

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

TRIPLE-I CAPITAL PARTNERS LIMITED

Applicant

and

12411300 CANADA INC.

Respondent

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 APPLICANT  
(returnable July 22, 2022)**

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TO: SERVICE LIST IN COURT FILE NO. CV-22-00684372-00CL

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**PART I - INTRODUCTION**

1. The Applicant, Triple-I Capital Partners Limited ("**Triple-I**"), brings this application for the appointment of Crowe Soberman Inc. ("**Crowe**") as receiver and manager of the assets, undertaking, and property (the "**Property**") of 12411300 Canada Inc. (the "**Debtor**").
2. This application to appoint a receiver is triggered by a confluence of events, including serious, substantial and ongoing defaults, which have led to Triple-I's loss of confidence in the Debtor's ability to manage the Property and preserve the Debtor's collateral.
3. Triple-I submits that it is just and convenient for the Court to appoint a receiver over the Property at this time.

**PART II - THE FACTS**

4. The facts giving rise to this receivership application are detailed in the affidavit of Alfred Tong sworn July 21, 2022 (the "**Tong Affidavit**") and are only repeated here as necessary.<sup>1</sup>

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<sup>1</sup> Affidavit of Alfred Tong sworn July 21, 2022 (the "**Tong Affidavit**") at Tab 2 to the Application Record of the Applicant dated July 21, 2022 (the "**Application Record**").

### *The Debtor*

5. The Debtor is a Canadian corporation with its registered head office in Oakville Ontario. The Debtor operates two medical clinics located in Mississauga and Brampton, Ontario, called Erin Mills Health & Wellness Centre. The Debtor's primary business is the distribution of medical supplies.<sup>2</sup>

6. Until May of 2022, the Debtor operated its business from its 18,201 square-foot building located on the property municipally known as 237B Advance Blvd. Brampton, ON, L6T 4J2 (the "**Real Property**"). The Real Property is approximately 0.85 acres of industrial land.<sup>3</sup>

### *The Loan and Security*

7. Triple-I advanced a loan of \$6,400,000 to the Debtor (the "**Loan**") pursuant to a mortgage loan commitment agreement dated April 15, 2021 (the "**Mortgage Agreement**"). Approximately \$6,865,153.76 is outstanding under the Loan.<sup>4</sup>

8. As security for the payment and performance of the Loan, the Debtor granted in favour of Triple-I, among other things:<sup>5</sup>

(a) a charge against the Real Property (the "**Mortgage**"), which is registered against title to the Real Property, and

(b) a general security interest over all of the Debtor's present and after-acquired property pursuant to a general security agreement (the "**GSA**"). The GSA was registered under the Ontario *Personal Property Security Act*, R.S.O. 1990, c. P. 10, as amended, on April 29, 2021.

### *Defaults under the Loan*

9. The Loan matured and was repayable in full on May 1, 2022. The Debtor failed to repay the Loan on that date in default of the Mortgage Agreement and the GSA.<sup>6</sup>

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<sup>2</sup> Tong Affidavit t para 9, Tab 2 to the Application Record.

<sup>3</sup> Tong Affidavit at para 4, Tab 2 to the Application Record.

<sup>4</sup> Tong Affidavit at paras 10 and 24, Tab 2 to the Application Record.

<sup>5</sup> Tong Affidavit at paras 12 and 16, Tab 2 to the Application Record.

<sup>6</sup> Tong Affidavit at para 22, Tab 2 to the Application Record.

10. In breach of the Mortgage Agreement, the Debtor has failed to pay municipal taxes to the City of Brampton since 2021. The total outstanding tax arrears as of May 5, 2022 was \$53,173.86 (the “**Tax Arrears**”). Pursuant to its rights under the loan and security documents, Triple-I satisfied the Tax Arrears on May 10, 2022 and added this amount to the total amount outstanding under the Loan.<sup>7</sup>

11. In further breach of the Mortgage Agreement, the Debtor granted a subsequent \$2 million charge on the Real Property without Triple-I’s prior written consent.<sup>8</sup>

