWEEN:

STERCUS ACCIDIT INVESTMENT CORP.

Applicant

- and -

JMD-M CANADA 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/ MOVING PARTY

**INCH HAMMOND
PROFESSIONAL CORPORATION**

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TO: THE SERVICE LIST

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

BETWEEN:

STERCUS ACCIDIT INVESTMENT CORP.

Applicant

- and -

JMD-M CANADA INC.

Respondent

IN THE MATTER OF THE PROPOSED RECEIVERSHIP OF JMD-M CANADA INC.

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

**SERVICE LIST
(as at March 28, 2023)**

JMD-M CANADA INC. 70 Falaise Road Scarborough, ON M1E 3B8 E: rakesh.verma_jmdci@yahoo.com Debtor	Rakesh Kumar Verma 70 Falaise Road Scarborough, ON M1E 3B8 E: rakesh.verma_jmdci@yahoo.com Guarantor
KSV RESTRUCTURING INC. 220 Bay Street Suite 1300 Toronto, ON M5J 2W4 T: 416-932-6030 David Sieradzki E: dsieradzki@ksvadvisory.com Proposed Receiver	CHAITONS LLP 5000 Yonge Street, 10 th Floor Toronto, ON M2N 7E9 T: 416-218-1141 George Benchetrit E: George@chaitons.com Lawyers for the Proposed Receiver

<p>D & A LAW PROFESSIONAL CORPORATION 75-1080 Walden Circle Mississauga, ON L5J 4J9 T: 416-830-1723</p> <p>Dhruv Pal E: mail@dalawyers.ca</p> <p>Lawyers for the 2nd Mortgagees, Sreelu Consulting Inc., John Paul Kancherla, Balaji Ramu Dhuchetti, Likith Santosh Ambati, Keerthi Chowdary Sukhavast and Vasu Kakarla</p>	<p>THE CITY OF KAWARTHA LAKES 26 Francis Street PO Box 696 Lindsay, ON K9V 4W9</p>
<p>CANADA REVENUE AGENCY c/o Department of Justice Ontario Regional Office 120 Adelaide Street W., Suite 400 Toronto, ON M5H 1T1 T: 416-952-8563</p> <p>Attention: Rakhee Bhandari E: rakhee.bhandari@justice.gc.ca</p>	<p>ONTARIO MINISTRY OF FINANCE 6th Floor- 33 King Street West Oshawa, ON L1H 8H5</p> <p>E: insolvency.unit@ontario.ca</p>
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PART I: NATURE OF THE APPLICATION

- 8) The Applicant, Stercus Accidit Investment Corp. (“**Stercus**”) brings this Application for:
- a) An order under section 243 of the *Bankruptcy and Insolvency Act* (the “**BIA**”)¹ and section 101 of the *Courts of Justice Act* (the “**CJA**”),² appointing KSV Restructuring Inc. (“**KSV**”) as receiver and manager, without security, (herein, the “**Receiver**”), of all assets, undertakings and properties of the respondent JMD-J Canada Inc. (the “**Respondent**”), including without limitation, the real property municipally known as 605 Highway 7, Oakwood (City of Kawartha Lakes), Ontario and legally described at Schedule A to the Appointment and Listing Order³ (the “**Property**”); and
 - b) Approving the listing agreement for the sale of the Property (the “**Listing Agreement**”), which Listing Agreement is described in the report filed by KSV.⁴

PART II – THE FACTS

- 9) The facts of this Application are more fully set out in the Kam Affidavit.
- 10) Capitalized terms used herein not defined shall have the meanings given to them in the affidavit of Michael Kam sworn March 20, 2021.⁵

¹ [R.S.C. 1985, c.B-3](#).

² [R.S.O. 1990, c.C-41](#).

³ A draft of the Appointment and Sale Order is provided at Tab 5 of the Application Record, and a comparison of the draft Appointment and Sale Order to the Commercial List model receivership order is included at Tab 4 of the Application Record.

⁴ Report of KSV Restructuring Inc. as Proposed Receiver of JMD-M Canada Inc. dated March 21, 2023 (“**Receiver’s Report**”), Tab 3 of the Application Record and Tab 3 of the Compendium of the Applicant.

⁵ Affidavit of Michael Kam sworn March 20, 2023, Tab 2 of the Application Record and Tab 4 of the Compendium of the Applicant (the “**Kam Affidavit**”).

