

Court File No:
ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

NEW SKIES SATELLITES B.V.

Applicant

- and -

JUCH-TECH INC.

Respondents

**APPLICATION UNDER SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O.
1990, C. C.43, AS AMENDED, AND SECTION 243 OF THE BANKRUPTCY AND
INSOLVENCY ACT, R.S.C. 1985, C. B-3 AS AMENDED**

FACTUM OF THE APPLICANT

December 8, 2020

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PART I -NATURE OF THE APPLICATION

1. This factum is filed in support of an application by New Skies Satellites B.V. (“**New Skies**” or the “**Applicant**”) for an order (the “**Appointment Order**”) appointing KSV Restructuring Inc (“**KSV**”) as receiver (in such capacity, the “**Receiver**”) of Juch-Tech Inc. (“**Juch-Tech**” or the “**Debtor**”), pursuant to section 243(1) of the *Bankruptcy and Insolvency Act* (Canada), as amended (the “**BIA**”), and section 101 of the *Courts of Justice Act* (Ontario).

2. Juch-Tech has defaulted on its payment obligations to New Skies under a Master Services Agreement dated December 17, 2010 (as amended from time to time, the “**MSA**”), under which New Skies provided Juch-Tech with access to satellite broadcasting bandwidth. Juch-Tech’s current indebtedness to New Skies is U.S. \$10,418,045.48 (the “**Juch-Tech Indebtedness**”). U.S. \$5,216,616.39 of this indebtedness is secured by a General Security Agreement between the parties dated July 2, 2015 (the “**General Security Agreement**”), pursuant to which Juch-Tech granted New Skies a security interest in the Collateral (as defined below). The remaining U.S. \$5,201,429.09 of the Juch-Tech Indebtedness is unsecured. Interest on the Juch-Tech Indebtedness and New Skies’ costs are continuing to accrue.

3. Juch-Tech has committed multiple, continuing events of default under the MSA and the General Security Agreement, including: (i) making unauthorized use of New Skies’ satellite services; (ii) repeatedly ignoring New Skies’ requests for information on the Collateral; (iii) failing to pay for the services performed by New Skies under the MSA and related Service Orders; and (iv) failing to perform when due any of the Secured Obligation, despite repeated demands for payment.

4. Despite New Skies' continuing support, cooperation, and patience with Juch-Tech over the span of many years, Juch-Tech has made no meaningful reduction in the amount of its significant arrears to New Skies. Juch-Tech has made no payments to New Skies after April 2016.

5. New Skies has until now refrained from taking steps to enforce its security as it did not have sufficient information to determine the realizable value of the Collateral and the value of any secured indebtedness that might rank in priority to the Juch-Tech Indebtedness. However, new information has arisen such that the immediate appointment of a Receiver is now critical.

6. New Skies recently discovered that Juch-Tech has moved assets that are subject to the General Security Agreement to a property apparently owned by a related party. These assets appear to have been moved, without the knowledge of New Skies, in the period after New Skies sent Juch-Tech a demand for payment and notice of unauthorized use – possibly to frustrate efforts by New Skies to enforce its security interest and preserve its rights (and while failing to respond to the demand). Urgent relief is now required to secure the Collateral.

7. New Skies no longer has confidence in Juch-Tech or its management and has serious and justifiable concerns regarding its Collateral.¹ Therefore, New Skies is urgently asking this Court to immediately appoint the Receiver. The initial purpose of the appointment is largely protective. The proposed Appointment Order provides that the Receiver will have limited powers to, among other things, (i) secure Juch-Tech's assets in order to prevent Juch-Tech from taking any steps to further move Collateral to another location, (ii) obtain and review Juch-Tech's books and records, (iii) investigate Juch-Tech's business and operations, (iv) determine the realizable value of any Collateral, and (v) report to this Court by no later than January 15, 2021 concerning its preliminary

¹ Capitalized terms used herein and not otherwise defined shall have the meaning given to them in the Affidavit of Brian Hassinger, sworn December 8, 2020 (the "**Hassinger Affidavit**").

findings. Once the Receiver has had an opportunity to review the books and records of Juch-Tech, ascertain the value of assets available for realization as well as Juch-Tech's other outstanding debt, and provide a report to New Skies and the Court, New Skies may seek court approval to expand the Receiver's mandate to take possession and control of the Collateral and to realize on the assets.

