

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

MITSUBISHI HC CAPITAL CANADA, INC. and
MITSUBISHI HC CAPITAL CANADA LEASING, INC.

Applicants

and

ORBIT EXPRESS INC., 10055913 CANADA INC.,
and 8615314 CANADA INC.

Respondents

APPLICATION UNDER 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

FACTUM OF THE APPLICANTS

July 23, 2024

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TO: **SERVICE LIST**

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FACTUM OF THE APPLICANTS

INTRODUCTION

1. This Factum is filed in support of an Application by Mitsubishi HC Capital Canada, Inc. (“**MHCCA**”) and its affiliate, Mitsubishi HC Capital Canada Leasing, Inc. (“**MHCCL**”, and together with MHCCA, the “**Lender**”) for an Order (the “**Appointment Order**”) appointing msi Spergel Inc. (“**MSI**”) as receiver and manager (in such capacity, the “**Receiver**”), without security, over all property, assets and undertakings of Orbit Express Inc. (“**Orbit**”), 10055913 Canada Inc. (“**100 Inc**”), and 8615314 Canada Inc. (“**861**”, together with Orbit and 100 Inc, the “**Debtors**”), pursuant to section 243 of the *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3 (the “**BIA**”)¹ and section 101 of the *Courts of Justice Act*, RSO 1990, c C43.²

SUMMARY OF FACTS

2. The facts with respect to this Application are only briefly recited herein and are set out in more detail in the Affidavit of Samuel Leblond (the “**Leblond Affidavit**”).³ Capitalized terms not otherwise defined herein have the meaning ascribed to them in the Leblond Affidavit.

¹ *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3 (“**BIA**”).

² *Courts of Justice Act*, RSO 1990, c C43 (“**CJA**”).

³ Affidavit of Samuel Leblond affirmed July 19, 2024, Application Record of the Applicants dated July 19, 2024 (“**AR**”), Tab 2 (“**Leblond Affidavit**”).

Credit Agreements and Security

3. The Lender is a financial institution that provides asset-based financing solutions to Canadian businesses through different divisions, including MHCCA and MHCCCL, depending on the nature of the financing product and collateral.⁴
4. The Lender made certain credit facilities available to the Debtors, including:
 - (a) the Factoring Facility under the Factoring Agreement;
 - (b) the EBR Facility under the Revolving Loan and Security Agreement;
 - (c) the Orbit Lease Agreements; and
 - (d) the 861 Lease Agreements (collectively, the “**Credit Agreements**”).⁵
5. As of July 11, 2024, the Debtors owed the Lender approximately CAD\$2,691,099.76 and approximately USD\$573,486.15 (the “**Indebtedness**”).⁶
6. As security for its indebtedness and liability to the Lenders pursuant to the Credit Agreements, among other things, the Debtors provided:
 - (a) a General Security Agreement dated December 5, 2021, pursuant to which Orbit granted to MHCCA a security interest in all of its present and after-acquired property;

⁴ Leblond Affidavit at para 3, AR, Tab 2.

⁵ Leblond Affidavit at para 7, AR, Tab 2.

⁶ Leblond Affidavit at paras 12-13, AR, Tab 2.

- (b) a General Absolute Assignment of Receivables dated December 5, 2021 from Orbit in favour of MHCCA;
 - (c) a Specific Security Agreement dated June 28, 2023, pursuant to which Orbit and 100 Inc granted to MHCCA a security interest in specified equipment and motor vehicles (as described therein); and
 - (d) a General Security Agreement dated January 14, 2022, under which 100 Inc granted a security interest in all of 100 Inc's present and after-acquired property.⁷
7. The Lender holds a first ranking security interest in respect of all of the assets, undertakings and property of the Debtors subject to this receivership application (the "**Property**").⁸ The Lender perfected its security interest against the Debtors by registration in accordance with the *Personal Property Security Act*, RSO 1990, c. P.10 (the "**PPSA**").⁹
8. Certain of the Orbit Lease Agreements indicate the lender as CLE Capital Inc. or Tpine Leasing Capital Corporation. The Lender subsequently acquired CLE Capital Inc. and Tpine Leasing Capital Corporation assigned the applicable Orbit Lease Agreements to MHCCL.¹⁰

⁷ Leblond Affidavit at para 7, AR, Tab 2.