A. The Parties

Stercus

- 11) Stercus, a private lender, is a secured creditor of the Respondent. As security for its obligation to Stercus under the commitment letter dated July 12, 2021 (the “**Commitment Letter**”)⁶, the Respondent provided security in favour of Stercus which included *inter alia* (collectively the “**Security**”), a first priority charge/mortgage over the Property registered on title to the Property in the principal amount of \$1,500,000.00,⁷ first priority general assignment of rents/leases, registration of which was duly made pursuant to the *Personal Property Security Act* (Ontario) and registered against the title of the Property,⁸ a first priority general security agreement forming a charge over all personal property of the Respondent, registration of which was duly made pursuant to the *Personal Property Security Act* (Ontario)⁹ and an unlimited personal guarantee of Rakesh Kuma Verma (“**Verma**”), the principal of the Respondent.¹⁰

The Respondent

- 12) The Respondent is an Ontario corporation that has its registered office located in Toronto, Ontario. Verma is its sole officer and director. The Respondent is the registered owner of the Property.¹¹
- 13) Pursuant to the Commitment Letter, Stercus advanced a loan to the Respondent in the principal amount of \$1,500,000.00 plus interest at a rate of 10% per annum, calculated monthly, not in advance, on certain terms and conditions as set out therein (the “**Loan**”).¹²

⁶ Kam Affidavit *supra* note 5 at para 5 and Exhibit C.

⁷ Kam Affidavit *supra* note 5 at para 8(a) and Exhibits B and E.

⁸ Kam Affidavit *supra* note 5 at para 8(b) and Exhibit F.

⁹ Kam Affidavit *supra* note 5 at para 2 and 8(c) and Exhibit G.

¹⁰ Kam Affidavit *supra* note 5 at paras 3 and 7 and Exhibit D.

¹¹ Kam Affidavit *supra* note 5 at paras 3-4 and Exhibit A and B.

¹² Kam Affidavit *supra* note 5 at para 5 and Exhibit C.

- 14) The purpose of the Loan was to assist with the purchase by the Respondent of certain assets, including the Property and an Esso Gas-bar and convenience store located on the Property (the “**Business**”)¹³.

(i) **Respondent Defaults on Commitment Letter**

- 15) The Commitment Letter required the Loan and all accrued interest, fees and other amounts owing pursuant to the Commitment Letter to be repaid by August 1, 2022 (the “**Maturity Date**”).
- 16) On July 13, 2022, and prior to the Maturity Date, Brian Hurren, solicitor for Stercus (“**Hurren**”) was contacted by Sabina Valiyeva, then lawyer for the Respondent, inquiring about early payment as the Respondent was seeking refinancing to pay out the Loan.¹⁴
- 17) After several exchanges between Hurren and Valiyeva, Hurren provided a payout statement on July 27, 2022 dated as of August 1, 2022. At that time, Valiyeva indicated that the refinancing would be completed and the Loan repaid by the Maturity Date.¹⁵
- 18) On July 28, 2022, Hurren was contacted by Michelle Shi (“**Shi**”) who said she was now acting for the Respondent and requested a payout statement. Shi indicated that the refinancing was now scheduled to be completed on August 3, 2022. No refinancing was completed and the Respondent did not pay the Loan by the Maturity Date as required by the Commitment Letter, thereby defaulting on the Loan.¹⁶

¹³ Kam Affidavit *supra* note 5 at para 6.

¹⁴ Kam Affidavit *supra* note 5 at para 10-11.

¹⁵ Kam Affidavit *supra* note 5 at para 11-15 and Exhibits H, I, J, K and L.

¹⁶ Kam Affidavit *supra* note 5 at para 16-17.

