

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

**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**

**B E T W E E N:**

MBL ADMINISTRATIVE AGENT II LLC, as agent for POST ROAD  
SPECIALTY LENDING FUND II LP (f/k/a MAN BRIDGE LANE  
SPECIALTY LENDING FUND II (US) LP), and POST ROAD SPECIALTY  
LENDING FUND (UMINN) LP (f/k/a MAN BRIDGE LANE SPECIALTY  
LENDING FUND (UMINN) LP)

Applicant

and

TRADE X GROUP OF COMPANIES INC., 12771888 CANADA INC., TVAS  
INC., TRADEXPRESS AUTO CANADA INC., TRADE X FUND GP INC.,  
TRADE X LP FUND I, TRADE X CONTINENTAL INC., TX CAPITAL CORP.,  
TECHLANTIC LTD. and TX OPS CANADA CORPORATION

Respondents

**FACTUM OF THE APPLICANT, MBL ADMINISTRATIVE AGENT II LLC  
(APPLICATION TO APPOINT RECEIVER)**

December 8th, 2023

**DAVIES WARD PHILLIPS & VINEBERG LLP**

155 Wellington Street West  
Toronto ON M5V 3J7

**Natasha MacParland** (LSO #42383G)

Email: NMacParland@dwpv.com  
Tel: 416.863.5567

**Natalie Renner** (LSO# 55954A)

Email: nrenner@dwpv.com  
Tel: 416.367.7489

**Maya Churilov** (LSO# 87190A)

Email: mchurilov@dwpv.com  
Tel: 416.367.7508

Tel: 416.367.0900

Fax: 416.863.0871

Lawyers for the Applicant,  
MBL Administrative Agent II LLC

TO:

**DENTONS LLP**

77 King St W Suite 400  
Toronto ON M5K 0A1

**John Salmas (LSO #42336B)**

Email: john.salmas@dentons.com  
Tel: 416.863.4737

Lawyer for the Respondents, Trade X Group  
of Companies Inc., 12771888 Canada Inc.,  
TVAS Inc., Tradexpress Auto Canada Inc.,  
Trade X Fund GP Inc., Trade X LP Fund I,  
Trade X Continental Inc., TX Capital Corp.,  
Techlantic Ltd., and TX OPS Canada  
Corporation

**AND TO: MCCARTHY TÉTRAULT LLP**  
66 Wellington St W, Suite 5300  
Toronto ON M5K 1E6

**Heather Meredith** (LSO #48354R)  
Email: hmeredith@mccarthy.ca  
Tel: 416.601.8342

Lawyer for Aimia Inc.

**AND TO: STIKEMAN ELLIOTT LLP**  
5300 Commerce Court West,  
199 Bay St,  
Toronto ON M5L 1B9

**Guy P. Martel**  
Email: gmartel@stikeman.com  
Tel: 514.397.3163

Lawyer for Highcrest Lending Inc.

**AND TO: GOODMAN'S LLP**  
333 Bay St, Suite 3400  
Toronto, ON M5H 2S7

**Caroline Descours**  
Email: cdescours@goodmans.ca  
Tel: 416.597.6275

Lawyer for the Proposed Receiver,  
FTI Consulting Canada Inc.

**AND TO: FTI CONSULTING CANADA INC.**  
79 Wellington St W Suite 2010,  
Toronto, ON M5K 1G8

**Paul Bishop**  
Email: paul.bishop@fticonsulting.com

The Proposed Receiver

## TABLE OF CONTENTS

<b>PART I - OVERVIEW.....</b>	<b>1</b>
<b>PART II - SUMMARY OF FACTS .....</b>	<b>3</b>
<b>A. THE PARTIES AND THE CREDIT FACILITIES.....</b>	<b>3</b>
<b>B. THE SECURITY INTERESTS AND COLLATERAL HELD BY MBL.....</b>	<b>7</b>
<b>C. THE RAPID DETERIORATION OF THE TRADE X GROUP'S BUSINESS .....</b>	<b>9</b>
<b>D. THE 2022 LOAN RESTRUCTURING.....</b>	<b>10</b>
<b>E. OTHER SECURED CREDITORS.....</b>	<b>11</b>
<b>F. THE BORROWERS DEFAULT ON THEIR OBLIGATIONS TO MBL .....</b>	<b>12</b>
<b>G. CURRENT STATUS OF THE TRADE X GROUP .....</b>	<b>13</b>
<b>H. THE RECEIVERSHIP.....</b>	<b>14</b>
<b>PART III - STATEMENT OF ISSUES .....</b>	<b>14</b>
<b>PART IV - LAW AND ARGUMENT .....</b>	<b>15</b>
<b>A. THIS COURT HAS JURISDICTION TO APPOINT THE PROPOSED RECEIVER.....</b>	<b>15</b>
<b>(I) SECTION 243 OF THE BIA AND SECTION 101 OF THE CJA APPLY TO THIS CASE .....</b>	<b>15</b>
<b>(II) THE LOCALITY OF THE DEBTOR IS IN ONTARIO .....</b>	<b>15</b>
<b>(III) THE PROPOSED RECEIVER IS A TRUSTEE UNDER THE BIA .....</b>	<b>17</b>
<b>B. IT IS JUST AND CONVENIENT TO APPOINT THE PROPOSED RECEIVER .....</b>	<b>18</b>
<b>(I) THE TEST FOR APPOINTING A RECEIVER UNDER THE BIA AND CJA.....</b>	<b>18</b>
<b>(II) NATURE OF THE PROPERTY, WASTE OF ASSETS, RISK TO MBL AND LIKELIHOOD OF MAXIMIZING RETURN .....</b>	<b>20</b>
<b>(III) CONDUCT OF THE PARTIES AND DIFFICULTY IN ENFORCING SECURITY INTEREST .....</b>	<b>21</b>
<b>(IV) COST TO THE PARTIES.....</b>	<b>22</b>
<b>(V) FACILITATING THE DUTIES OF THE RECEIVER.....</b>	<b>22</b>
<b>C. THE TERMS OF THE PROPOSED APPOINTMENT ORDER ARE APPROPRIATE ...</b>	<b>22</b>
<b>(I) THE TERMS OF THE PROPOSED APPOINTMENT ORDER .....</b>	<b>22</b>
<b>(II) THE RECEIVER'S BORROWING CHARGE.....</b>	<b>23</b>
<b>PART V - ORDER REQUESTED.....</b>	<b>23</b>

## PART I - OVERVIEW<sup>1</sup>

1. The Applicant, MBL Administrative Agent II LLC (“**MBL**”) seeks the appointment of FTI Consulting Canada Inc. (“**FTI**”) as receiver and manager (the “**Receiver**”) of substantially all of the assets, undertakings and property of the Respondents, pursuant to section 243(1) of the *Bankruptcy and Insolvency Act* (the “**BIA**”)<sup>2</sup> and section 101 of the *Courts of Justice Act* (Ontario) (the “**CJA**”).