12. The Debtor has also not satisfied Triple-I’s attempts to obtain information regarding the status of the collateral, nor has the Debtor provided Triple-I with access to the Real Property, despite numerous requests.<sup>9</sup>

13. The Real Property appears to be vacant and abandoned. Triple-I has serious concern that the Debtor has ceased operations and that Triple-I’s collateral is at risk.<sup>10</sup>

*Right to Appoint a Receiver*

14. Triple-I issued a notice of intention to enforce security on June 10, 2022.<sup>11</sup>

15. Under the Mortgage Agreement and the GSA, Triple-I has the right to appoint a receiver in the event of default.<sup>12</sup>

16. The Debtor has lost all confidence in the Debtor’s ability to protect its collateral.

17. In addition to the foregoing, the Debtor has insistently refused to respond to the lenders requests for information and for permission to attend the Real Property to inspect its status.

18. Subsections 4.1(n) and (v) of the GSA require the Debtor to provide such information to Triple-I related to the collateral secured by the GSA, the Debtor, or the Debtor’s business and affairs as Triple-I may reasonably request.

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<sup>7</sup> Tong Affidavit at paras 25-26, Tab 2 to the Application Record.

<sup>8</sup> Tong Affidavit at paras 28-29, Tab 2 to the Application Record.

<sup>9</sup> Tong Affidavit at paras 30-36, Tab 2 to the Application Record.

<sup>10</sup> Tong Affidavit at para 37, Tab 2 to the Application Record.

<sup>11</sup> Tong Affidavit at para 39, Tab 2 to the Application Record.

<sup>12</sup> Tong Affidavit at paras 40-41, Tab 2 to the Application Record.

19. On May 25, 2022, counsel for Triple-I wrote to counsel for the Debtor and advised that the Debtor was in default of the Mortgage Agreement for failing to pay property taxes, and to repay the Loan when due, as well as the subsequent charge on the Real Property.<sup>13</sup>

20. Counsel for the Debtor responded to the email on June 15, 2022, and advised that the Debtor was attempting to re-finance the Loan. He further stated that most of the funding conditions had been satisfied, and that he expected the financing to be completed “in later July”.<sup>14</sup>

21. On June 16, 2022, counsel for Triple-I requested information regarding the purported refinancing, as well as certain additional information about the status of the Debtor’s business including whether it continued to occupy the Real Property, and copies of appraisals and reports the Debtor had obtained in connection with the refinancing (the “Requests for Information”). Counsel for Triple-I also requested a walk through of the Real Property.<sup>15</sup>

22. After repeated follow ups from counsel for Triple-I on the Requests for Information, counsel for the Debtor responded on June 29, 2022. However, the email lacked sufficient particulars to adequately respond to the Requests for Information. Among other things, counsel for the Debtor failed to provide any details in respect of the refinancing, or copies of appraisals or reports. Further, counsel for the Debtor did not agree to permit Triple-I to inspect the Real Property. Instead, he requested that Triple-I provide the name and contact information of the person who wanted to inspect the property and the purpose of the inspection and the Debtor would “consider and make arrangements, as appropriate.” Counsel for the Debtor also erroneously advised that the Debtor had paid property taxes for the Real Property in full.<sup>16</sup>

23. Counsel for Triple-I provided Triple-I’s availability for a walk through of the Real Property on June 30, 2022. He also stated that Triple-I had commenced enforcement

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<sup>13</sup> Tong Affidavit Exhibit “L”.

<sup>14</sup> Tong Affidavit Exhibit “M”.

<sup>15</sup> Tong Affidavit Exhibit “N”.

<sup>16</sup> Tong Affidavit Exhibit “O”.

proceedings by issuing a notice of intention to enforce security and retaining counsel to appoint a receiver pursuant to the terms of the loan and security documents.<sup>17</sup>

24. Despite the Debtor's obligation to provide Triple-I with information related to the Real Property and the Debtor's business under the GSA and Triple-I's repeated requests for the same, the Debtor has failed to provide such information. As a result, Triple-I has lost all confidence that the Real Property and the collateral secured by the GSA were being adequately protected by the Debtor. Among other things, Triple-I has reason to believe that the building located on the Real Property is vacant, despite representations made by the Debtor's counsel that the Debtor's business is fully operational.<sup>18</sup>

25. The lender had personally attended at the Real Property on a number of occasions, most recently in September, 2021. On each occasion, the lender's representative observed the Real Property to be vacant and abandoned, as no cars had been parked in the parking lot, and no individuals could be seen entering or exiting the premises.