(ii) Loan Not Repaid Despite Multiple Assurances of Payment and Imminent Refinancing

- 19) After the Respondent defaulted on the Loan, Hurren was contacted on several occasions by Shi, who was purporting to act for the Respondent and who made assurances that refinancing was imminent and the Loan would be repaid. These include:
- a) August 8, 2022 Shi advises Hurren that the refinancing was now scheduled to close on August 12, 2022 and asked for an updated payout statement which Hurren provided on August 11, 2022¹⁷ - no payment was received;
 - b) August 29, 2022 Shi advises Hurren that the refinancing was now scheduled to close on August 31, 2022 and asked for an updated payout statement which was provided on August 29, 2022¹⁸ – no payment was received; and
 - c) September 7, 2022 Hurren inquires of Shi about a definite date that the refinancing would close. No response was received.¹⁹
- 20) On October 12, 2022, when the Loan still had not been repaid, Stercus, through its lawyers, delivered a demand letter to the Respondent for payment of \$1,546,475.59, the amount due pursuant to the Loan as of that date and that if no payment was received by October 31, 2022, Stercus would commence enforcement proceedings to enforce on its Security. Also on October 12, 2022, Stercus delivered Notice of Intention to Enforce Security under subsection 244(1) of the *Bankruptcy and Insolvency Act* (Canada) and demand for payment to Verma pursuant to his personal guarantee.²⁰

¹⁷ Kam Affidavit *supra* note 5 at para 18-19 and Exhibits N and O.

¹⁸ Kam Affidavit *supra* note 5 at para 21 and Exhibit P.

¹⁹ Kam Affidavit *supra* note 5 at para 22 and Exhibit Q.

²⁰ Kam Affidavit *supra* note 5 at para 23-24 and Exhibit R.

21) Upon receipt of the demand, the Respondent made further assurances of imminent refinancing and repayment, including:

- a) On November 1, 2022, Hurren was contacted by Oliver De Guerre (“**De Guerre**”) who now indicated that he was acting for the Respondent. De Guerre advised that the Respondent had secured refinancing that was scheduled to close at the end of the month – no payment was received;²¹
- b) On December 2, 2022, after Hurren followed-up, De Guerre advised that the Respondent had obtained financing to pay out the Loan. He requested a pay-out statement dated as of December 28, 2022 which was provided. A further information sheet was also provided by Hurren upon request of De Guerre, which was purportedly required in connection with securing refinancing;²²
- c) On December 30, 2022 De Guerre advised that the refinancing was now set to close by the end of January 2023 and that the delay was on account of the holidays;²³
- d) On January 5, 2023, De Guerre advised that the Respondent was expecting a firm commitment of refinancing by January 6, 2023 at latest;²⁴ and
- e) On January 30, 2023, De Guerre advised that a new appraisal was required and once obtained, a commitment letter for refinancing would follow – no commitment letter was subsequently provided.²⁵

²¹ Kam Affidavit *supra* note 5 at para 27 and Exhibit S.

²² Kam Affidavit *supra* note 5 at paras 28-29 and Exhibits S, T and U.

²³ Kam Affidavit *supra* note 5 at para 31 and Exhibit S.

²⁴ Kam Affidavit *supra* note 5 at para 32 and Exhibit S.

²⁵ Kam Affidavit *supra* note 5 at para 34 and Exhibit S.

- 22) On February 6, 2023, lawyers for the Applicant, Inch Hammond Professional Corporation (“**Inch Hammond**”) wrote to De Guerre advising that Stercus was preparing an application for an appointment of a receiver.
- 23) On February 17, 2023, Inch Hammond was contacted by yet another lawyer, Henry Han Kil Jang (“**Jang**”), who indicated that he was being retained by the Respondent and that the Respondent had listed the Property for sale. He was asking for a further delay in the receivership proceedings. Though asked, Jang never confirmed that he was actually retained with regard to the listing the Property²⁶ and subsequently confirmed he was not retained with respect to these proceedings.²⁷
- 24) The Property has been listed for sale by the Respondent since October 2022, without any known offers, so the recent request of Jang to delay enforcement in light of same is not reasonable.²⁸
- 25) On March 13, 2023, Inch Hammond received an email from Valiyeva, the first lawyer who purportedly was acting for the Respondent. She, once again, asked for a pay out statement for refinancing. In response, Inch Hammond said that it would not agree to any further delay in the receivership proceedings, but invited Valiyeva to produce a signed commitment letter for consideration, if there was one.²⁹
- 26) When no response was received from Valiyeva was received, Inch Hammond emailed her the Notice of Application and advised her of the scheduling appointment to be heard on March 23, 2023. It was only in response to informing Valiyeva that Stercus was proceeding

²⁶ Kam Affidavit *supra* note 5 at para 37 and Exhibit V.

²⁷ Affidavit of Attempted Service of Sandra Deforest sworn March 22, 2023, Tab 19 of the Applicant’s Compendium (“**Deforest Affidavit of Attempted Service**”) at para 1.