PART II - THE FACTS

A. The Parties to this Application

8. The applicant New Skies is a Dutch company with its registered office in the Hague, Netherlands.² It is a direct subsidiary of SES S.A. ("SES"), a Luxembourg company that is one of the world's leading satellite owners and operators.³ SES operates the world's only multi-orbit constellation of satellites.⁴

9. The respondent Juch-Tech is a corporation operating under the laws of Canada with its registered office in Hamilton, Ontario.⁵ Juch-Tech provides satellite broadcast and internet transmission and uplink services.⁶ According to its LinkedIn profile, Juch-Tech is a Canada-based teleport and ISP that harnesses bandwidth on SES World Skies' satellites to deliver broadband services to small businesses and residents from South Africa to Eastern Europe.⁷

B. The Master Services Agreement and Service Orders

10. Juch-Tech provides broadband services to its customers using bandwidth provided by New Skies' satellite network. The terms and conditions under which Juch-Tech could order satellite

² Hassinger Affidavit at para 5.

³ Hassinger Affidavit at para 5.

⁴ Hassinger Affidavit at para 5.

⁵ Hassinger Affidavit at para 5.

⁶ Hassinger Affidavit at para 5.

⁷ Hassinger Affidavit at para 5.

network services from New Skies are set out in the MSA.⁸ Within this framework, Juch-Tech and New Skies entered into certain Service Orders, which described more specifically the type of satellite network services required by Juch-Tech and the fees applicable to such services (the “**Service Fees**”).⁹

11. Significant provisions of the MSA include:¹⁰

- (a) **Service Fees:** the MSA provides that Juch-Tech shall make each and every Service Fee payment in advance, on or before the 25th day of the month preceding the month in which service is provided. This requirement is reiterated in the Service Orders, which set out the Service Fees owed for the services provided by New Skies.
- (b) **Term:** The MSA provides that it will remain in effect for five years from December 17, 2010 and then shall be renewed thereafter for successive periods of one year each, unless either party provides notice no later than 30 days prior to any such renewal period that it does not wish to renew the MSA. Termination of the MSA will not affect the obligations of the parties with respect to the performance of Service Orders existing as of the termination date or the applicability of the terms and conditions set forth in the MSA to such Service Orders.
- (c) **Termination:** New Skies may elect to terminate a Service Order or suspend service if, among other things, Juch-Tech fails to (i) pay any amount when due and does not cure such default within 10 days of receiving notice thereof, (ii) cease any activity in violation of Section 4 (Compliance with Laws) or Section 5 (Permitted

⁸ Hassinger Affidavit at para 7.

⁹ Hassinger Affidavit at para 8.

¹⁰ Hassinger Affidavit at para 10.

Use) immediately after receiving notice from New Skies, or (iii) cease any other activities in violation of the MSA or any Service Order within 30 days after receiving notice of such breach.

The MSA also provides that Juch-Tech will immediately cease all transmissions upon the expiration or termination of a Service Order unless otherwise agreed in writing by New Skies. However, if Juch-Tech fails to cease use of the service immediately, then without implying any right to continued use, Juch-Tech will pay a fee equal to the then-current rate for thirty-day occasion use service charged by New Skies, which payments will continue until Juch-Tech's use ceases.

12. Pursuant to the terms of the MSA, New Skies and Juch-Tech also entered into three Service Orders (which were replaced with updated versions from time to time).¹¹ Each Service Order was effective for a certain term (generally, between one and five years); specified which satellite services would be provided by New Skies to Juch-Tech; and specified a monthly Service Fee to be paid by Juch-Tech for such services. Each Service Order also required Juch-Tech to deposit security, which was to be applied toward the Service Fee due for the last month of the term.

13. All the Service Orders with Juch-Tech have expired as of May 2017 and there are no Service Orders currently in effect.¹² However, Juch-Tech continued to utilize some of New Skies' satellites after the expiry of the Service Orders until early 2020.¹³ This was a violation of the MSA.

14. Initially, New Skies tolerated Juch-Tech's continued use of its satellites in order to permit Juch-Tech's business to operate while New Skies tried to collect the significant receivable owing

¹¹ Hassinger Affidavit at para 8.

¹² Hassinger Affidavit at para 9.

¹³ Hassinger Affidavit at para 9.

to it. Juch-Tech indicated at various times to New Skies that it had found third-party investors for its business and that an interruption of the satellite link would have severe implications on the ground. Moreover, it was technically impossible for New Skies to block Juch-Tech's unauthorized use without risking interruption for other customers using those same satellites. In light of these circumstances, and the ongoing discussions regarding the settlement of Juch-Tech's significant debt, New Skies permitted Juch-Tech some continued use.¹⁴

15. However, after Juch-Tech's continued failure to pay the debt owing to New Skies notwithstanding New Skies' indulgence, New Skies sent notices demanding that Juch-Tech cease such unauthorized use. Juch-Tech ignored these notices.¹⁵

C. The General Security Agreement

16. Starting in 2011, Juch-Tech began falling behind on payments owing to New Skies under the Service Orders. New Skies began sending Juch-Tech non-payment notifications in 2012.¹⁶ As of June 2015, Juch-Tech owed U.S. \$5,216,616.39 to New Skies (again, the "**Secured Obligation**"). New Skies indicated that it was not willing to continue providing services on an unsecured basis given this significant receivable. As a result, New Skies and Juch-Tech entered into the General Security Agreement dated July 2, 2015.¹⁷

17. Under the General Security Agreement, as general and continuing security for the Secured Obligation, Juch-Tech granted to New Skies a continuing security interest in the undertaking of Juch-Tech and in all Goods, Chattel Paper, Documents of Title, Instruments, Intangibles,

¹⁴ Hassinger Affidavit at para 21.