2. MBL is the administrative agent under credit facilities made available to certain affiliates of the Respondents (defined and described below as the Borrowers).<sup>3</sup> The Respondents are Canadian affiliates of the Borrowers and have guaranteed, on a secured basis, the obligations of the Borrowers.<sup>4</sup> Consequently, MBL has security in all of the Respondents’ property, assets and undertakings (other than, as detailed below, one of the Respondents’ affiliates).<sup>5</sup> The Borrowers are in material default of their obligations under the credit agreements with MBL and the defaults are continuing.<sup>6</sup> As of November 30, 2023, the Respondents are indebted to MBL in the aggregate amount of US\$15,256,504.16 (which includes principal and interest) (the “**Indebtedness**”).<sup>7</sup>

3. In the face of the Borrowers’ ongoing defaults under the Credit Facilities, the primary objective of these proceedings is to appoint the Receiver with the goal of preserving the Collateral that is subject to MBL’s security interest.<sup>8</sup>

---

<sup>1</sup> Capitalized terms used in this Overview but not defined herein have the meanings ascribed to them in the Affidavit of Westin Lovy sworn December 4, 2023.

<sup>2</sup> RSC 1985, c. B-3.

<sup>3</sup> Affidavit of Westin Lovy sworn on December 4, 2023 (the “**Lovy Affidavit**”) at para. 8, Application Record, Tab 2 at p. 23.

<sup>4</sup> Lovy Affidavit at para. 57, Application Record, Tab 2 at p. 42.

<sup>5</sup> Lovy Affidavit at para. 9, Application Record, Tab 2 at p. 23.

<sup>6</sup> Lovy Affidavit at para. 67, Application Record, Tab 2 at p. 46.

<sup>7</sup> Lovy Affidavit at para. 7, Application Record, Tab 2 at p. 22.

<sup>8</sup> Lovy Affidavit at paras. 11 & 77, Application Record, Tab 2 at pp. 24 & 49.

4. The Respondents are part of a group of companies referred to as the “**Trade X Group**”. The Trade X Group are primarily involved in operating a business-to-business vehicle trading platform for car dealerships to purchase inventory from or sell inventory to Canada and other overseas markets.<sup>9</sup> Over the past two years, the Trade X Group have experienced declining revenues due to a decline in used automobile prices, rising expenses and an undisciplined acquisition and sales practice.<sup>10</sup> In recent months, the Trade X Group have conducted their operations in a manner that has jeopardized the Collateral, materially breached the terms of their credit agreements with MBL and disregarded the interests of MBL as a senior secured creditor of the Respondents.<sup>11</sup>

5. The appointment of the Receiver is urgent and necessary in light of the Trade X Group’s recent actions. The Trade X Group have not only improperly and unlawfully diverted and misappropriated funds payable to MBL, including to fund their payroll obligations and other working capital needs, but have also been quietly shutting down their operations in Ontario.<sup>12</sup> An inspection of the Trade X Group’s offices in Ontario showed that there was no apparent business being conducted by the Trade X Group in Canada.<sup>13</sup> Moreover, the Trade X Group’s management has admitted that they have been complicit in the wilful diversion of payments owed to MBL.<sup>14</sup> Given these circumstances, MBL has lost faith in the management of the Trade X Group.<sup>15</sup>

6. The three issues before the Court on this application are: (a) whether this Court has the jurisdiction to appoint the Receiver; (b) whether it is just and convenient to appoint the Receiver;

---

<sup>9</sup> Lovy Affidavit at para. 16, Application Record, Tab 2 at p. 26.  
<sup>10</sup> Lovy Affidavit at para. 4, Application Record, Tab 2 at p. 22.  
<sup>11</sup> Lovy Affidavit at para. 5, Application Record, Tab 2 at p. 22.  
<sup>12</sup> Lovy Affidavit at para. 10, Application Record, Tab 2 at p. 23.  
<sup>13</sup> Lovy Affidavit at para. 71, Application Record, Tab 2 at p. 47.  
<sup>14</sup> Lovy Affidavit at para. 68, Application Record, Tab 2 at p. 46.  
<sup>15</sup> Lovy Affidavit at para. 11, Application Record, Tab 2 at p. 24.

and (c) whether the terms of the proposed order appointing the Receiver are appropriate. MBL submits that the answer to each issue is “yes”.

## **PART II - SUMMARY OF FACTS**

7. The relevant facts of this Application are set out in detail in the Affidavit of Westin Lovy sworn December 4, 2023 and the Supplementary Affidavit of Westin Lovy sworn December 8, 2023. A brief summary of the relevant facts is set out below.

### **A. The Parties and the Credit Facilities**

8. The Respondents are Trade X Group of Companies Inc. (“**Trade X Parent**”), 12771888 Canada Inc., TVAS Inc., Tradexpress Auto Canada Inc. (“**Tradexpress**”), Trade X Fund GP Inc., Trade X LP Fund I, Trade X Continental Inc., TX Capital Corp., Techlantic Ltd. (“**Techlantic**”) and TX OPS Canada Corporation (“**TX Canada**”). Trade X Parent, a private corporation formed under the laws of Canada, is a holding company and is the direct and indirect parent company of the other Respondents.<sup>16</sup>

9. The Respondents and their subsidiaries (together with Trade X Parent, the “**Trade X Group**”) are primarily involved in operating a business-to-business vehicle trading platform for car dealerships to purchase inventory from Canada and other overseas markets.<sup>17</sup> Trade X Parent and the other Respondents employ less than 30 individuals (none of whom are unionized, subject to collective agreements or party to a pension plan), all operate out of leased facilities in Ontario and have the same registered head office located in Mississauga, Ontario.<sup>18</sup>

10. In Canada, the Trade X Group’s operations are predominantly conducted by three companies: (a) TX Canada, (b) Techlantic, and (c) Wholesale Express:<sup>19</sup>

---

<sup>16</sup> Lovy Affidavit at para. 13, Application Record, Tab 2 at p. 24.

<sup>17</sup> Lovy Affidavit at para. 16, Application Record, Tab 2 at p. 26.

<sup>18</sup> Lovy Affidavit at paras. 15 & 20, Application Record, Tab 2 at p. 25 & 27.

<sup>19</sup> Lovy Affidavit at para. 16, Application Record, Tab 2 at p. 26.

- (a) **TX Canada:** a federally incorporated company that operates an automotive trading platform to connect car dealerships located in the United States with sellers in Canada through a secure marketplace offering end to end service that handles procurement, foreign exchange, logistics and duties for vehicle acquisitions between Canada and the United States.<sup>20</sup>
- (b) **Techlantic:** a federally incorporated company that operates out of Oakville, Ontario. Techlantic supports a network of automobile exporters, offering similar services to those offered by TX Canada, globally.<sup>21</sup>
- (c) **Wholesale Express:** a federally incorporated company that operates out of Saint-Madeleine, Quebec. Wholesale Express operates an online dealer-to-dealer auction platform for vehicles, whereby it acquires and sells pre-owned cars to registered dealers.<sup>22</sup> Wholesale Express is wholly owned by Trade X Parent but is not a Respondent in these proceedings.