²⁸ Kam Affidavit *supra* note 5 at para 53 and Exhibit V.

²⁹ Kam Affidavit *supra* note 5 at para 38 and Exhibit W.

with the within Application, did Valiyeva then provide a discussion paper from the Bank of Montreal regarding the purported refinancing of the Property (the “**BMO Discussion Paper**”).³⁰

- 27) The BMO Discussion Paper requires an initial application fee of \$15,000.00, is unsigned and is dated as of January 20, 2023. Inch Hammond subsequently emailed Valiyeva and inquired whether the application fee was paid and what was the status of the application for refinancing. Valiyeva responded saying that her client “has sent [her] an email from his mortgage broker requesting [a payout statement]. In other words, she is suggesting that the payout statement from Stercus is a precondition to finalizing the financing.”³¹
- 28) However, previously on January 30, 2023, De Guerre had emailed Hurren and advised that a new appraisal was the cause of delay in finalizing the refinancing. If all that was required was a payout statement, then the refinancing could have been finalized in February.
- 29) Rather, it was not until Stercus indicated that it was proceeding with the within Application, did the Respondent ask for a payout statement in connection with the BMO Discussion Paper or provide Stercus with a copy of said Discussion Paper. It is respectfully submitted that the recent production of the BMO Discussion Paper is an attempt to further delay enforcement proceedings, including the within Application, and is not credible evidence of the Respondent’s ability to obtain financing in order to pay its creditors.

(iii) Other Creditors of the Respondent

- 30) In addition to the amounts owed to Stercus, the Respondent also owes:
- a) The principal amount of \$1,000,000.00 plus applicable fees and interest, security for which includes a second priority mortgage/charge registered against title to the Property (the

³⁰ Kam Affidavit *supra* note 5 at para 39 and Exhibit X.

³¹ Kam Affidavit *supra* note 5 at para 40-41 and Exhibit Y.

“**Second Mortgage**”) and a second priority notice of assignment of rents registered against the Property, both in favour of Sreelu Consulting Inc., John Paul Kancherla, Balaji Ramu Dhuchetty, Likith Santosh Ambati, Keerthi Chowdary Sukhavast, and Vasu Karkarla (collectively the “**Second Mortgagees**”);³² and

- b) The amount of \$6,409.07 to the City of Kawartha in municipal taxes and interest. This is also a further default on the Commitment Letter, which requires that the municipal taxes be kept current.³³

(iv) **Receivership**

- 31) The Commitment Letter has been in default for over 7 months and despite repeated assurances of refinancing and repayment, the Respondent has provided no credible evidence that it has been able to obtain refinancing or that it otherwise has the ability to repay the Loan.
- 32) Stercus has lost all confidence in the Respondent to repay the Loan or to execute any refinancing transaction or realization process in order to repay the Loan or operate the Business. A receiver is in a better position to market and sell the Business and Property in order to maximize return for all stakeholders.³⁴
- 33) Stercus is the largest creditor of the Respondent and brings this Application to protect its interests and the interests of all the stakeholders.
- 34) Pursuant to the Receiver’s Report, the Property will continue to be listed at its current price of \$4.29 million. On March 3, 2023, the price was dropped from \$4.85 million to \$4.29

³² Kam Affidavit *supra* note 5 at para 40 and 41 and Exhibits B, Y and Z.

³³ Kam Affidavit *supra* note 5 at para 39 and Exhibit X.

³⁴ Kam Affidavit *supra* note 5 at para 51-52.

million and is now generating interested parties who are performing diligence on the Property.³⁵

35) Specifically, the Appointment and Listing Order being sought provides for:

- a) Receivership financing under the Receiver's Borrowing Charge which will enable the funding of the receivership, the marketing and sale process, and the operations of the Business during the marketing and sale process; and
- b) The Listing Agreement also requires court approval of the completion of any sale transaction and transfer of title requires, therefore, the Listing Agreement ensures an orderly, transparent, and court-supervised process conducted by an officer of the court, in order to maximize return for all stakeholders.³⁶

(v) Service of Application Record on Respondent

36) Service of the Notice of Application was completed or attempted as follows:

- a) On March 21, 2023, Inch Hammond emailed the Notice of Application to Jang, who responded that he cannot accept service and Valiyeva who responded that she was not retained to accept service.³⁷ Notably, however, Valiyeva subsequently indicated that she was in email communication with the Respondent in connection with the purported refinancing³⁸; and
- b) On March 21, 2023, a process server attempted to personally serve the Respondent by attending at its registered office but could not locate the corporate Respondent at that

³⁵ Receiver's Report *supra* note 4 at p. 3.