¹⁵ Hassinger Affidavit at para 9.

¹⁶ Hassinger Affidavit at para 11.

¹⁷ Hassinger Affidavit at para 11.

Securities and any other personal property or rights owned or acquired by Juch-Tech as of the date of the General Security Agreement or thereafter (collectively, the “**Collateral**”).¹⁸

18. Juch-Tech made certain representations and warranties in the General Security Agreement, including the following:¹⁹

- (a) Section 2(a) provides that Juch-Tech would not give any further or other security agreement covering the Collateral to any party other than New Skies, and no financing statement (other than any on behalf of New Skies) covering any of the Collateral “is, now or will be” on file in any public office while the General Security Agreement remains outstanding.
- (b) Section 2(b) provides that, except for the security interest granted in the General Security Agreement, Juch-Tech is, or as to Collateral acquired after the date of the General Security Agreement (save the purchase money security interest as described above) will be, the owner of the Collateral, free from any adverse lien, security interest or encumbrance. In addition, Juch-Tech agreed to defend the Collateral against all claims and demands of all persons at any time claiming the same or any interest therein.
- (c) Section 2(c) provides that Juch-Tech’s principal place of business and the location of the office where it keeps its records respecting the accounts receivable was that given at the beginning of the General Security Agreement. The General Security Agreement lists only one business address for Juch-Tech: 50 Green Mountain Road West, Hamilton, Ontario. If Juch-Tech changes its principal place of business, or

¹⁸ Hassinger Affidavit at para 12.

¹⁹ Hassinger Affidavit at para 13.

the location of the inventory or equipment, or the location of the office where it keeps its records respecting the accounts receivable, or acquires other places of business, it must promptly notify New Skies.

- (d) Section 2(d) provides that Juch-Tech will from time to time forthwith on request furnish to New Skies in writing all information requested relating to the Collateral and New Skies shall be entitled from time to time to inspect the Collateral.

19. The General Security Agreement also contains several events of default upon which the security will become enforceable at New Skies' option, including:²⁰

- (a) If Juch-Tech fails to pay or perform when due any of the Secured Obligation;
- (b) If Juch-Tech fails to perform any provision of the General Security Agreement, or of any other agreement to which Juch-Tech and New Skies are parties;
- (c) If any of the representations or warranties in the General Security Agreement are, or are deemed to have been, wilfully false or inaccurate when made; and
- (d) If Juch-Tech ceases or threatens to cease to carry on its business, commits an act of bankruptcy, becomes insolvent, makes an assignment or bulk sale of its assets, or proposes a compromise or arrangement to its creditors.

20. If any event of default occurs, the General Security Agreement provides that, among other things, New Skies may take such steps as it considers necessary or desirable to obtain possession of all or any part of the Collateral, and that New Skies may by its agents, enter upon lands and

²⁰ Hassinger Affidavit at para 14.

premises for the purpose of taking possession of and removing the Collateral or any part thereof.²¹ The General Security Agreement also provides that New Skies may deal with the Collateral or any part thereof in such manner, upon such terms and conditions and at such time or times as may seem to it advisable and without notice to Juch-Tech.²² Any failure of New Skies to exercise any right set out in the General Security Agreement in any particular instance shall not constitute a waiver thereof in any other instance.²³

21. The General Security Agreement contemplated that New Skies and Juch-Tech would enter into a payment plan. The parties exchanged drafts of a payment plan and New Skies received verbal promises from representatives of Juch-Tech that Juch-Tech would make payments to pay off the significant arrears owing to New Skies.²⁴ However, the parties never finalized a payment plan. While Juch-Tech made a few payments to New Skies, it did not make consistent payments and its arrears continued to grow over time.²⁵

22. Pursuant to its rights under the General Security Agreement, New Skies registered its security interests against the Collateral under the *Personal Property Security Act* (Ontario) (the “**PPSA**”).²⁶ Based on a search of the Personal Property Registry in Ontario conducted on December 3, 2020, the only other secured parties that appear are Canada Trustco Mortgage Company (now known as TD Canada Trust) (“**Canada Trustco**”) and the Hamilton Teleport Ltd., which New Skies understands to be a related entity to Juch-Tech (“**Hamilton Teleport**” and, collectively, the “**PPSA Registrants**”).²⁷

²¹ Hassinger Affidavit at para 15.