11. The Applicant, MBL is a limited liability corporation under the laws of Delaware and a direct subsidiary of Post Road Group LP, a privately held alternative investment advisory firm based in Stamford, Connecticut.<sup>23</sup>

12. The outstanding Indebtedness owing to MBL by the Respondents (in their capacity as guarantors for the Borrowers) arises pursuant to two separate credit agreements (the “**Credit Agreements**”) under which MBL acts as the administrative agent for the Lenders (as defined below):

---

<sup>20</sup> Lovy Affidavit at para. 17, Application Record, Tab 2 at p. 26.  
<sup>21</sup> Lovy Affidavit at para. 18, Application Record, Tab 2 at p. 26.  
<sup>22</sup> Lovy Affidavit at para. 19, Application Record, Tab 2 at p. 27.  
<sup>23</sup> Lovy Affidavit at para. 12, Application Record, Tab 2 at p. 24.

- (a) **Domestic Facility:** a US\$ 30 million credit facility made available pursuant to a senior secured revolving credit agreement dated February 5, 2021 between Post Road Specialty Lending Fund II LP and Post Road Specialty Lending Fund (UMINN) LP, as lenders (the “**Domestic Lenders**”) and TX OPS Funding II, LLC, as borrower (the “**Domestic Borrower**”) (the “**Domestic Facility**”); and
- (b) **Global Facility:** a US\$ 30 million credit facility made available pursuant to a senior secured revolving credit agreement dated September 27, 2021 between Man Bridge Lane Specialty Lending Fund II (US) LP and Man Bridge Lane Specialty Lending Fund (UMINN) LP, as lenders (“the “**Global Lenders**”, and collectively with the Domestic Lenders, the “**Lenders**”) and Techlantic and TX OPS Global Funding I, LLC, as borrowers (the “**Global Borrowers**”, and collectively with the Domestic Borrower, the “**Borrowers**”) (the “**Global Facility**”, and collectively, the “**Credit Facilities**”).

13. The Domestic Borrower is a Delaware special purpose entity owned by TX OPS Indiana Limited, a U.S. affiliate of the Respondents (“**TX Indiana**”).<sup>24</sup> The Global Borrowers are Techlantic and TX OPS Global Funding I, LLC, which is also a Delaware special purpose vehicle that is owned by TX Indiana.<sup>25</sup>

14. The Credit Facilities are borrowing base facilities used by the Lenders to extend advances (“**Advances**”) to the Borrowers to facilitate the purchase and sale of vehicles by certain members of the Trade X Group, including Techlantic, TX Canada and TX Indiana, for sale between Canada

---

<sup>24</sup> Lovy Affidavit at para. 24, Application Record, Tab 2 at p. 29.

<sup>25</sup> Lovy Affidavit at para. 24, Application Record, Tab 2 at p. 29.

and the United States (in the case of the Domestic Facility) or globally (in the case of the Global Facility).<sup>26</sup>

15. There are a number of steps involved in connection with each Advance under the Credit Facilities, which are outlined in detail in the Lovy Affidavit. A high level summary of these steps is as follows:<sup>27</sup>

- (a) TX Canada or Techlantic purchases a used vehicle (the “**Vehicle**”) and then enters into a purchase agreement with TX Indiana to sell the Vehicle to TX Indiana;
- (b) TX Indian sells the Vehicle to a Borrower, along with TX Indian’s rights under the related purchase agreement. The Borrower makes an Advance request to MBL to finance the purchase price for the Vehicle. Once the Advance is made by the Lenders, the Vehicle forms part of the Collateral that is subject to the Security (defined below);
- (c) An end buyer purchases the Vehicle and pays a deposit to TX Indiana. Once the Vehicle is delivered to the importing country (being the location of the end buyer), the end buyer pays the balance of the purchase price to the Borrower (the deposit, purchase price and any other amounts payable by the end buyer together, the “**End Buyer Payment**”). These monies are required to be deposited by TX Indian and the Borrower in a designated bank account that is subject to a deposit account control agreement in favour of MBL (the “**Collection Account**”). The funds held in the Collection Account are used to repay the Advance made by the Lenders.

---

<sup>26</sup> Lovy Affidavit at para. 25, Application Record, Tab 2 at p. 29.

<sup>27</sup> Lovy Affidavit at paras. 27(a)-(i), Application Record, Tab 2 at pp. 30-33.

**B. The Security Interests and Collateral Held by MBL**

16. MBL has a first ranking security over substantially all of the assets of the Borrowers and the Respondents pursuant to a series of security agreements that are summarized below.

17. *The Borrower Security:* the Borrowers granted MBL a security interest in all of their property on February 5, 2021, in respect of the Domestic Facility (the “**Domestic Security**”) and on September 27, 2021, in respect of the Global Facility (the “**Global Security**”), as continuing security for the payment and performance of the Borrowers’ obligations under these Credit Facilities.<sup>28</sup>

18. *TX Canada Security:* TX Canada entered into guarantee and security agreements in connection with the Credit Facilities (collectively, the “**TX Canada Security**”). Pursuant to the TX Canada Security, TX Canada provided a guarantee for the obligations of the Borrowers to MBL for, among other things, any loss arising out of any acts of misappropriation or misapplication of funds or proceeds of any of the Collateral under the Domestic Security and Global Security (the “**Guaranteed Obligations**”).

19. As security for the Guaranteed Obligations, TX Canada: (a) granted a security interest over the harmonized sales tax receivables generated from the purchase of a Vehicle from TX Canada; (b) Vehicles that have been financed by an Advance and all the rights to payment and proceeds for all such Vehicles; (c) all of the rights and obligations under purchase agreements to which TX Canada is party; and (d) any Vehicles owned by TX Canada that are not subject to purchase agreements (collectively, the “**TX Canada Collateral**”).<sup>29</sup>

20. *Canadian Guarantors:* Pursuant to the 2022 Loan Restructuring (described and defined in paragraphs 26-28 below), each of the Respondents, other than TX Canada who was already a

---

<sup>28</sup> Lovy Affidavit at para. 32, Application Record, Tab 2 at p. 35.