³⁶ Kam Affidavit *supra* note 5 at para 53

³⁷ Deforest Affidavit of Attempted Service *supra* note 27 at paras 1-2 and Schedules A and B.

³⁸ Kam Affidavit *supra* note 5 at para 41 and Exhibit Y.

address. He subsequently mailed the Notice of Application to the Respondent's registered office³⁹.

37) After obtaining a date for the within hearing, service of the Application Record and notice of the hearing of this Application was completed or attempted as follows:

- a) On March 24, 2023, Deforest emailed the Application Record together with correspondence informing the Respondent of the hearing date to Varma at his personal email address and on March 28, 2023 Deforest emailed to Varma the link for the hearing of this Application;⁴⁰
- b) On or about March 24 and March 25, 2023 a process server attempted to personally serve the Respondent by attending at its registered office but could not locate the corporate respondent at that address. He subsequently mailed the Application Record to the Respondent's registered office⁴¹ and on March 28, 2023, Inch Hammond sent a courier to the Respondent's registered office with a letter confirming the date of the hearing and providing a Zoom link for same;⁴²
- c) On March 27, 2023 a process server attended at the Business and left a copy of the Application Record with someone purporting to be the manager and on March 28, 2023, a process server attended at the Business and left a letter with the same person confirming the return date of the Application and providing the Zoom link for same; and⁴³

³⁹ Affidavit of Service of John Luis sworn March 22, 2023, Compendium of the Applicant at Tab 24 at para 1-3.

⁴⁰ Affidavit of Service of Sandra Deforest sworn March 28, 2023, Tab 25 of the Applicant's Compendium ("**Deforest Affidavit of Service**") at para 3.

⁴¹ Affidavit of John Luis sworn March 28, 2023, Compendium of the Applicant at Tab 26 para 1-3.

⁴² Deforest Affidavit of Service *supra* note 40 at para 3.

⁴³ Affidavit of Service of Cathy McLeod sworn March 29, 2023, Compendium of the Applicant at Tab 27 at para. 1-3.

- d) On March 28, 2023, Inch Hammond also sent an email to Jang and Valiyeva advising of the hearing date and providing them with the Zoom link for same.⁴⁴

PART III – THE ISSUES

- 38) The issues on this application are (1) has the Respondent been duly served with the Application materials and (2) should the Court grant the Appointment and Listing Order.

PART IV – LAW AND ARGUMENT

A. The Respondent has been Duly Served with the Application Record

- 39) Rule 1.04(1) states that, as a general principle, the *Rules* "shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits". Rule 1.04(1.1) further states that the Court "shall make orders and give directions that are proportionate to the importance and complexity of the issues."⁴⁵
- 40) Rule 16.03 sets out the relevant alternatives to personal service, namely:

16.03 (1) Where these rules or an order of the court permit service by an alternative to personal service, service shall be made in accordance with this rule.

Acceptance of Service by Lawyer

(2) Service on a party who has a lawyer may be made by leaving a copy of the document with the lawyer or an employee in the lawyer's office, but service under this subrule is effective only if the lawyer endorses on the document or a copy of it an acceptance of service and the date of the acceptance.

(3) By accepting service the lawyer shall be deemed to represent to the court that the lawyer has the authority of his or her client to accept service.

(6) Where the head office, registered office or principal place of business of a corporation or, in the case of an extra-provincial corporation, the attorney for service in Ontario cannot be found at the last address recorded with the Ministry of Public and Business Service Delivery, service may be made on the corporation by mailing a copy

⁴⁴ Deforest Affidavit of Service *supra* note 40 at para 8-9.

⁴⁵ *Rules of Civil Procedure* ("Rules"), [R.R.O. 1990, Reg. 194, Rule 1.04](#).