⁸ Leblond Affidavit at paras 14-15, and 18, AR, Tab 2.

⁹ Leblond Affidavit at para 18, AR, Tab 2.

¹⁰ Leblond Affidavit at paras 9-10, AR, Tab 2.

9. Certain of the 861 Lease Agreements indicate the lender is Sonoma Capital Corp. Sonoma Capital Corp. is a syndicate partner of MHCCL and assigned the applicable 861 Lease Agreement to MHCCL.¹¹
10. In addition to the Lender's security registrations, there are a number of additional VIN-specific registrations from other secured parties as well as 63 registrations under the *Repair Storage Lien Act* totalling nearly \$125,000 (the "**RSLA Registrations**").¹² The majority of the RSLA Registrations are also registered against Tpine Leasing Capital Corporation, which is currently subject to proceedings under the *Companies Creditors Arrangement Act* in the Ontario Superior Court of Justice (Commercial List).¹³

Defaults and Demands

11. Under the terms of the General Security Agreement and the Specific Security Agreement, upon the occurrence of an event of default, Orbit and 100 Inc agreed the Lender may take possession of its collateral and enforce their rights by any manner permitted by law.¹⁴
12. The Orbit Lease Agreements and 861 Lease Agreements expressly authorize the Lender to appoint a receiver upon the occurrence of an event of default.¹⁵

¹¹ Leblond Affidavit at para 11, AR, Tab 2.

¹² Leblond Affidavit at paras 20-22, AR, Tab 2.

¹³ Leblond Affidavit at para 22, AR, Tab 2.

¹⁴ Leblond Affidavit at para 16, AR, Tab 2.

¹⁵ Leblond Affidavit at para 17, AR, Tab 2.

13. Contrary to the terms of the Lender's security agreements with the Debtors, the Debtors permitted the RSLA Registrations.¹⁶
14. Additionally, the Debtors took steps to divert funds from its account debtors that were properly payments to be made to the Lender pursuant to the Credit Agreements.¹⁷
15. In light of the defaults under the Credit Agreements, the Lender demanded repayment in full of amounts owing to the Lender (the "**Demand**") and delivered Notices of Intention to Enforce Security under Section 244 of the BIA (the "**NITES**"). As of the return date of this Application, the 10-day waiting period will have expired.¹⁸

Concerns about Debtors' Diversion of Funds and Business Operations

16. Beyond the defaults under the Credit Agreements, the Lender has serious concerns about the Debtors actions to date and the risk to the Lender's collateral.¹⁹
17. Chief among the Lender's concerns is that the Debtors have repeatedly attempted to convince account debtors to divert funds that are required to be paid directly to the Lender in accordance with the Factoring Agreement.²⁰

¹⁶ Leblond Affidavit at para 21, AR, Tab 2.

¹⁷ Leblond Affidavit at paras 26-35, AR, Tab 2.

¹⁸ Leblond Affidavit at para 24 and 40, AR, Tab 2. The Notice of Intention to Enforce on Security enclosure was inadvertently excluded from the original Demand and was served on 100 Inc on July 18, 2024.

¹⁹ Leblond Affidavit at para 23, AR, Tab 2.

²⁰ Leblond Affidavit at paras 26-35, AR, Tab 2.

Beyond this, the Debtors permitted the RSLA Registrations, appear to be removing branding from the vehicles secured under the Credit Agreements, and the principals of the Debtors have incorporated another corporate entity in Alberta.²¹

STATEMENT OF ISSUES, LAW & AUTHORITIES

18. The only issue to be determined by the Court in respect of this Application is whether it is just and convenient to appoint MSI as Receiver over the assets, property and undertakings of the Debtors.