### **PART III - ISSUES AND THE LAW**

26. The only issue to be addressed before this Honourable Court is whether it is just and convenient for Crowe to be appointed as receiver of the Real Property.

### **PART IV - LAW AND ANALYSIS**

#### **A. Technical Requirements for the Appointment of a Receiver are Met**

27. Pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA"), on the application of a secured creditor, a Court may appoint a receiver to do any of the following if it is "just and convenient to do so".<sup>19</sup>

- (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;

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<sup>17</sup> Tong Affidavit Exhibit "P"

<sup>18</sup> Tong Affidavit Exhibit Q".

<sup>19</sup> s. 243(1), BIA.



- (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.

28. Where a notice of intention to enforce security is to be sent under section 244(1) of the BIA, a court cannot appoint a receiver until 10 days after the notice is sent unless the insolvent person consents to earlier enforcement, or the court considers it appropriate to appoint a receiver on an earlier date.<sup>20</sup>

29. The Debtor is in breach of the Loan, the Mortgage, and the GSA by, among other things, failing to pay the municipal tax arrears when due, granting the subsequent mortgage, failing to provide Triple-I with responses to its requests for information regarding the status of the collateral, and failing to provide Triple-I with access to the Real Property, despite numerous requests.

30. As a result of these breaches, the Debtor is in default under the Loan, and pursuant to Schedule "A" of the Mortgage and article 6.1(b) of the GSA, Triple-I may enforce its security by appointing a receiver.

31. Triple-I issued a notice of intention to enforce security on June 10, 2022. As such this application may be returnable on July 22, 2022, as more than 10 days have passed after notice was sent.

**B. It is Just and Convenient to Appoint a Receiver**

32. In addition to section 243 of the BIA, a court may appoint a receiver pursuant to section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended ("**CJA**"), if it is "just and convenient" to do so.<sup>21</sup>

33. In determining whether or not it is just and convenient to appoint a receiver, a court must "have regard to all of the circumstances".<sup>22</sup> Among other factors, a court should consider:<sup>23</sup>

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<sup>20</sup> s. 243(1.1), BIA.

<sup>21</sup> s. 101, CJA.

- (a) the nature of the property;
- (b) the rights and interests of the parties to the property;
- (c) whether the lender's security is at risk of deteriorating;
- (d) whether there is a need to stabilize and preserve the business;
- (e) whether there is a loss of confidence in the debtor's management; and
- (f) the positions and interests of other creditors.

34. While the appointment of a receiver is ordinarily an extraordinary remedy, where a security agreement between a creditor and its debtor permits the same, the appointment of a receiver is not extraordinary because the creditor "is merely seeking to enforce a term of an agreement that was assented to by both parties."<sup>24</sup>

35. If a court appoints a receiver pursuant to section 101 of the CJA, the order may include any terms as "are considered just".<sup>25</sup>

36. In addition to Triple-I's contractual rights, Triple-I submits that it is just and convenient to appoint a receiver over the Property because, among other things:

- (a) The Debtor is in default of the Loan, the Mortgage, the GSA and these defaults are continuing;
- (b) The Debtor has failed to provide any satisfactory response to Triple-I regarding the status of its collateral, including enumerated equipment;
- (c) The Debtor has failed to provide Triple-I with access to the Real Property for inspection, despite numerous requests and despite Triple-I's right to same;

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<sup>22</sup> *Bank of Nova Scotia v Freure Village on Clair Creek*, 1996 CanLII 8258 at para 10 (Ont Sup Ct J [Gen Div Commercial List]).

<sup>23</sup> *Meridian v. Okje Cho & Family Enterprise Ltd.*, 2021 ONSC 3755 at para 20.

<sup>24</sup> *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 at para 27 ; *Meridian v. Okje Cho & Family Enterprise Ltd.*, 2021 ONSC 3755 at para 21.