²² Hassinger Affidavit at para 15.

²³ Hassinger Affidavit at para 16.

²⁴ Hassinger Affidavit at para 17.

²⁵ Hassinger Affidavit at para 17.

²⁶ Hassinger Affidavit at para 18.

²⁷ Hassinger Affidavit at para 18.

D. Loss of Confidence in Juch-Tech

23. Juch-Tech is currently in default under the MSA, the Service Orders, and the General Security Agreement. The existing and continuing defaults under the General Security Agreement include the following:²⁸

- (a) Juch-Tech has failed to pay the Secured Obligation, which is an event of default under Section 3(a) of the General Security Agreement;
- (b) Juch-Tech has failed to perform its obligations under Section 6 of the MSA by failing to pay outstanding Service Fees when due and interest thereon, which is an event of default under Section 3(b) of the General Security Agreement;
- (c) Juch-Tech has failed to deliver a detailed summary of the scope and value of the Collateral pursuant to Section 2(d) of the General Security Agreement and information regarding Juch-Tech's indebtedness to PPSA Registrants that was requested in the correspondence described below. This is an event of default under Section 3(b) of the General Security Agreement; and
- (d) Juch-Tech has engaged in unauthorized use of New Skies' satellites, in violation of the MSA.

24. In addition to these events of default, Juch-Tech's actions over a period of years have frustrated the relationship and caused New Skies to utterly lose confidence in Juch-Tech and its management.

²⁸ Hassinger Affidavit at para 19.

(a) New Skies' Demands for Payment and Requests for Information

25. Despite New Skies' continued support, Juch-Tech did not make any consistent payments and did not meaningfully reduce the significant arrears owing to New Skies.²⁹

26. As a result of Juch-Tech's conduct, New Skies ultimately demanded payment of the amounts owing by Juch-Tech. New Skies has sent numerous correspondence to Juch-Tech demanding that Juch-Tech cure its defaults and repay the Juch-Tech Indebtedness.³⁰ However, Juch-Tech has failed to respond to any of the three demand letters sent in 2020.³¹

(b) Information Requests to PPSA Registrants

27. Due to Juch-Tech's refusal to respond to New Skies' information requests, including its refusal to provide required information about the Collateral, New Skies has limited information regarding the value of Juch-Tech's assets available for realization or the amount of any other secured indebtedness. As a result, after Juch-Tech failed to provide the requested information regarding amounts owed by Juch-Tech to the PPSA Registrants, New Skies directly sought the information from the PPSA Registrants themselves.³² In particular, on April 1 and 7, 2020, Osler on behalf of New Skies sent letters to the PPSA Registrants seeking the following information pursuant to s. 18 of the PPSA:³³

- (a) a statement in writing of the amount of the indebtedness and the terms of payment thereof as of the date of the letter; and

²⁹ Hassinger Affidavit at para 21.

³⁰ New Skies or its counsel on behalf of New Skies sent demand letters to Juch-Tech on: May 21, 2019; February 20, 2020; March 20, 2020; and November 4, 2020. The last three of these demand letters contained s. 244 notices of intent to enforce on security pursuant to the terms of the BIA: Hassinger Affidavit at para 22.

³¹ Hassinger Affidavit at para 23.

³² Hassinger Affidavit at para 24.

³³ Hassinger Affidavit at para 24.

- (b) a true copy of the security agreement(s).

28. Canada Trustco responded to the request and provided the requested information in late October and early November 2020. Canada Trustco's response was delayed in part due to COVID-19 and due to their internal legal counsel considering the request. Canada Trustco ultimately advised that it had extended a business line of credit to Juch-Tech, that Juch-Tech owed \$99,037.65 as of October 23, 2020, and that the debt owed to Canada Trustco fluctuated between \$95,000 to \$99,000.00 on a monthly basis. Canada Trustco also provided copies of certain documents and its PPSA registration.³⁴

29. To date, New Skies has not received any response from Hamilton Teleport.³⁵

30. New Skies believes that Hamilton Teleport and Juch-Tech are related corporations for reasons including:³⁶

- (a) Both companies' corporate search reports indicate that they have the same registered address (335 Greencedar Drive, Hamilton) and have the same director (W. Juchniewicz, which appears to be Walt Juchniewicz, President and Chief Executive Officer of Juch-Tech). 335 Greencedar Drive, Hamilton is also listed as the address for W. Juchniewicz in each of the corporate search reports;
- (b) Juch-Tech provided a submission to Industry Canada dated April 16, 2009 which states that Juch-Tech is the "owner and operator of the Hamilton Teleport"; and

³⁴ Hassinger Affidavit at para 24.

³⁵ Hassinger Affidavit at para 25.