Technical Requirements to Appoint a Receiver Have Been Met

19. The Lender submits that the technical requirements for the appointment of a receiver under both the BIA and the CJA have been met.
20. The technical requirements in these circumstances are the following:
- (a) under the BIA, the applicant must be a secured creditor (this is not a requirement to appoint a receiver under the CJA);
 - (b) the applicant must have sent a NITES pursuant to section 244 of the BIA;
 - (c) the 10-day notice period has expired; and
 - (d) the proposed receiver is a licensed insolvency trustee that has consented to the appointment.

²¹ Leblond Affidavit at paras 25, 36-40, AR, Tab 2.

21. The Lender is a secured creditor of the Debtors and is therefore entitled to bring an application under section 243 of the BIA. As required under subsection 243(1.1) of the BIA, the Lender issued the NITES. The notice period for Orbit and 861, as provided for under the BIA and outlined in the NITES, has expired.²² The NITES for 100 Inc was served on July 18, 2024 and will expire on July 29, 2024.²³
22. MSI is qualified to act as Receiver in accordance with the requirements of subsection 243(4) of the BIA and has consented to serve as Receiver in these proceedings.²⁴

It Is Just and Convenient to Appoint the Receiver

23. Pursuant to both subsection 243(1) of the BIA,²⁵ and subsection 101(1) of the CJA,²⁶ the Court may grant an order appointing a receiver when it is “just or convenient” to do so.
24. In *Freure Village*, Justice Blair (as he was then), found that, in deciding if the appointment of a receiver is just or convenient, the Court must have regard to *inter alia* the nature of the property and the rights and interest of all parties in relation thereto, which includes a secured creditor under its security.²⁷

²² Leblond Affidavit at para 23, AR, Tab 2.

²³ Leblond Affidavit at para 23, AR, Tab 2.

²⁴ **BIA**, subsection **243(4)**; Leblond Affidavit at para 42, AR, Tab 2.

²⁵ **BIA**, section **243**.

²⁶ **CJA**, subsection **101(1)**.

²⁷ ***Bank of Nova Scotia v Freure Village on Clair Creek***, [1996] OJ No 5088 (QL), 40 CBR (3d) 274 (ONSC (Commercial List)) at **paras 10-12** [*“Freure Village”*]; ***Canadian Equipment Finance and Leasing Inc. v The Hypoint Company Limited***, 2022 ONSC 6186 at **para 23** [*“Hypoint”*].

25. Among other things, the following may be considered by a Court in determining whether or not it is just or convenient to appoint a receiver:
- (a) the potential costs of the receiver;
 - (b) the relationship between the debtor and the creditor;
 - (c) the likelihood of preserving and maximizing the return on the subject property; and
 - (d) the best way of facilitating the work and duties of the receiver.²⁸
26. Generally speaking, the appointment of a receiver is “an extraordinary remedy”. That being said, where a secured creditor is seeking the appointment of a receiver and its credit documents specifically afford it the right to appoint a receiver, the appointment of a receiver is not an “extraordinary remedy”. The rationale for this relaxed standard is that, in such circumstances, as Justice Morawetz (as he then was) remarked in *Sherco*: “the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties”.²⁹
27. The Orbit Lease Agreements and 861 Lease Agreements explicitly provide for the appointment of a receiver.³⁰ Additionally, under the terms of the General Security Agreement and the Specific Security Agreement, upon the occurrence

²⁸ **Elleway Acquisitions Limited v. The Cruise Professionals Limited**, 2013 ONSC 6866 (Commercial List) at paras 28, 30 and 34 [“**Elleway**”]; **Freure Village** at para 12.

²⁹ **Bank of Montreal v Sherco Properties Inc.**, 2013 ONSC 7023 (Commercial List) at **para 42** [“**Sherco**”].

³⁰ Leblond Affidavit at para 17, AR, Tab 2.

of an event of default, Orbit and 100 Inc agreed the Lender may take possession of its collateral and enforce their rights by any manner permitted by law.³¹

28. In *Atlas Healthcare*, this Court held that where a secured creditor has bargained for the contractual right to have a receiver appointed, there must be a good reason to deprive the creditor of that contractual right.³² No such reason exists here.