<sup>29</sup> Lovy Affidavit at para. 34, Application Record, Tab 2 at p. 35.

guarantor of each of the Credit Facilities (collectively, the “**Canadian Guarantors**”), entered into joinders of the Global Facility and the Domestic Facility.<sup>30</sup> The joinders had the effect of making each Canadian Guarantor a guarantor of the obligations of the Borrowers under the Credit Facilities, causing each Canadian Guarantor to become party to the Domestic Security and the Global Security and granting MBL a security interest in all of their property, and pledged to MBL any equity directly owned by them in the shares of a member of the Trade X Group.<sup>31</sup>

21. *Blocked Accounts and Deposit Account Control Agreements:* MBL has entered into various blocked account agreements and deposit account control agreements with the Borrowers, TX Canada, Techlantic and Tradexpress (the “**DACAs**”).<sup>32</sup> As noted above, any amounts received from an end buyer of a vehicle must be deposited into the Collection Account by TX Indiana and the Borrowers, along with any harmonized sales tax receivable that is generated from the purchase of a Vehicle from TX Canada, Techlantic and Tradexpress.<sup>33</sup>

22. As a result of the Domestic Security, the Global Security, TX Canada Security and the DACAs, MBL has security over (a) the TX Canada Collateral, (b) substantially all of the assets of the Canadian Guarantors, (c) the shares of the Respondents, as well as their affiliate, Wholesale Express, some of which are perfected by possession, and (d) the Collection Account (collectively, the “**Collateral**”).<sup>34</sup>

23. MBL registered its security against the Respondents under the *Personal Property Security Act* (Ontario) (the “**PPSA**”) as follows: (a) against all of the property of TX Canada on February 4, 2021 and September 27, 2021; (b) against collateral identified as Accounts and Other in respect

---

<sup>30</sup> Lovy Affidavit at para. 35, Application Record, Tab 2 at p. 36.

<sup>31</sup> Lovy Affidavit at para. 35, Application Record, Tab 2 at p. 36.

<sup>32</sup> Lovy Affidavit at para. 36, Application Record, Tab 2 at p. 36.

<sup>33</sup> As described in paragraph 31 of the Lovy Affidavit, as part of its services, TX Canada, Techlantic or Tradexpress will pay the HST on a Vehicle on behalf of an end buyer and recover the HST for its own account. Lovy Affidavit at para. 31 and 37, Application Record, Tab 2 at p. 34 and 37.

<sup>34</sup> Lovy Affidavit at para. 38, Application Record, Tab 2 at p. 37.

of Davidson Motors Incorporated (former name of Tradexpress) on August 31, 2021, September 2, 2021 and September 27, 2021; (c) against all property of Techlantic registered on December 21, 2021 and December 23, 2022; and (d) against all of the property of the Canadian Guarantors, other than Tradexpress and Techlantic, on December 23, 2022.<sup>35</sup>

### **C. The Rapid Deterioration of the Trade X Group's Business**

24. Throughout 2020 and 2021, as a result of inventory shortages and supply chain issues caused by the COVID-19 pandemic, the Trade X Group benefited significantly from an increase in demand for used vehicles and was able to raise significant venture capital and rapidly grow its team.<sup>36</sup>

25. However, in 2022, car prices dropped precipitously (an average of 14% in the U.S. alone) as demand declined and the Trade X Group began to experience significant losses. The Trade X Group's losses were exacerbated by among other things, operational inefficiencies and its use of compensation model that provided bonuses based on the number of vehicles acquired for inventory purposes, regardless of the price paid by the end buyer of the vehicle.<sup>37</sup> These difficulties were further compounded by the general reduction of available capital in the investment community, which meant that Trade X Parent was not able to raise additional funds to subsidize the losses in the Trade X Group.<sup>38</sup>

---

<sup>35</sup> Lovy Affidavit at para. 41, Application Record, Tab 2 at pp. 37-38; Exhibit "L" to the Lovy Affidavit, Application Record, Tab 2L at pp. 503-801.

<sup>36</sup> Lovy Affidavit at paras. 50-51, Application Record, Tab 2 at pp. 40-41.

<sup>37</sup> Lovy Affidavit at para. 52, Application Record, Tab 2 at p. 41.

<sup>38</sup> Lovy Affidavit at para. 53, Application Record, Tab 2 at p. 41.

**D. The 2022 Loan Restructuring**

26. As a result of its financial troubles, in December 2022, Trade X Parent entered into a loan restructuring transaction with its three largest creditors – Highcrest Lending Inc. (“**Highcrest**”), Aimia Inc. (“**Aimia**”), and MBL (the “**2022 Loan Restructuring**”), whereby:

- (a) Aimia was granted a perfected security interest in all of the assets of Trade X Parent, whereas previously it was an unsecured creditor;<sup>39</sup>
- (b) Wholesale Express and Trade X Parent entered into a Master Amended and Restated Loan and Security Agreement dated December 23, 2022 between Highcrest, as lender, Wholesale Express, as borrower, and Trade X Parent as guarantor, in which Trade X Parent pledged its interests in 100% of the equity of Wholesale Express and the assets of Wholesale Express in favour of Highcrest (the “**Highcrest Collateral**”);<sup>40</sup> and
- (c) the Canadian Guarantors became parties to the Domestic Security and Global Security and granted security in all of their assets in favour of MBL.<sup>41</sup>

27. On December 23, 2022, Aimia, Highcrest, MBL, the Borrowers, TX Indiana, TX Canada and TX Parent entered into an amended and restated intercreditor agreement (the “**Intercreditor Agreement**”). Pursuant to the Intercreditor Agreement, the parties agreed that (a) Highcrest has a priority security interest in the Highcrest Collateral, (b) MBL has a priority security interest over all of the assets of Trade X Parent (other than Wholesale Express and its shares), (c) and Aimia

---

<sup>39</sup> Lovy Affidavit at para. 55, Application Record, Tab 2 at p. 42.

<sup>40</sup> Lovy Affidavit at para. 55, Application Record, Tab 2 at p. 42.

<sup>41</sup> Lovy Affidavit at para. 55, Application Record, Tab 2 at p. 42.

subordinated its interest for so long as any obligations to Highcrest and MBL remain outstanding.<sup>42</sup>

28. On November 22, 2023, Highcrest obtained an initial order under the *Companies' Creditors Arrangement Act* ("**CCAA**") against Wholesale Express in respect of the Highcrest Collateral.<sup>43</sup> The initial order permits MBL to bring an Application for receivership, provided that MBL does not seek control over the equity or assets of Wholesale Express.<sup>44</sup> Accordingly, the Appointment Order sought by MBL does not extend to Trade X Parent's interest in Wholesale Express and, at this time, MBL has no intention of pursuing control over Wholesale Express.

#### **E. Other Secured Creditors**

29. PPSA searches against the Respondents show that in addition to MBL, the following parties have registered a security interest against certain of the Respondents' property (collectively, the "**Other Secured Parties**"): <sup>45</sup>

<b>Creditor</b>	<b>Respondent</b>	<b>Date of Registration</b>
Highcrest	Trade X Parent	December 8, 2022
Aimia	Trade X Parent	January 3, 2023
TX Indiana	TX Canada	September 27, 2021
Congressional Bank	TX Canada	September 27, 2021
Trade X LP Fund I	TX Canada	February 25, 2020

30. Congressional Bank has released its interest and there is no indebtedness outstanding between TX Canada and Congressional Bank.<sup>46</sup> The Other Secured Parties have all been provided with notice of this Application.