³⁶ Hassinger Affidavit at para 28.

- (c) A posting on isp.today (an online directory of internet service providers) states that Juch-Tech “operates at The Hamilton Teleport”.

31. Juch-Tech and Hamilton Teleport are parties to a lease agreement dated January 1, 2009 (the “**Lease**”) under which Hamilton Teleport leases to Juch-Tech certain premises at 50 Green Mountain Road West, Stoney Creek, ON and all telecommunication related licenses held and maintained by Hamilton Teleport.³⁷

32. Juch-Tech and Hamilton Teleport are parties to a Security Agreement dated May 13, 2011.³⁸

E. A Receiver Must be Appointed Urgently

33. Despite Juch-Tech repeatedly ignoring New Skies’ requests for information and demands for payment, New Skies has until now refrained from taking steps to enforce its security interest, in part because it did not have the necessary information to determine the realizable value of the Collateral and any debt that may rank in priority to the Juch-Tech Indebtedness.³⁹ In addition, in an act of good faith, and without prejudice to its ability to enforce on its security, New Skies provided Juch-Tech with time to secure additional funding or sell its business so that Juch-Tech could fund payment of the significant arrears owing to New Skies. However, as detailed above,

³⁷ Hassinger Affidavit at para 28(d).

³⁸ Hassinger Affidavit at para 28(e).

³⁹ Hassinger Affidavit at para 29.

over the past year, Juch-Tech and Hamilton Teleport have completely ignored the numerous demand notices and requests for information made by New Skies.

34. More critically, over the past few days, New Skies has discovered that Juch-Tech appears to have moved assets without providing notice to New Skies, potentially to avoid any enforcement steps by New Skies.⁴⁰

35. On December 1, 2020, Osler, as counsel to New Skies, contacted KSV to potentially act as a Receiver in this matter. KSV prepared a pre-filing report outlining its steps to investigate Juch-Tech after it was contacted by Osler and certain findings related to Juch-Tech (the “**KSV Report**”). Among other things, the KSV Report states that:⁴¹

- (a) KSV performed internet searches on Juch-Tech. These searches suggest that Juch-Tech has moved satellite dishes believed to be owned by Juch-Tech from 50 Green Mountain Road West in Stoney Creek, ON (the “**Green Mountain Property**”) to 10th Rd E, Stoney Creek, ON (the “**10th Road Property**”). The 10th Road Property is listed online as Juch-Tech’s current address.
- (b) On December 2, 2020, KSV sent one of its representatives to the Green Mountain Property. Prior to this visit, KSV obtained “street view” and “aerial” pictures of the Green Mountain Property dated June 2009 and June 2019 from Google maps, which show several buildings and satellite dishes on the property. However, when the KSV representative visited the Green Mountain Property on December 2, it was

⁴⁰ Hassinger Affidavit at para 30.

⁴¹ Hassinger Affidavit at para 30.

vacant and no buildings, satellite dishes, antennae or other equipment was located on the property.

- (c) Juch-Tech's operations, and the Collateral, appear to have been moved to a second location not previously disclosed to New Skies. After his attendance at the Green Mountain site, the KSV representative identified a field with numerous satellite dishes and other equipment located near the intersection of 10th Road East and Dofasco 2000 Trail in Stoney Creek (the "**Operating Site**"). This is believed to be the 10th Road Property. The KSV representative briefly spoke with one of the men at the Operating Site, who advised that he is a contractor and that Juch-Tech is operating from that location

36. Based on this information, it appears that Juch-Tech has ceased operating at the Green Mountain Property and has moved certain of its satellites and other assets that form part of the Collateral to the 10th Road Property.⁴² A title search indicates that Hamilton Teleport is the current owner of the 10th Road Property.⁴³

37. Under the General Security Agreement, Juch-Tech is obligated to give notice to New Skies before it moves its office or the Collateral. New Skies did not receive any such notice.⁴⁴

38. Based on historical satellite photographs, it appears that Juch-Tech may have moved the satellite dishes to the Operating Site a few weeks after New Skies sent a demand letter to Juch-Tech in May 2019.⁴⁵

⁴² Hassinger Affidavit at para 31.

⁴³ Hassinger Affidavit at para 31.

⁴⁴ Hassinger Affidavit at para 32.

⁴⁵ Hassinger Affidavit at para 33.