29. The Lender submits that, in accordance with the test and factors outlined above, it is both just and convenient to appoint MSI as Receiver as:

- (a) defaults have occurred under the Credit Agreements;³³
- (b) the statutory notice period for Orbit and 861, as provided for under the BIA and outlined in the NITES, has expired;³⁴
- (c) the statutory notice period for 100 Inc, as provided for under the BIA and outlined in the NITES, will expire on July 29, 2024;
- (d) the Debtors have failed to repay the Indebtedness;³⁵
- (e) as set out above, the Lender has serious concerns about the Debtors' conduct and the disposition of the Lender's collateral;

³¹ Leblond Affidavit at para 16, AR, Tab 2.

³² ***Romspen Investment Corporation v. Atlas Healthcare (Richmond Hill) Ltd. et al.*** 2018 ONSC 7382 (Commercial List) at para 100 [**"Atlas Healthcare"**],

³³ Leblond Affidavit at para 23, AR, Tab 2.

³⁴ Leblond Affidavit at para 23, AR, Tab 2.

³⁵ Leblond Affidavit at para 40, AR, Tab 2.

- (f) the Orbit Loan Agreements and 861 Loan Agreements specifically provide the Lender with the right to seek the appointment of a receiver and the Lender should not be deprived of this contractual right;³⁶ and
- (g) the appointment of a Receiver will create a transparent process to collect accounts receivable and permit the parties to locate, retrieve and realize on the Lender's collateral;³⁷
- (h) the appointment of a Receiver will provide a clear way forward for the repayment of the amounts owed to secured creditors, including the determination of the validity and priority of the RSLA Registrations.³⁸

ORDER REQUESTED

- 30. The appointment of the Receiver will: (i) facilitate the collection of accounts receivable; (ii) facilitate the investigation of the alleged RSLA Registrations and potential reviewable transactions; (iii) permit the parties to locate, retrieve, and realize on the Lender's collateral; and (iv) permit the distribution of proceeds (if any).
- 31. For the reasons set out above, the Lender requests that the Court grant the Appointment Order in the form sought by the Lender.

³⁶ Leblond Affidavit at para 41, AR, Tab 2.

³⁷ Leblond Affidavit at para 41, AR, Tab 2.

³⁸ Leblond Affidavit at para 41, AR, Tab 2.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of July, 2024.



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SCHEDULE "A"

LIST OF AUTHORITIES

1. [*Bank of Nova Scotia v Freure Village on Clair Creek et al*](#), [1996] OJ No 5088 (QL), 40 CBR (3d) 274 (ONSC (Commercial List))
2. [*Canadian Equipment Finance and Leasing Inc. v The Hypoint Company Limited*](#), 2022 ONSC 6186
3. [*Elleway Acquisitions Limited v The Cruise Professionals Limited.*](#), 2013 ONSC 6866 (Commercial List)
4. [*Bank of Montreal v Sherco Properties Inc.*](#), 2013 ONSC 7023 (Commercial List)
5. [*Romspen Investment Corporation v Atlas Healthcare \(Richmond Hill\) Ltd. et al*](#), 2018 ONSC 7382 (Commercial List)

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.

Restriction on appointment of receiver

[243 \(1.1\)](#) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

Definition of receiver

[243 \(2\)](#) Subject to subsections (3) and (4), in this Part, receiver means a person who

- (a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of receiver — subsection 248(2)

[243 \(3\)](#) For the purposes of subsection 248(2), the definition receiver in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

[243 \(4\)](#) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

[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.

Meaning of disbursements

[243 \(7\)](#) In subsection (6), disbursements does not include payments made in the operation of a business of the insolvent person or bankrupt.

Advance notice

[244 \(1\)](#) A secured creditor who intends to enforce a security on all or substantially all of

- (a) the inventory,
- (b) the accounts receivable, or
- (c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

[244 \(2\)](#) 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.

No advance consent

[244 \(2.1\)](#) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

[244 \(3\)](#) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

[244 \(4\)](#) This section does not apply where there is a receiver in respect of the insolvent person.

[Courts of Justice Act, RSO 1990, c C43](#)

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

[101 \(2\)](#) An order under subsection (1) may include such terms as are considered just.

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PROCEEDING COMMENCED AT
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