---

<sup>42</sup> Lovy Affidavit at para. 57, Application Record, Tab 2 at p. 42.

<sup>43</sup> Lovy Affidavit at para. 48, Application Record, Tab 2 at p. 40.

<sup>44</sup> Lovy Affidavit at para. 49, Application Record, Tab 2 at p. 40.

<sup>45</sup> Lovy Affidavit at para. 42, Application Record, Tab 2 at p. 38. Exhibit "L" to the Lovy Affidavit, Application Record, Tab 2L at pp. 503-801.

<sup>46</sup> Lovy Affidavit at para. 42, Application Record, Tab 2 at p. 38.

**F. The Borrowers Default on their Obligations to MBL**

31. The Borrowers are in material default of their obligations under the Credit Agreements. On October 9, 2023, MBL became aware that the Borrowers and Respondents failed to deposit payments received from end buyers of Vehicles into the Collection Account as required by the Credit Facilities to repay the Advances.<sup>47</sup> Instead, these monies have been diverted by the Trade X Group to fund its own operations and working capital needs, including for the satisfaction of payroll obligations.<sup>48</sup> Between June and September 2023 alone, the Borrowers and Respondents diverted over US\$7 million from the Lenders and have continued to divert funds since that time.<sup>49</sup>

32. As described above, the Collateral securing the Credit Facilities is predominantly comprised of the Vehicles, the rights of parties under purchase and sale agreements in respect of such Vehicles and End Buyer Payments for those Vehicles.<sup>50</sup> Accordingly, Advances under the Credit Facilities are made available on a borrowing base, with the Vehicles serving as the primary Collateral for calculating the borrowing base.

33. As a result, there are a series of defaults (together, the “**Defaults**”) arising from the wrongful diversion of funds by the Borrowers and the Respondents, including, among other things, the failure of the Borrowers to deposit End Buyer Payments into the Collection Account, failure of the Vehicles to qualify as “Eligible Assets”<sup>51</sup> for purposes of calculating the borrowing base and the inability of the Borrower to deliver an accurate certification in respect of the borrowing base under the Credit Agreements.<sup>52</sup>

---

<sup>47</sup> Lovy Affidavit at para. 58, Application Record, Tab 2 at p. 43.

<sup>48</sup> Lovy Affidavit at paras. 58 & 69, Application Record, Tab 2 at pp. 43 & 47.

<sup>49</sup> Lovy Affidavit at para. 59, Application Record, Tab 2 at p. 43.

<sup>50</sup> Lovy Affidavit at para. 61, Application Record, Tab 2 at p. 44.

<sup>51</sup> As described in para 27(g) of the Lovy Affidavit, End Buyer Payments must be paid by the Borrower into the Collection Account within a prescribed period of time in order for a Vehicle to continue being characterized as an “Eligible Asset”. Lovy Affidavit at para. 27(g), Application Record, Tab 2 at pp. 32-33.

<sup>52</sup> Lovy Affidavit at para. 62, Application Record, Tab 2 at pp. 44-45.

34. The Defaults have triggered the obligations of TX Canada under the TX Canada Security, as well as the obligations of the Canadian Guarantors under the Domestic Security and the Global Security.<sup>53</sup>

35. MBL acted swiftly after it learned of the Defaults: (a) on October 10, 2023, MBL sent a notice of exclusive control under each of the DACAs to Silicon Valley Bank pursuant to which MBL directed the bank to cease complying with instructions from the Borrowers;<sup>54</sup> (b) on October 13, 2023, MBL sent notices of default and acceleration in respect of the Defaults to the Borrowers, TX Indiana and the Respondents, advising of the outstanding obligations under the Credit Facilities;<sup>55</sup> (c) on October 16, 2023, MBL sent notices of activation to RBC and under the DACAs notifying the bank that they were to transfer all funds on deposit to the Collection Account;<sup>56</sup> (d) on November 11, 2023, MBL sent the Respondents notices of intention to enforce the security under section 244 of the BIA.<sup>57</sup> Despite MBL's significant efforts, the Defaults are uncured and remain ongoing.

### **G. Current Status of the Trade X Group**

36. The Trade X Group has been so poorly managed that it is unclear whether the company will ever recover and there is a growing risk that what remains of the Collateral will continue to dissipate, jeopardizing MBL's ability to recover what it is owed.

37. Trade X Parent's management has **expressly admitted** to wilfully diverting funds properly owed to MBL and the Trade X Group appears to have run out of operating capital.<sup>58</sup> The majority of the Respondents' employees have resigned from their employment,<sup>59</sup> and an inspection

---

<sup>53</sup> Lovy Affidavit at para. 63, Application Record, Tab 2 at p. 45.

<sup>54</sup> Lovy Affidavit at para. 66, Application Record, Tab 2 at p. 46.

<sup>55</sup> Lovy Affidavit at para. 64, Application Record, Tab 2 at p. 45.

<sup>56</sup> Lovy Affidavit at para. 65, Application Record, Tab 2 at p. 46.

<sup>57</sup> Lovy Affidavit at para. 67, Application Record, Tab 2 at p. 46.

<sup>58</sup> Lovy Affidavit at paras. 68-69, Application Record, Tab 2 at pp. 46-47.

<sup>59</sup> Lovy Affidavit at para. 70, Application Record, Tab 2 at p. 47.

conducted by FTI and Trade X Group's premises in Mississauga, Ontario revealed that that there was no apparent business being operated by the company in Canada.<sup>60</sup> In the circumstances, MBL has entirely lost confidence in the management of Trade X Parent and the other Respondents.

38. On November 27, 2023, the landlord under the lease of the Mississauga Location, VS Verwaltungs GmbH served Trade X Parent with a Lease Default Notice, stating that Trade X Parent was in default of its obligations under the Lease Agreement.<sup>61</sup>

#### **H. The Receivership**

39. MBL is seeking the appointment of FTI as the Receiver to enable it to determine the status of the Respondents' operations in Canada, to preserve the remaining Collateral and to ensure adequate recovery on those assets. FTI has consented to act as the Receiver.<sup>62</sup>

40. If appointed, the Receiver will be empowered by court order to borrow funds from MBL for the purposes of, among other things, funding the costs and disbursements of the receivership.<sup>63</sup> MBL has agreed to a charge in favour of the Receiver and its counsel, as security for payment of their respective fees and disbursements, which shall form a first charge in priority to the claims of MBL as secured creditor (described below as the Receiver's Charge) and a charge for the Receiver's borrowings from MBL (described below as the Receiver's Borrowings Charge).<sup>64</sup>

### **PART III - STATEMENT OF ISSUES**

41. There are three issues on this Application: (a) whether this Court has the jurisdiction to make the requested order to appoint the Proposed Receiver (the "**Appointment Order**");

---

<sup>60</sup> Lovy Affidavit at para. 71, Application Record, Tab 2 at p. 47.