39. As a result of the relocation of the satellite dishes, New Skies is urgently seeking an order appointing KSV as Receiver to, among other things, obtain and review Juch-Tech's books and records to determine the realizable value of any Collateral and to take steps to safeguard the Collateral to eliminate the risk that it is further relocated and removed beyond the reach of creditors. Once KST has had an opportunity to review Juch-Tech's operations, financial position and its books and records, it will provide a report to New Skies and the Court by January 15, 2021 at the latest. After reviewing that report, New Skies may seek court approval to expand KSV's mandate to take possession and control of the Collateral and realize on the assets.⁴⁶

PART III -THE ISSUES

40. The issues to be determined on this application are whether:
- (a) This Court has authority to appoint the proposed Receiver;
 - (b) Appointment of the proposed Receiver would be "just" or "convenient";
 - (c) This Court should authorize the Receiver's Charge and Receiver's Borrowing Charge; and
 - (d) It is appropriate for this proceeding to be commenced in Ontario and for the requested Order to be granted by this Court?

PART IV - THE LAW

A. Authority to Appoint the Receiver

41. Under section 101(1) of the *Courts of Justice Act* (Ontario), this Court has the power to appoint a receiver or receiver and manager "where it appears to a judge of the court to be just or convenient to do so." Section 101(2) provides that an order under subsection (1) may include "such terms as are considered just."

⁴⁶ Hassinger Affidavit at para 35.

42. The test for appointing a receiver under the authority of section 243 of the *BIA* is similar. Section 243 authorizes a court, on application by a secured creditor, to appoint a receiver over the property of an insolvent person:

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.

43. Where a notice of intention to enforce security has been issued under section 244(1) of the *BIA*, section 243(1.1) authorizes the court to issue a receivership order only after ten days have expired following the date that the secured creditor sends the section 244 notice, unless the insolvent person consents to an earlier enforcement or the court considers it appropriate to appoint a receiver before then.

44. On February 20, 2020, Osler, on behalf of New Skies, delivered a demand letter to Juch-Tech at its last known address that enclosed a notice of intention to enforce security pursuant to s. 244 of the *BIA* to Juch-Tech. Subsequently, on March 20, 2020, Osler on behalf of New Skies sent a second demand letter to Juch-Tech and requested a detailed summary of the scope and value of the Collateral. Finally, on November 4, 2020, Osler on behalf of New Skies sent a third demand letter enclosing a second s. 244 notice. The ten-day standstill period required by s. 243(1.1) for each of these two notices has long since expired, satisfying the requirement for appointing a Receiver.

B. Appointment of the Receiver is “Just” or “Convenient”

45. In determining whether it is “just” or “convenient” to appoint a receiver, the Court should have regard for all the circumstances of the case, including: (i) the nature of the property over which the receiver is to be appointed; (ii) the rights and interests of all parties in relation to the property over which the receiver is to be appointed; and (iii) whether the secured creditor has the right under the security agreement to appoint a receiver privately.⁴⁷

46. On numerous occasions, courts have held that a loss of confidence in the debtor and its management arising from a pattern of defaults supports the appointment of a receiver, even in the face of arguments that such appointment may have significant consequences for a debtor’s employees, unsecured creditors and shareholders.⁴⁸

47. Where a debtor has repeatedly defaulted on a payment agreement, has failed to provide information regarding the state of the creditor’s security as per its contractual requirements, and failed to respond to the creditor despite the creditor’s attempts to secure compliance without acting on its security, it will be just or convenient to appoint a receiver.⁴⁹

48. Another factor that militates in favour of the appointment of a receiver is evidence of dishonest or other improper conduct by the debtor.⁵⁰ Similarly, it is appropriate to appoint a receiver where there is a serious apprehension about the safety of the assets or where a debtor

⁴⁷ [Bank of Nova Scotia v Freure Village on Clair Creek](#), 1996 CarswellOnt 2328 (Gen Div) [*Freure Village*] at para 10; [Callidus Capital Corp v Carcap Inc](#), 2012 ONSC 163 [*Callidus*] at para 41.

⁴⁸ See for example, [Affinity Credit Union 2013 v Vortex Drilling Ltd](#), 2017 SKQB 228 [*Affinity*] at para 37; *Callidus* at para 51; [Alexander v 2025610 Ontario Ltd](#), 2012 ONSC 3486 [*Alexander*] at para 49.

⁴⁹ [Bank of Montreal v Gian’s Business Centre Inc](#), 2016 BCSC 2348 [*Gian’s*] at paras 11-15, 26-27.

