

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N :

CANADIAN EQUIPMENT FINANCE AND LEASING INC.

Applicant

– and –

**THE HYPOINT COMPANY LIMITED, 2618905 ONTARIO LIMITED,
2618909 ONTARIO LIMITED, BEVERLEY ROCKLIFFE,
AND CHANTAL BLOCK**

Respondents

**FACTUM OF THE RECEIVER
(RE: DISTRIBUTION AND DISCHARGE)**

October 2, 2023

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in its capacity as the court appointed
receiver of 2618909 Ontario Limited and
Hypoint Company Limited**

TO: THE SERVICE LIST

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PART I – OVERVIEW

1. Msi Spergel Inc. in its capacity as receiver (the “**Receiver**”) of all of the property, assets and undertakings of 2618909 Ontario Limited (“**261**”) and The Hypoint Company Limited (“**Hypoint**” and together with 261, the “**Debtors**”), seeks an Order, *inter alia*, substantially in the form attached at Tab 3 of the Motion Record (the “**Order**”) that, among other things:

- (a) abridges the time for service of this motion, validates the manner of service, and declares that this motion is properly returnable before the Court;
- (b) authorizes and directs the Receiver to make the Interim Distribution (as defined below) as described in the Second Report of the Receiver dated September 24, 2023 (the “**Second Report**”);
- (c) approves the fees and disbursements of the Receiver and of its independent counsel, Reconstruct LLP (“**Reconstruct**”) until the conclusion of these proceedings;
- (d) authorizes the Receiver to file an Assignment for the General Benefit of Creditors with respect to Hypoint under the provisions of the *Bankruptcy and Insolvency Act* (“**BIA**”);
- (e) approves the discharge of the Receiver upon the filing of the Discharge Certificate in the form substantially as set out as in the Order (the “**Discharge Certificate**”), certifying that the remaining receivership tasks described in the Second Report have been completed by the Receiver (the “**Remaining Activities**”); and
- (f) approves the Second Report and the activities and conduct of the Receiver and its counsel, Reconstruct, as disclosed therein.

PART II – FACTS

2. The facts on this motion are set out in the Second Report. Capitalized terms used herein but otherwise undefined have the respective meanings given to them in the Second Report. The following is a high-level summary of the facts relevant to this motion.

A. The Debtors' Assets

3. 261 and Hypoint are Canadian owned, private corporations incorporated pursuant to the laws of the Province of Ontario.¹

4. Prior to the sale in these receivership proceedings, 261 was the owner of real property located at 59 Roy Blvd., Brantford, Ontario (the “**Real Property**”) subject to a first mortgage in favour of Bruce Lubelsky, a second mortgage in favour of Delrin Investments Inc., Samuel Stern, Harvey Kessler and Richard Goldberg (collectively, the “**Mortgagees**”) and a third mortgage in favour of 2767888 Ontario Inc.²

5. Together, the Debtors operated a licensed cannabis growing facility at the Real Property until August 2021, at which time operations ceased due to a downturn in the cannabis industry.³ Since August 2021, no cannabis production has occurred at the Real Property.⁴

6. Certain fixtures on the Real Property and used for the cannabis business (the “**HVAC Equipment**”) are subject to a security interest in favour of Canadian Equipment Financing and Leasing Inc. (“**CEFL**”).⁵ The Debtors' assets consist primarily of the Real Property and the HVAC

¹ Second Report at para 2 ([Caselines Master E266](#)).

² Second Report at para 3 ([Caselines Master E266](#)).

³ Second Report at para 4 ([Caselines Master E266](#)).

⁴ Second Report at para 4 ([Caselines Master E266](#)).

⁵ Second Report at para 5 ([Caselines Master E266](#)).