*of the document to the corporation or to the attorney for service in Ontario, as the case may be, at that address.*⁴⁶

- 41) Pursuant to R. 16.04, where it is impractical to effect prompt service of an originating process or any other document required to be served personally, the court may make an order for substituted service or may dispense with service.⁴⁷

- 42) Further, the Court can validate service, namely:

Where a document has been served in a manner other than one authorized by these rules or an order, the court may make an order validating the service where the court is satisfied that,

(a) the document came to the notice of the person to be served; or

*(b) the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.*⁴⁸

- 43) In *Boodoo v. Boodoo*, counsel for the Plaintiff delivered a copy of the amended statement of claim to defence counsel by email and fax on or about January 20, 2011. Defence counsel did not accept service of the amended statement of claim on or after this date and, thus, Master Sproat held that there had not been service in accordance with the *Rules*. However, Master Sproat validated service of the amended statement of claim as of January 22, 2011, as there was "(...) no doubt in my mind that [the defendant] had notice of the claims advanced in the amended statement of claim" as of that date⁴⁹.

- 44) In this instance, though the Respondent's lawyers Jang and Valiyeva did not accept service, they were clearly in communication with the Respondent. In particular, it appears from her email of March 21, 2023, received after Inch Hammond's email of March 21, 2023 serving the Notice of Application, that Valiyeva was in recent email communication with the

⁴⁶ *Rules, ibid*, [Rule 16.03](#)

⁴⁷ *Rules, ibid*, [Rule 16.04](#)

⁴⁸ *Rules, ibid*, [Rule 16.08](#).

⁴⁹ [2011 ONSC 4600](#) at [para 2](#).

Respondent. Further, it is submitted that it was likely the client's receipt of the Notice of Application which prompted the Respondent to have Valiyeva disclose the BMO Discussion Paper, presumably in the hope of delaying the within proceeding.

- 45) Further, both the Notice of Application, Application Record and confirmation of the hearing date with Zoom link were mailed to the Respondent's registered office and emailed to him directly as well as a copy of the Application Record and confirmation of the hearing date with Zoom link were left with a manager at the Property where the Respondent carries on business.
- 46) In summary, the Applicant has emailed the registered office, left copies at the place of business, emailed two lawyers purporting to act for the Respondent and emailed the Respondent directly. It is respectfully submitted that there is "no doubt" that the within proceeding has come to the Respondent's attention and certainly there is sufficient evidence that the Court can find on a balance of probabilities, that the within proceeding has come to the attention of the Respondent.
- 47) It is therefore submitted that either service has therefore been made in accordance with an acceptable alternative to personal service (mail to the registered office), or alternatively, this Application has come to the attention of the Respondent, and service should be validated or substituted.
- 48) Further, in addition to validating service, the Court may make an order to abridge any time prescribed by the *Rules*, including the time for service, on such terms as are just.⁵⁰
- 49) To the extent that an abridgement of time for service is required, it is submitted that the Court should exercise its jurisdiction to do so. According to the Proposed Receiver's report, there

⁵⁰ *Rules*, *ibid*, [Rule 3.02\(1\)](#).

is current interest in Property and it is imperative that steps be taken without delay in order for the Receiver to list, market and sell the Property in accordance with the draft Listing Agreement as described in the proposed Receiver's Report.⁵¹

B. The Test for Appointing a Receiver under the BIA and CJA

- 50) Subsection 243(1) of the BIA provides that on application by a secured creditor, a court may appoint a receiver to, *inter alia*, take possession over the assets of an insolvent person and exercise any control that the court considers advisable over that property and over the insolvent person's business, again where it is "just or convenient". Similarly, the CJA enables the court to appoint a receiver where such appointment is "just or convenient".
- 51) The BIA also requires that the applicant be a secured creditor, that the debtor be insolvent,⁵² and that the applicant has complied with the notice and 10-day requirements of s. 244 of the BIA.⁵³ All of the latter requirements are met in this case:
- (a) Stercus is a secured creditor of the Respondent under the Security, including the Mortgage and GSA⁵⁴;
 - (b) the Respondent is insolvent because it is unable to meet its debts as they become due as evidenced by, *inter alia*, the defaults and amounts due and owing to Stercus, the 2nd Mortgagees and the City of Kawartha Lakes;⁵⁵ and
 - (c) Stercus sent the Respondent a demand and notice in accordance with s. 244 of the BIA on October 12, 2022.⁵⁶

⁵¹ Receiver's Report, *supra* note 4 at pg. 3.