⁵⁰ *Affinity* at paras 33-35; *Callidus* at para 52.

appears to be taking steps to defeat the rights of secured creditors. It is just or convenient to appoint a receiver where the principal owing is in arrears and where the security is in jeopardy.⁵¹

49. A receivership order may be made on an *ex parte* basis where urgent circumstances exist and the applicant is at a real risk of irreparable harm: for instance there is a “reasonable apprehension of serious mischief and risk of disappearance or dissipation of assets.”⁵² There will be an “element of urgency” when the creditor has no information about the state of its security because the debtor has failed to respond to information requests or address a creditor’s concerns.⁵³

50. In light of this jurisprudence, New Skies submits that it is just and convenient to urgently appoint the Receiver in respect of Juch-Tech because:

- (a) Juch-Tech has been in default of its payment obligations to New Skies in one form another for many years;
- (b) Juch-Tech’s current indebtedness to New Skies exceeds U.S. \$10.4 million and is continuing to accrue interest and costs. Despite support from New Skies, Juch-Tech has never made a meaningful effort to reduce this significant indebtedness;
- (c) Juch-Tech has engaged in a pattern of improper conduct including unauthorized use of New Skies’ satellites in violation of the MSA;
- (d) Juch-Tech has ignored and failed to respond to multiple demand letters and multiple requests for the required Collateral Summary over a period of months;

⁵¹ [Ontario Development Corp v Ralph Nicholas Enterprises Ltd](#), 1985 CarswellOnt 206 (Sup Ct [In Bkcty]) at para 20.

⁵² [Paragon Capital Corp v Merchants & Traders Assurance CO](#), 2002 ABQB 430 at para 20.

⁵³ *Gian’s* at para 40; see also *Alexander* at paras 29,49.

- (e) Juch-Tech has committed material and continuing events of default under the MSA and the General Security Agreement, including failing to deliver the Collateral Summary as required by the General Security Agreement;
- (f) After receiving a s. 244 notice from New Skies, Juch-Tech appears to have moved its business and the Collateral without informing New Skies of the move, in violation of the General Security Agreement;
- (g) This move appears to be an attempt to thwart New Skies' enforcement rights and places New Skies' Collateral at risk – this Collateral being potentially New Skies' only source of recovery;
- (h) In light of Juch-Tech consistently withholding information about the Collateral, and now appearing to move the Collateral without New Skies' knowledge or consent, a Receiver is urgently required to ensure the security of the Collateral and to preserve New Skies' secured interest therein;
- (i) The General Security Agreement authorizes New Skies to take steps, or engage others to take steps on its behalf, to enforce on its security if Juch-Tech commits an event of default, and these provisions contemplate the "reasonable expenses" of a receiver; and
- (j) New Skies' efforts to enforce on its security and collect the significant arrears owing to it have been stymied by Juch-Tech's refusal to provide required information. A court-appointed Receiver is needed to conduct a thorough review of Juch-Tech's affairs and determine the realizable value of the Collateral.

51. While the General Security Agreement does not expressly authorize the appointment of a receiver, this is not a requirement to appoint a receiver. Both the *BIA and the Courts of Justice Act* authorize this Court to appoint a receiver when it is “just” or “convenient” to do so. Under the *Courts of Justice Act*, there are no preconditions for the exercise of a court’s discretion to appoint a receiver: each case depends on its own facts, and courts have appointed receivers at the behest of a creditor even without an express contractual entitlement.⁵⁴ Moreover, the General Security Agreement provides that New Skies may charge reasonable sums for services rendered in enforcing on its security, expressly including expenses for a receiver.⁵⁵ As such, the parties to the General Security Agreement clearly contemplated that a receiver might be appointed in respect of the Collateral.

52. New Skies’ previous support of Juch-Tech while Juch-Tech insisted it was seeking third-party investment in its business does not impact the appointment of the Receiver. A secured creditor can elect to seek the appointment of a receiver at any time, and the appropriateness of such appointment will be assessed based on the particular circumstances of each case. As circumstances have changed, and new information has come to light about Juch-Tech’s conduct, New Skies has determined that it must now immediately take enforcement measures. The parties contemplated this possibility in the General Security Agreement, which provides that any failure of New Skies to exercise any right in any particular instance shall not constitute a waiver thereof in any other instance.⁵⁶

53. In light of Juch-Tech’s actions, it is critical that a Receiver be appointed to ensure that New Skies’ rights as a secured creditor are safeguarded, and to facilitate the review of Juch-Tech’s

⁵⁴ See for example [DeGroot v DC Entertainment Corp](#), 2013 ONSC 7101 at para 53.

⁵⁵ Hassinger Affidavit at para 15.

⁵⁶ Hassinger Affidavit at para 16.

books and records. It is anticipated that the Receiver will report back to the Court as soon as possible regarding the potential realizable value of any remaining Collateral. KSV is a reputable corporate restructuring, financial advisory and consulting firm with extensive experience in restructuring transactions in Canada. KSV has consented to act as Receiver if appointed by this Honourable Court.⁵⁷

C. Court Ordered Charges should be Approved

(a) Receiver's Charge

54. The proposed Appointment Order provides that the Receiver and counsel to the Receiver will be granted a charge on the Collateral to secure the payment of their respective fees and disbursements incurred in connection with these proceedings (the "**Receiver's Charge**"). Except as discussed below, the Receiver's Charge would form a first-priority charge on the Property of the Debtor. Given the urgent nature of this Application and to ensure that the rights of secured creditors are protected, the Appointment Order provides that the Receiver's Charge shall not rank in priority to any encumbrance in favour of a secured creditor who would be materially affected by the Appointment Order and who was not given notice of this Application.