Equipment. The balance of Hypoint's assets are chattels which were located on the Real Property at the time of the receivership (the "**Chattels**").⁶

7. The Mortgagees have registered mortgage interests in the Real Property and CEFL holds a priority interest in the HVAC Equipment under the *Personal Property Security Act* (the "**PPSA**").⁷ Prior to the appointment of the Receiver, both groups sought to monetize the Debtors' property (the "**Property**") through a sale.⁸

8. The Receiver, after consulting with the Debtors' material secured creditors, devised and implemented a sale process for the Property. The sale process culminated in a sale of the Property.⁹

9. On May 12, 2023, the Court granted Orders, *inter alia*, approving an agreement of purchase and sale.¹⁰ The sale transaction closed on June 12, 2023.¹¹

10. There is a dispute as between the Mortgagees and CEFL concerning the allocation of the proceeds of sale between the Real Property and the HVAC Equipment.¹² A full-day contested motion is currently scheduled for December 18, 2023 to determine the allocation of the proceeds of sale as between the Real Property or the HVAC Equipment.¹³

⁶ Second Report at para 5 ([Caselines Master E267](#)).

⁷ Second Report at para 6 ([Caselines Master E267](#)).

⁸ Second Report at para 7 ([Caselines Master E267](#)).

⁹ Second Report at paras 10-11 ([Caselines Master E268](#)).

¹⁰ Second Report at para 11 ([Caselines Master E268](#)).

¹¹ Second Report at para 12 ([Caselines Master E268](#)).

¹² Second Report at para 12 ([Caselines Master E268](#)).

¹³ Second Report at para 12 ([Caselines Master E268](#)).

B. The Secured Claims

The Canada Revenue Agency

11. During the pendency of the receivership, the CRA filed a series of claims for unpaid source deductions, including a claim letter dated August 29, 2023, for a deemed trust priority claim for source deductions in the amount of \$43,588.11 (the “**CRA Priority Payable**”).¹⁴

The Registered Secured Creditors

12. The Real Property is subject to the following mortgages:

- (a) a first mortgage in favour Bruce Lubelsky in the principal amount of \$1,300,000;
- (b) a second mortgage in favour of Delrin Investments Inc., Samuel Stern, Harvey Kessler, and Richard Goldberg in the principal amount of \$4,000,000; and
- (c) a third mortgage in favour of 2767888 Ontario Inc. in the principal amount of \$70,000.¹⁵

13. The Receiver obtained an independent legal opinion as to the validity of the first and second mortgages on the Real Property, which opinion provides that, subject to standard assumptions and caveats, both the first and second mortgages are valid and enforceable as against a trustee in bankruptcy.¹⁶

14. The Receiver also obtained an independent legal opinion as to the validity of CEFL’s personal property security interest in the HVAC Equipment, which opinion provides that, subject

¹⁴ Second Report at para 24 ([Caselines Master E273](#)).

¹⁵ Second Report at para 33 ([Caselines Master E275](#)).

¹⁶ Second Report at para 34 ([Caselines Master E275](#)).

to standard assumptions and caveats, CEFL's security over the HVAC Equipment is valid and enforceable as against a trustee in bankruptcy.¹⁷

15. The Receiver reviewed the validity of the security registered in favour of Thomas Bock and determined that Thomas Bock does not have valid and enforceable security over the Chattels vis a vis a trustee in bankruptcy.¹⁸ As a result of the absence of an executed security agreement establishing the security interest, there was no attachment of the security as required pursuant to section 11(2)(a) of the PPSA.¹⁹

The Interim Distribution

16. Regardless of the outcome of the contested motion on December 18, 2023, the receivership estate holds funds in excess of any amount to be distributed to CEFL.²⁰

17. The Receiver recommends that an interim distribution of the proceeds of sale be made to the CRA regarding the CRA Priority Payable and to the Mortgagees, which amount is not opposed as between the Mortgagees and CEFL (the "**Interim Distribution**"). The Receiver will holdback the following funds:

- (a) the amount of the full claim of CEFL;
- (b) the Receiver's Fee Accrual and the Receiver's Counsel Fee Accrual (as defined in the Second Report); and

¹⁷ Second Report at para 28 ([Caselines Master E274](#)).

¹⁸ Second Report at para 30 ([Caselines Master E274](#)).

¹⁹ Second Report at para 30 ([Caselines Master E274](#)); *PPSA* at section 11(2)(a).

²⁰ Second Report at para 36 ([Caselines Master E276](#)).