⁵² [Section 2 of the BIA](#) defines "insolvent person" as including a person unable to meet its obligations as they generally become due for any reason, or that has ceased paying its current obligations in the normal course of business.

⁵³ BIA, [s. 243](#).

⁵⁴ Kam Affidavit *supra* note 5 at paras 8-9 and Exhibits E, F, and G.

⁵⁵ Kam Affidavit *supra* note 5 at paras 17, 40, 41 and 45.

⁵⁶ Kam Affidavit *supra* note 5 at paras 23-24 and Exhibit R.

C. Is it just and convenient to Appoint a Receiver?

52) It is “just or convenient” to appoint the Receiver. In deciding whether it is just or convenient

to appoint a receiver, the Courts will “*have regard to all circumstances*” including:⁵⁷

- | | |
|---|---|
| (a) the fact that the debtor is insolvent or in financial difficulty and is not able to satisfy its debts in the normal course; | (h) the maximization of the return on the subject property and the maximization of creditor recovery; |
| (b) the fact that the debtor is in default towards the applicant and others; | (i) the fact that a receivership would facilitate the orderly and commercially reasonable disposition of the subject property through an efficient and transparent sale or liquidation process; |
| (c) the amounts owed; | (j) the fact that a receivership would facilitate the resolution of outstanding issues such as any issue of priority among creditors; and |
| (d) the fact that the applicant has an enforceable security interest over the subject property; | (k) the fact that a receivership provides relief that is beneficial to the objectives of the receivership and the interest of stakeholders generally. |
| (e) whether the debtor consents to the appointment of a receiver; | |
| (f) the potential loss to the subject property or the applicant’s security if a receivership is not ordered; | |
| (g) the interests of the debtor, creditors and affected third parties; | |

30. In this instance, the appointment of the Receiver over the Respondent is just and

convenient as a result of, among other things:

- (a) the Respondent’s defaults pursuant to the terms of the Loan and the Security as well as defaulting on the Second Mortgage and owing municipal tax arrears;
- (b) Stercus’ enforceable Security over, *inter alia*, the Property and Business;
- (c) the Respondent’s repeated assurances that it has secured suitable refinancing without providing any credible evidence of same;

⁵⁷ See, *inter alia*, *Bank of Nova Scotia v Freure Village of Clair Creek*, [1996 CanLII 8258 \(ON SC\)](#) (Blair J. (as he then was)), paras. [10-12](#) (“*Freure Village*”); *1529599 Ontario Limited v Dalcour Inc.*, [2012 ONSC 5707](#) (Brown J. (as he then was)), paras. [40-42](#); *First National Financial GP Corporation v 3291735 Nova Scotia Limited*, [2018 NSSC 235](#) (Brothers J.), paras. [3-17](#); and *Canadian Equipment Finance and Leasing Inc. v The Hypoint Company Limited*, [2022 ONSC 6186](#) (Osborne J.), paras. [22-29](#).

- (d) the Respondent has listed the Property since October of 2022 and has not produced any purchase offers;
 - (e) A Receiver is therefore in a better position to list, market and sell the Property and Business to maximize recovery for the Respondent's creditors;
 - (f) the proposed Listing Agreement provides full transparency to the Respondent's other creditors and the requirement of court-approval of the sale of the Property will allow for an efficient, orderly and transparent sales process where any priority issues as between the Respondent's creditors can be resolved.
- 53) Where the history and evidence of the behaviour of a debtor indicate that a creditor's attempts to privately enforce its security will be delayed or otherwise fail, a court-appointed receiver is warranted.⁵⁸
- 54) Stercus has tried to work with the Respondent and, to this end, has been exceeding patient in allowing the Respondent to try to find a feasible way to repay the Loan. However, the Respondent has only provided multiple and empty promises of repayment. The Respondent has failed to provide any credible evidence that it has or has any ability to obtain the necessary refinancing. The Respondent has failed to obtain any offers to purchase the Property, despite having it listed since October of 2022.
- 55) Stercus can delay no further and needs a process in place to ensure that its Security is realized upon as efficiently and effectively as possible, and a greater level of control over the Respondent and its property is now required.
- 56) A Court-appointed receivership, involving the Court's supervision, a forum for all stakeholders, a Court-approved Sale Listing Agreement, a Court-approved sale, the presence

⁵⁸ *Freure Village supra* note 57 at [para 13](#).


of fiduciary obligations and maximum transparency, is the best way to ensure that the realization of the Respondent's assets is conducted fairly and equitably, in recognition of the interests of all stakeholders.