<sup>61</sup> Lovy Affidavit at para. 72, Application Record, Tab 2 at pp. 47-48.

<sup>62</sup> Lovy Affidavit at para. 77, Application Record, Tab 2 at p. 49.

<sup>63</sup> Lovy Affidavit at para. 79, Application Record, Tab 2 at p. 50.

<sup>64</sup> Lovy Affidavit at para. 78, Application Record, Tab 2 at p. 49.

(b) whether it is just and convenient to appoint FTI as the receiver; and (c) whether the terms of the proposed Appointment Order are appropriate.

42. MBL submits that the answer to each issue is “yes”.

#### **PART IV - LAW AND ARGUMENT**

##### **A. This Court has Jurisdiction to Appoint the Proposed Receiver**

43. The Court has the jurisdiction to appoint FTI as the receiver.

##### **(i) Section 243 of the BIA and Section 101 of the CJA Apply to this Case**

44. Section 243(1) of the BIA and section 101 of the CJA authorize a court, on the application of a secured creditor, to appoint a receiver where it is just and convenient to do so, and on such terms as the court considers just.<sup>65</sup> MBL is permitted to bring the within application because it is a secured creditor of the Respondents with a perfected security interest in the Collateral.<sup>66</sup> MBL has delivered the Section 244 Notices in accordance with the BIA and the ten-day notice period prescribed thereunder has expired.<sup>67</sup>

##### **(ii) The Locality of the Debtor is in Ontario**

45. Section 243(5) of the BIA provides that an application for the appointment of a receiver “is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor”.<sup>68</sup>

46. The “locality of the debtor” is defined under the BIA as:

- (a) the principal place where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,
- (b) the principal place where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

---

<sup>65</sup> BIA, [s. 243\(1\)](#); *Courts of Justice Act*, R.S.O. 1990, c. C.43, [s. 101](#).

<sup>66</sup> Lovy Affidavit at para. 38, Application Record, Tab 2 at p. 37.

<sup>67</sup> Lovy Affidavit at para. 67, Application Record, Tab 2 at p. 46.

<sup>68</sup> BIA, s. [243\(5\)](#).

- (c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated.<sup>69</sup>

47. In determining the principal place a debtor has carried on business or resided, courts have considered the following factors, among others: (a) the location of the head office of the debtor; (b) the jurisdiction of incorporation of the debtor; and (c) where business operations took place.<sup>70</sup>

48. Applying these factors, the locality of the Respondents within the meaning of the BIA is Ontario.<sup>71</sup> Trade X Parent and the Respondents are all incorporated pursuant to the federal laws of Canada.<sup>72</sup> All of the Respondents have their registered head office located in Mississauga, Ontario.<sup>73</sup> Although the Respondents operate an online platform to facilitate the purchase and sale of vehicles, the physical vehicles comprising the inventory were purchased from and sold to purchasers in Canada (in the case of the Domestic Facility).<sup>74</sup> TX Canada specifically operates a platform that connects dealerships in the United States with Canadian sellers of vehicles, located in Canada. TX Canada arranges for the procurement, foreign exchange, logistics and duties for such vehicle acquisitions.<sup>75</sup> As a result, this Court has jurisdiction and is the appropriate forum to grant the requested Appointment Order.

49. While some of the Respondents' operations may have taken place outside of Ontario by virtue of their dealings with their U.S. and global affiliates, such consideration does not displace the preponderance of factors connecting the Trade X Group to Ontario. The principal place in

---

<sup>69</sup> BIA, [s. 2](#).

<sup>70</sup> *Malartic Hygrade Gold Mines Ltd., Re*, [1966 CarswellOnt 30](#) (Ont. Sup. Ct., In Bankruptcy) at paras. 35-38, Applicant's Book of Authorities ("ABOA"), Tab 8; *Flax Investment Ltd., Re*, [1979 CarswellOnt 248](#) (Ont. Sup. Ct., In Bankruptcy) at paras. 5-15, ABOA, Tab 7; *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001 SCC 92](#) at paras. 22-23, ABOA, Tan 11.

<sup>71</sup> Lovy Affidavit at paras. 13-15, Application Record, Tab 2 at pp. 24-25.

<sup>72</sup> Lovy Affidavit at paras. 13 & 17-18, Application Record, Tab 2 at pp. 24 & 26.

<sup>73</sup> Lovy Affidavit at para. 15, Application Record, Tab 2 at p. 25.

<sup>74</sup> Lovy Affidavit at para. 4, Application Record, Tab 2 at p. 21.

<sup>75</sup> Lovy Affidavit at para. 17, Application Record, Tab 2 at p. 26.

which the Respondents domiciled in the preceding year is clearly Ontario by virtue of their jurisdiction of incorporation and the location of their head office.<sup>76</sup>

50. Courts have been guided by the balance of convenience in determining the locality of the debtor and whether they have jurisdiction to hear an application.<sup>77</sup> The balance of convenience weighs in favour of bringing this Application before this Court. The Respondents reside in Ontario and MBL and the Other Secured Creditors have all registered their secured interest against the Respondents in Ontario.<sup>78</sup> The Receiver is also located in Ontario. The CCAA Application brought by Highcrest in Quebec has no bearing on the determination of jurisdiction for this Application because Highcrest is a creditor of Wholesale Express, an entity whose headquarters are in Quebec and who is not party to this Application.<sup>79</sup> As a result, this Court has jurisdiction and is the appropriate forum to grant the requested Appointment Order.

**(iii) The Proposed Receiver is a Trustee under the BIA**

51. Section 243(4) only permits a “trustee” to be appointed as a receiver under the BIA.<sup>80</sup> FTI is a trustee under the BIA and has provided its consent to act as the receiver if so appointed.<sup>81</sup>

---

<sup>76</sup> Lovy Affidavit at paras. 13, 15 & 17-18, Application Record, Tab 2 at pp. 24-26.

<sup>77</sup> See for example *Malartic Hygrade Gold Mines Ltd., Re*, [1966 CarswellOnt 30](#) (Ont. Sup. Ct., In Bankruptcy) at para. 50, ABOA, Tab 8.

<sup>78</sup> Lovy Affidavit at para. 41 & 45, Application Record, Tab 2 at pp. 37-39.

<sup>79</sup> Lovy Affidavit at paras. 9 & 19, Application Record, Tab 2 at pp. 23 & 27.

<sup>80</sup> *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, [s. 243\(4\)](#).

<sup>81</sup> Lovy Affidavit at para. 77, Application Record, Tab 2 at p. 49.