55. The proposed Receiver's Charge is typical in proceedings of this nature and is permitted under section 243(6) of the *BIA*.

(b) Receiver's Borrowing Charge

56. The Receiver may need to borrow funds in order to administer the Collateral and carry out its other duties and responsibilities pursuant to the proposed Appointment Order. New Skies is

⁵⁷ Hassinger Affidavit at para 36.

seeking, as part of the Appointment Order, a provision that the Receiver is authorized to borrow funds for this purpose (from the Applicant or otherwise), provided that the outstanding principal amount does not exceed \$500,000 (or such greater amount as this Court may by further Order authorize) at any time. Any such borrowings would be secured by a fixed and specific charge (the “**Receiver’s Borrowings Charge**”) over the Property of the Debtor.⁵⁸

57. The Receiver’s Borrowings Charge is proposed to rank behind the Receiver’s Charge (which will which will secure the Receiver’s fees and disbursements), any security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of a secured creditor who would be materially affected by the granting of the requested order and who was not given notice of New Skies’ application, and subject to the charges set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA, but ahead of all other indebtedness.⁵⁹

D. Ontario is the Appropriate Jurisdiction for the requested Order

58. Section 243(5) of the *BIA* provides that the application for the appointment of the receiver under section 243 of the *BIA* must be brought in the court having jurisdiction in the “judicial district of the locality of the debtor.”

59. Section 2 of the *BIA* defines “locality of a debtor” as follows:

locality of a debtor means the principal place

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated;

⁵⁸ Hassinger Affidavit at paras 37-38.

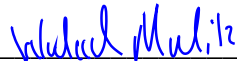
⁵⁹ Hassinger Affidavit at para 38.

The Supreme Court of Canada has held that the “locality of a debtor” test requires the Court to consider the jurisdiction which has the most substantial connections to the debtor.⁶⁰ In this case, the jurisdiction with the most substantial connection to Juch-Tech is Ontario. Juch-Tech is a corporation registered under the laws of Canada with its registered head office in Hamilton, Ontario. Moreover, the bulk of Juch-Tech’s assets and business operations appear to be currently located in Stoney Creek, Ontario. Finally, while not determinative, the General Security Agreement specified that the parties agreed to submit themselves to the jurisdiction of the courts of Ontario. Accordingly, the “locality” of Juch-Tech for the purposes of the *BIA* is Ontario.

PART V - RELIEF REQUESTED

60. For the foregoing reasons, the Applicant requests that this Honourable Court grant the requested Appointment Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of December, 2020.



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⁶⁰ [Eagle River International Ltd, Re](#), 2001 SCC 92 at paras 76-78.

SCHEDULE A - LIST OF AUTHORITIES

Case Law

1. [*Affinity Credit Union 2013 v Vortex Drilling Ltd*](#), 2017 SKQB 228
2. [*Alexander v 2025610 Ontario Ltd*](#), 2012 ONSC 3486
3. [*Bank of Montreal v Gian's Business Centre Inc*](#), 2016 BCSC 2348
4. [*Bank of Nova Scotia v Freure Village on Clair Creek*](#), 1996 CarswellOnt 2328 (Gen Div)
5. [*Callidus Capital Corp v Carcap Inc*](#), 2012 ONSC 163
6. [*DeGroot v DC Entertainment Corp*](#), 2013 ONSC 7101
7. [*Eagle River International Ltd*](#), 2001 SCC 92
8. [*Ontario Development Corp v Ralph Nicholas Enterprises Ltd*](#), 1985 CarswellOnt (Sup Ct [In Bkcty])
9. [*Paragon Capital Corp v Merchants & Traders Assurance Co*](#), 2002 ABQB 430

SCHEDULE B -STATUTES

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3

Definitions

2 In this Act,

locality of a debtor means the principal place

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated;

[...]

Priority of claims

14.06 (7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security

(a) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and

(b) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

[...]

Rank of security

81.1(4) A security under this section ranks above every other claim, right, charge or security against the person's current assets — regardless of when that other claim, right, charge or security arose — except rights under sections 81.1 and 81.2.

[...]

Rank of security

81.6(2) A security under this section ranks above every other claim, right, charge or security against the person's assets, regardless of when that other claim, right, charge or security arose, except rights under sections 81.1 and 81.2 and securities under sections 81.3 and 81.4.

[...]

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.

Place of filing

243(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

243(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.

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.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

NEW SKIES SATELLITES B.V.

Applicant

and

JUCH-TECH INC..

Respondent

Court File No:

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
PROCEEDING COMMENCED AT: TORONTO**

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