- (c) \$100,000, being the purchaser's allocation of the purchase price to the Chattels, subject to the resolution of Thomas Bock's claim.²¹

18. As of the date of this Factum, the Receiver is not aware of any opposition to the Interim Distribution, nor is the Receiver aware of any basis upon which a creditor will oppose the Interim Distribution.

PART III – ISSUES

19. The issues of this motion are whether this Court should grant an Order that:

- (a) approves and grants the Interim Distribution;
- (b) approves the fees and activities of the Receiver and its counsel, Reconstruct; and
- (c) discharges the Receiver upon the filing of the Discharge Certificate in the form substantially as set out in the Order, certifying that the Remaining Activities have been completed by the Receiver.

PART IV – LAW & ARGUMENT

A. The Interim Distribution Should be Authorized

20. The Receiver submits that the Mortgagees and CEFL hold valid and enforceable security interests in respect of the collateral covered by their respective security. The Receiver and its counsel have reached this conclusion after reviewing the applicable loan and security documents for each of the Mortgagees and CEFL and the Receiver has been provided with security opinions which confirm, subject to standard assumptions and qualifications contained therein, the validity of their secured claims.

²¹ Second Report at para 37 ([Caselines Master E276](#)).

21. No party will be prejudiced if the requested relief is granted. The Receiver, with the consent of the Mortgagees and CEFL, seeks to make the Interim Distribution to provide the balance of funds currently held in advance of the resolution of the allocation dispute.

B. The Fees and Activities of the Receiver and its Counsel Should be Approved

22. The activities of the Receiver described in the Second Report were necessary and undertaken in good faith pursuant to the Receiver's duties and powers, and in each case were in the best interests of the Debtors' stakeholders generally.

23. The Receiver is seeking approval of the professional fees incurred by it and its legal counsel as described in the fee affidavits attached to the Second Report, including the estimated fees of the Receiver and its legal counsel in connection with the completion of these proceedings.

24. The standard to be applied is whether the compensation sought is "fair and reasonable", with an emphasis on the value provided and what was accomplished.²² The Receiver submits that the professional fees incurred by it and Reconstruct are fair and reasonable in light of the mandate.

C. The Receiver should be Discharged Upon the Filing of the Discharge Certificate

25. As no creditor has a valid and enforceable general security interest over all of the assets of Hypoint (the CEFL security is limited to the HVAC Equipment), the net proceeds from the sale of the Chattels owned by Hypoint, would be available to unsecured creditors in a bankruptcy of Hypoint.²³ The Receiver therefore requests that this Court lift the stay for the sole purpose of

²² [Bank of Nova Scotia v Diemer, 2014 ONCA 851](#) at paras 44-45.

²³ Second Report at para 31 ([Caselines Master E274](#)).

allowing the Receiver to file an assignment in bankruptcy for the general benefit of unsecured creditors of Hypoint.

26. Once the Receiver has completed the Remaining Activities, as set out in paragraph 46 of the Second Report, it will have completed its mandate.²⁴ The Receiver therefore respectfully submits that this receivership proceeding should be terminated and the Receiver should be discharged and released following the filing of the Discharge Certificate with the Court, certifying that it has completed the Remaining Activities.

PART V – RELIEF REQUESTED

27. For the reasons set out above, the Receiver requests that this Honourable Court grant the Order included at Tab 3 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd DAY OF OCTOBER, 2023.



RECONSTRUCT LLP

²⁴ Second Report at para 46 ([Caselines Master E278](#)).

SCHEDULE “A”

List of Authorities

1. *Bank of Nova Scotia v Diemer, 2014 ONCA 851*

SCHEDULE “B”

Statutory Authorities

Personal Property Security Act, RSO 1990, c P.10

Attachment required to enforce security interest

11 (1) A security interest is not enforceable against a third party unless it has attached.

When security interest attaches to collateral

(2) Subject to section 11.1, a security interest, including a security interest in the nature of a floating charge, attaches to collateral only when value is given, the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party and,

(a) the debtor has signed a security agreement that contains,

(i) a description of the collateral sufficient to enable it to be identified, or

(ii) a description of collateral that is a security entitlement, securities account or futures account, if it describes the collateral by any of those terms or as investment property or if it describes the underlying financial asset or futures contract;

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Proceedings commenced at Toronto

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