<sup>25</sup> s. 101(2), CJA.

(d) Triple-I has a serious concern that its collateral is at risk of deterioration, including due to, among other things, the apparent cessation of the Debtor's business operations;

(e) As the major secured creditor, Triple-I has the primary economic interest in the Debtor; and

(f) Triple-I issued a notice of intention to enforce security on June 11, 2022, and the outstanding amount under the Loan remains unsatisfied.

37. In the alternative, Triple-I respectfully requests that this Court grant an order appointing Crowe as interim receiver over the Property. Section 47 of the BIA authorizes the Court to appoint an interim receiver if the Court is satisfied: (a) that a notice under section 244(1) of the BIA has been sent or is about to be sent; and (b) that the order is necessary for the protection of the debtor's estate or the interest of the creditors who sent the notice.<sup>26</sup>

38. In *Royal Bank v Canada Print Music Distributors Inc.*, the Court held that there is no requirement for the Applicant to prove with certainty that assets had in fact been misappropriated or dissipated.<sup>27</sup>

39. The facts demonstrate that, if this Honourable Court does not find it just and convenient to appoint a receiver over the Property at this time, it is necessary for the protection of both the Debtor's estate and for the protection of the interests of Triple-I to appoint an interim receiver over the Property. An interim receivership would permit Triple-I to inspect and monitor the affairs of the Debtor and protect its collateral from the risk of any further deterioration or dissipation.

## **PART V - ORDER REQUESTED**

40. For the reasons set out above, Triple-I respectfully requests that this Court exercise its discretion under s. 243 of the BIA to grant the Receivership Order sought at Tab 3 to the Application Record.

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<sup>26</sup> s. 47, BIA.

<sup>27</sup> *Royal Bank v Canadian Print Music Distributors Inc* 2006, CarswellOnt 3780, [2006 CanLII 21048 \(ON SC\)](#) paras 15-18.

41. In the alternative, it is respectfully submitted that this Court exercise its discretion under s. 47 of the BIA to grant an order for the appointment of an interim receiver over the Property.

42. In the further alternative, the moving party requests that if an adjournment be granted by this court to allow the filing of responding materials this court should order as a term of the adjournment that arrears of interest, repayment of taxes by the lender, and legal fees incurred to date, including those of the receiver and its counsel be paid forthwith.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of July, 2022.

  
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Aram Simovonian, for Carmine Scalzi  
SCALZI PROFESSIONAL CORPORATION

Lawyers for the Applicant

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. [\*Bank of Nova Scotia v Freure Village on Clair Creek\*](#), 1996 CanLII 8258 at para 10 (Ont Sup Ct J [Gen Div Commercial List]).
2. [\*Meridian v. Okje Cho & Family Enterprise Ltd.\*](#), 2021 ONSC 3755.
3. [\*Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.\*](#), 2013 ONSC 6866.
4. *Royal Bank v Canadian Print Music Distributors Inc* 2006, CarswellOnt 3780, [2006 CanLII 21048 \(ON SC\)](#).

**SCHEDULE “B”  
RELEVANT STATUTES**

***Bankruptcy and Insolvency Act (R.S.C., 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**

**(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**

**(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)**

**(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**

**(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**

**(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**

**(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***

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

#### **Appointment of interim receiver**

**47 (1)** If the court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates until the earliest of

- (a)** the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,
- (b)** the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and
- (c)** the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.

#### **Directions to interim receiver**

**(2)** The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

- (a)** take possession of all or part of the debtor's property mentioned in the appointment;
- (b)** exercise such control over that property, and over the debtor's business, as the court considers advisable;
- (c)** take conservatory measures; and
- (d)** summarily dispose of property that is perishable or likely to depreciate rapidly in value.

#### **When appointment may be made**

**(3)** An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

- (a)** the debtor's estate; or
- (b)** the interests of the creditor who sent the notice under subsection 244(1).

#### **Place of filing**

**(4)** An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

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

### INTERLOCUTORY ORDERS

#### **Injunctions and receivers**

**101** (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

#### **Terms**

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



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