**B. It is Just and Convenient to Appoint the Proposed Receiver**

**(i) The Test for Appointing a Receiver under the BIA and CJA**

52. Subsection 243(1) of the BIA and section 101 of the CJA authorize a court to appoint a receiver where such appointment is “just or convenient”.<sup>82</sup> In determining whether it is just and convenient to appoint a receiver a court must have regard to all of the circumstances of the case.<sup>83</sup>

53. Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.<sup>84</sup>

54. The Credit Agreements provide MBL with a contractual right to appoint a receiver in respect of the Respondents (other than TX Canada)<sup>85</sup> during an “Event of Default” as defined in Article IX of the Credit Agreements, which allows MBL to enforce its security and sell the Collateral pursuant to court-appointed receivership proceedings.<sup>86</sup>

---

<sup>82</sup> *BIA*, s. 243(1).

<sup>83</sup> *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited et al.*, [2022 ONSC 6186](#) at [para. 23](#), ABOA, Tab 3.

<sup>84</sup> *Meridian v. Okje Cho & Family Enterprise Ltd.*, [2021 ONSC 3755](#) at [para. 21](#), ABOA, Tab 9; *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, [2020 ONSC 1953](#) at [para. 43](#), ABOA, Tab 2; *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, [2013 ONSC 6866](#) at [para. 27](#), ABOA, Tab 5; *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, [2010 BCSC 477](#), at paras. [50](#) and [75](#) (B.C. S.C. [In Chambers]), ABOA, Tab 12; *Canadian Tire Corp. v. Healy*, [2011 ONSC 4616](#) at [para. 18](#) (S.C.J. [Commercial List]), ABOA, Tab 4; *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, [2011 ONSC 1007](#) at [para. 27](#) (S.C.J. [Commercial List]), ABOA, Tab 1; *Farallon Investments Ltd. v. Bruce Pallett Fruit Farms Ltd.*, [\[1992\] OJ No 330](#) at paras. 2-6 (Gen. Div.), ABOA, Tab 6.

<sup>85</sup> TX Canada did not enter into a joinder of the Credit Facilities as part of the 2022 Loan Restructuring because it was already a guarantor and secured party pursuant to the TX Canada Security.

<sup>86</sup> Lovy Affidavit at para. 75, Application Record, Tab 2 at p. 49.

55. Regardless of its contractual right to appoint a receiver, MBL submits that in any event it is just and convenient to appoint a receiver in the circumstances, including in respect of TX Canada. The “just or convenient inquiry” requires the court to determine whether it is in the interests of all concerned to have the receiver appointed by the court. In making such a determination, courts have considered, among others, the following factors, with added emphasis on the factors that are relevant on this Application, discussed further below:<sup>87</sup>

- (a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;
- (b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
- (c) the nature of the property;
- (d) the apprehended or actual waste of the debtor's assets;
- (e) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
- (f) the effect of the order upon the parties;
- (g) the conduct of the parties;
- (h) the cost to the parties;
- (i) the likelihood of maximizing return to the parties;
- (j) the goal of facilitating the duties of the receiver.

56. Courts are guided by “what justice dictates and practicality demands”<sup>88</sup> and have been prepared to appoint a receiver “where it is necessary for the protection or preservation of the

---

<sup>87</sup> *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited et al.*, [2022 ONSC 6186](#) at [para. 25](#), ABOA, Tab 3.

<sup>88</sup> *Third Eye Capital Corp. v. Dianor Resources Inc.*, [2019 ONCA 508](#) at [para. 57](#), ABOA, Tab 13. Although the relevant phrase was used in describing the court's powers to allow a receiver to “take such other action that the court considers advisable”, the comment in question is nevertheless instructive.

secured creditors security interest in the debtor's property" or "to preserve the property pending realization where ordinary legal remedies are defective, or to preserve property from some danger that threatens it."<sup>89</sup> It is just and convenient to appoint FTI as the Receiver in the circumstances of this case, for the reasons that follow.

**(ii) Nature of the Property, Waste of Assets, Risk to MBL and Likelihood of Maximizing Return**

57. The nature and condition of the Collateral and the resulting need to preserve their value, favour heavily the appointment of a receiver. While courts recognize that they must have regard to "all of the circumstances" of a case, particular emphasis is placed on "the nature of the property and rights and interests of all parties in relation thereto".<sup>90</sup> In cases where there is a risk of diminution in value of the assets at issue, courts have relied on this factor (among others) in appointing a receiver.<sup>91</sup>

58. In the present case, the Collateral predominantly consists of Vehicles, rights under the related purchase agreements and End Buyer Payments.<sup>92</sup> Given the complex nature of the intercompany payables, the online nature of the business and the fact that Vehicles are exported between jurisdictions with frequency, MBL is concerned that if there is Collateral available, it is at risk of further dissipating.<sup>93</sup> The funds belonging to the Collection Account continue to be diverted by the Borrowers and the Respondents. A senior member of the Techlantic's management, Eric

---

<sup>89</sup> Roderick J. Wood, *Bankruptcy and Insolvency Law* (Canada: Irwin Law Inc., 2015) at p. 528, ABOA, Tab 14.

<sup>90</sup> *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited et al.*, [2022 ONSC 6186](#) at [para. 23](#), ABOA, Tab 3.

<sup>91</sup> See for example *Pandion Mine Finance Fund LP v. Otso Gold Corp.*, [2022 BCSC 136](#), ABOA, Tab 10. In that case, the debtor had no funds to maintain a mine, one of the key assets at issue. The court found that the appointment of a receiver was necessary to preserve the value of the mine and to conduct an orderly marketing of the mine. See also the discussion in *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited et al.*, [2022 ONSC 6186](#) at [paras. 33-34](#), ABOA, Tab 3.

<sup>92</sup> Lovy Affidavit at paras. 22, 31 & 38, Application Record, Tab 2 at pp. 27-28, 34 & 37.

<sup>93</sup> Lovy Affidavit at para. 74, Application Record, Tab 2 at p. 48.

van Essen, admitted to MBL that the Respondents were using all of their inbound funds to pay their critical expenses before repaying their creditors.<sup>94</sup>

59. Put simply, unless the Receiver is appointed quickly to gain control of the Respondents' operations, secure the Collateral and trace the diverted funds on an expedited basis, MBL's chances of recovery will be slim.

**(iii) Conduct of the Parties and Difficulty in Enforcing Security Interest**

60. The conduct of the parties and the difficulty in enforcing the security interest make it just and convenient to appoint a receiver over the Collateral. As discussed above, the Borrowers and the Respondents continue to divert funds from the Collection Account and continues to treat the obligations it owes to MBL as though they are optional.<sup>95</sup>

61. Indeed, bad faith, dishonest conduct or other impropriety by the debtor may militate in favour of the appointment of a receiver.<sup>96</sup> Given the length of time during which the diversion of funds have persisted by the Respondents and other members of the Trade X Group, the deliberate, proactive nature of those financial irregularities and the deliberate efforts to hide the irregularities, MBL has a legitimate basis for a lack of confidence in management of the Respondents.<sup>97</sup>

62. MBL has exhausted all of the out-of-Court remedies available to it under the Credit Agreements, but Trade X Group has failed or refused to collaborate and give effect to such remedies.<sup>98</sup> Trade X Group's failure or refusal to do so, coupled with its blatant disregard for

---

<sup>94</sup> Lovy Affidavit at para. 73, Application Record, Tab 2 at p. 48.