PART V – ORDER SOUGHT

- 57) Stercus respectfully requests an Order substantially in the form of the draft Appointment and Listing Order contained in this Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of March, 2023.

Per:



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SCHEDULE “A”: LIST OF AUTHORITIES

- | | |
|---|----|
| <u><i>Rules of Civil Procedure</i></u> | 1. |
| <u><i>Bankruptcy and Insolvency Act</i></u> | 2. |
| <u><i>Courts of Justice Act</i></u> | 3. |
| <u><i>Boodoo v. Boodoo</i></u> | 4. |
| <u><i>Bank of Nova Scotia v Freure Village of Clair Creek</i></u> | 5. |
| <u><i>1529599 Ontario Limited v Dalcour Inc</i></u> | 6. |
| <u><i>First National Financial GP Corporation v 3291735 Nova Scotia Limited</i></u> | 7. |
| <u><i>Canadian Equipment Finance and Leasing Inc. v The Hypoint Company Limited</i></u> | 8. |

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

Court of Justice Act R.S.O. 1990 c.C.43

S. 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).

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

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

S. 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.

Rules of Civil Procedure R.R.O. 1990, Reg. 194

R. 1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, r. 1.04 (1).

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding. O. Reg. 438/08, s. 2.

R. 3.02 (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just. R.R.O. 1990, Reg. 194, r. 3.02 (1).

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed. R.R.O. 1990, Reg. 194, r. 3.02 (2).

Alternatives to Personal Service

Where Available

R. 16.03 (1) Where these rules or an order of the court permit service by an alternative to personal service, service shall be made in accordance with this rule. R.R.O. 1990, Reg. 194, r. 16.03 (1).

Acceptance of Service by Lawyer

(2) Service on a party who has a lawyer may be made by leaving a copy of the document with the lawyer or an employee in the lawyer's office, but service under this subrule is effective only if the lawyer endorses on the document or a copy of it an acceptance of service and the date of the acceptance. O. Reg. 575/07, s. 17.

(3) By accepting service the lawyer shall be deemed to represent to the court that the lawyer has the authority of his or her client to accept service. R.R.O. 1990, Reg. 194, r. 16.03 (3); O. Reg. 575/07, s. 1.

Service on a Corporation

(6) Where the head office, registered office or principal place of business of a corporation or, in the case of an extra-provincial corporation, the attorney for service in Ontario cannot be found at the last address recorded with the Ministry of Public and Business Service Delivery, service may be made on the corporation by mailing a copy of the document to the corporation or to the attorney for service in Ontario, as the case may be, at that address. R.R.O. 1990, Reg. 194, r. 16.03 (6); O. Reg. 170/14, s. 4; O. Reg. 520/22, s. 2.

Crown in Right of Ontario, Attorney General

(7) Service of a document on the Crown in right of Ontario or on the Attorney General of Ontario may be made by e-mailing a copy of the document in accordance with subrule 16.06.1 (1) to the e-mail address for service specified for the Crown or the Attorney General, as the case may be, on the website of the Ministry of the Attorney General. O. Reg. 107/21, s. 2.

Substituted Service or Dispensing with Service

Where Order May be Made

R. 16.04 (1) Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service under these rules, the court may make an order for substituted

service or, where necessary in the interest of justice, may dispense with service. R.R.O. 1990, Reg. 194, r. 16.04 (1).

Effective Date of Service

(2) In an order for substituted service, the court shall specify when service in accordance with the order is effective. R.R.O. 1990, Reg. 194, r. 16.04 (2).

(3) Where an order is made dispensing with service of a document, the document shall be deemed to have been served on the date of the order for the purpose of the computation of time under these rules. R.R.O. 1990, Reg. 194, r. 16.04 (3).

Validating Service

16.08 Where a document has been served in a manner other than one authorized by these rules or an order, the court may make an order validating the service where the court is satisfied that,

- (a) the document came to the notice of the person to be served; or
- (b) the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service. R.R.O. 1990, Reg. 194, r. 16.08.

STERCUS ACCIDIT -and-
INVESTMENT CORP.
Applicant

JMD-M CANADA INC.
Respondent

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

FACTUM OF THE APPLICANT/ MOVING PARTY

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