<sup>95</sup> Lovy Affidavit at para. 69, Application Record, Tab 2 at p. 47.

<sup>96</sup> *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, [2020 ONSC 1953](#) at [para. 49](#).

<sup>97</sup> *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, [2020 ONSC 1953](#) at [para. 49](#).

<sup>98</sup> Lovy Affidavit at paras. 64-67, Application Record, Tab 2 at pp. 45-46.

payment and other obligations under the Credit Facilities, make it clear that there is no workable remedy other than the appointment of a receiver.

**(iv) Cost to the Parties**

63. The cost of the receivership will be borne by MBL at no prejudice to any other party. If appointed, it is contemplated the Receiver will be empowered by the Appointment Order to borrow funds from MBL for the purposes of, among other things, funding the costs and disbursements of the receivership and the costs associated with the sales process.<sup>99</sup> MBL has agreed to a charge in favour of the Receiver, and its counsel, security for payment of their respective fees and disbursements, in each case at their standard rate and charges, which shall form a first charge in priority to the claims of MBL as secured creditor.<sup>100</sup> The Other Secured Creditors are aware of this Application.<sup>101</sup>

**(v) Facilitating the Duties of the Receiver**

64. The appointment of the Receiver will provide stability and supervision needed to preserve the value of the Collateral. Furthermore, as noted above, MBL is not the only secured creditor of the Respondents. A receivership will provide transparency about the Respondents and their operations, which benefits all of the Respondents' stakeholders. The proposed Receiver will also be able to equitably deal with the interests of all of the Respondents' creditors and coordinate this proceeding with the CCAA proceeding in respect of Wholesale Express.

**C. The Terms of the Proposed Appointment Order are Appropriate**

**(i) The Terms of the Proposed Appointment Order**

65. The proposed Appointment Order is based on the Commercial List model order. To the extent there are any deviations from such order, they are made to address the nature and scope

---

<sup>99</sup> Lovy Affidavit at paras. 78-79, Application Record, Tab 2 at pp. 49-50.

<sup>100</sup> Lovy Affidavit at para. 79, Application Record, Tab 2 at p. 50.

<sup>101</sup> Lovy Affidavit at para. 81(g), Application Record, Tab 2 at p. 51.

of the Collateral. In MBL's respectful submission, these provisions are reasonable and necessary to enable the Receiver to fulfill its mandate.

**(ii) The Receiver's Borrowing Charge**

66. The Court has express statutory jurisdiction pursuant to section 243(6) of the BIA to make an order respecting the payment and fees of the receiver, including to grant a charge ranking ahead of any secured creditors over the debtor's property, provided that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.<sup>102</sup>

67. In addition, section 101(2) of the CJA provides that any order under section 101(1) of the CJA may include such terms as are considered just.

68. The proposed Appointment Order provides for a "Receiver's Charge" on the Collateral to secure the fees and disbursements of the Receiver and its counsel and a "Receiver's Borrowings Charge" to secure monies loaned to the Receiver by MBL from time to time for the purposes of funding the receivership (collectively, the "**Charges**"). The Charges will rank ahead of MBL's security interest.<sup>103</sup> MBL has informed the Other Secured Creditors of the Charges via notice of this Application.

**PART V - ORDER REQUESTED**

69. MBL respectfully requests: (a) an order appointing FTI as receiver and manager over substantially all the assets, undertakings and property of the Respondents pursuant to section 243 of the BIA and section 101 of the CJA, as amended; and (b) ancillary relief as set out in the proposed Appointment Order.

---

<sup>102</sup> BIA, [s. 243\(6\)](#).

<sup>103</sup> Lovy Affidavit at para. 78, Application Record, Tab 2 at pp. 49-50.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 8<sup>th</sup> day of December, 2023.



---

**Davies Ward Phillips & Vineberg LLP**  
155 Wellington Street West  
Toronto ON M5V 3J7

**Natasha MacParland** (LSO #42383G)  
Email: NMacParland@dwpv.com  
Tel: 416.863.5567

**Natalie Renner** (LSO# 55954A)  
Email: nrenner@dwpv.com  
Tel: 416.367.7489

**Maya Churilov** (LSO# 87190A)  
Email: mchurilov@dwpv.com  
Tel: 416.367.7508

Lawyers for the Applicant, MBL Administrative  
Agent II LLC

## SCHEDULE "A"

### LIST OF AUTHORITIES

#### **Cases**

1. [\*Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited\*](#), 2011 ONSC 1007
2. [\*BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.\*](#), 2020 ONSC 1953
3. [\*Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited et al.\*](#), 2022 ONSC 6186
4. [\*Canadian Tire Corp. v. Healy\*](#), 2011 ONSC 4616
5. [\*Farallon Investments Ltd. v. Bruce Pallett Fruit Farms Ltd.\*](#), [1992] OJ No 330 (Gen. Div.)
6. [\*Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.\*](#), 2013 ONSC 6866
7. [\*Flax Investment Ltd., Re\*](#), 1979 CarswellOnt 248 (Ont. Sup. Ct., In Bankruptcy)
8. [\*Malartic Hygrade Gold Mines Ltd., Re\*](#), 1966 CarswellOnt 30 (Ont. Sup. Ct., In Bankruptcy)
9. [\*Meridian v. Okje Cho & Family Enterprise Ltd.\*](#), 2021 ONSC 3755
10. [\*Pandion Mine Finance Fund LP v. Otso Gold Corp.\*](#), 2022 BCSC 136
11. [\*Sam Lévy & Associés Inc. v. Azco Mining Inc.\*](#), 2001 SCC 92
12. [\*Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.\*](#), 2010 BCSC 477
13. [\*Third Eye Capital Corp. v. Dianor Resources Inc.\*](#), 2019 ONCA 508

#### **Secondary Source**

14. Roderick J. Wood, *Bankruptcy and Insolvency Law* (Canada: Irwin Law Inc., 2015)

## SCHEDULE "B"

### TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

#### Interpretation

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; (*localité*)

#### 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.

### **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**

**(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.

***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**

**101(2)** An order under subsection (1) may include such terms as are considered just.

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT  
TORONTO

**FACTUM**

**DAVIES WARD PHILLIPS & VINEBERG LLP**  
155 Wellington Street West  
Toronto ON M5V 3J7

**Natasha MacParland** (LSO #42383G)  
Email: NMacParland@dwpv.com  
Tel: 416.863.5567

**Natalie Renner** (LSO# 55954A)  
Email: nrenner@dwpv.com  
Tel: 416.367.7489

**Maya Churilov** (LSO# 87190A)  
Email: mchurilov@dwpv.com  
Tel: 416.367.7508

Tel: 416.863.0900  
Fax: 416.863.0871

Lawyers for the Applicant, MBL Administrative Agent II LLC