

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

**IN THE MATTER OF section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3,
as amended and section 101 of the *Courts of Justice Act*, RSO 1990, c. C43, as amended**

B E T W E E N:

HSBC BANK CANADA

Applicant

- and -

DMI EXIM LIMITED

Respondent

**FACTUM OF THE APPLICANT
(Appointment of a Receiver – Application returnable August 1, 2023)**

July 31, 2023

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PART I - NATURE OF THE APPLICATION

1. It is just and convenient for this Court to appoint KPMG Inc. as receiver and manager (in such capacity, the “**Receiver**”) of the property, assets and undertaking (the “**Property**”) of the Respondent, DMI EXIM Limited (“**DMI**”).
2. The Applicant, HSBC Bank Canada (the “**Lender**”), is DMI’s senior secured creditor. It is also DMI’s largest creditor, being owed more than US\$21.6 million and CA\$520,000.¹
3. DMI’s assets include approximately US\$47.7 million in accounts receivable and its office located at 10 Falconer Drive, Unit 3, Mississauga, Ontario, L5N 3L8 (the “**Office**”), which is subject to a charge in favour of the Lender.²
4. On Friday, July 28, 2023, DMI made a voluntary assignment in bankruptcy and named KPMG Inc. as its trustee in bankruptcy (in such capacity, the “**Trustee**”).³ The Trustee consents to this application. It is uncontested that the appointment of the Receiver is the most cost-effective and expeditious means of recovering DMI’s accounts receivable and other assets.

PART II - FACTS

5. DMI is an international commodities trader that operated from its Office in Mississauga.⁴

¹ Affidavit of Brian Pettit sworn July 28, 2023 (the “**Pettit Affidavit**”) at para 11, Application Record dated July 28, 2023 (“**AR**”), Tab 2, CaseLines pg. A21.

² Pettit Affidavit at paras 5, 8-9 and 14, AR, Tab 2, CaseLines pgs. A19-A20 and A22.

³ [Certificate of Appointment dated July 28, 2023](https://kpmg.com/ca/en/home/services/advisory/deal-advisory/creditorlinks/dmi-exim) at <https://kpmg.com/ca/en/home/services/advisory/deal-advisory/creditorlinks/dmi-exim>.

⁴ Pettit Affidavit at paras 4-5 and 8, AR, Tab 2, CaseLines pg. A19.

6. Pursuant to an amended and restated facility letter dated February 7, 2022 (the “**Facility Letter**”), the Lender made certain credit facilities available to DMI to, among other things, purchase the Office and finance its operations (the “**Credit Facilities**”).⁵
7. Pursuant to a General Security Agreement dated April 29, 2021 (the “**GSA**”), DMI granted the Lender security over all of its present and after-acquired real and personal property.⁶ The GSA provides that the Lender may appoint a receiver should DMI default on any of its obligations to the Lender.⁷
8. DMI also granted to the Lender a first-ranking charge over the Office in the amount of CA\$575,000 as security for all of its obligations to the Lender.⁸
9. As of May 26, 2023, DMI was in default of its obligations to the Lender for not having repaid more than US\$10 million when due.⁹
10. By letter dated June 8, 2023, the Lender demanded payment of all amounts outstanding under the Credit Facilities and served a notice pursuant to [s.244](#) of the *BIA*.¹⁰ The demand letter and *BIA* notice have not been satisfied. DMI’s defaults remain outstanding.¹¹
11. On June 19, 2023, DMI filed a Notice of Intention to Make a Proposal pursuant to the *BIA*. On July 19, 2023, DMI submitted a proposal to its unsecured creditors.¹² DMI has since made an assignment in bankruptcy.

⁵ Pettit Affidavit at para 10, AR, Tab 2, CaseLines pg. A20.

⁶ GSA – Exhibit “E” to Pettit Affidavit, AR, Tab 2, CaseLines pgs. A122-136.

⁷ Exhibit “E” to Pettit Affidavit, paras 18(p) -18(q), AR, Tab 2, CaseLines pg. A129.

⁸ Pettit Affidavit at para 14, AR, Tab 2, CaseLines pg. A22.

⁹ Pettit Affidavit at paras 17-18, AR, Tab 2, CaseLines pg. A23.

¹⁰ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*].

¹¹ Pettit Affidavit at paras 19 and 25, AR, Tab 2, CaseLines pgs. A24 and A25.

¹² Pettit Affidavit at paras 21-22, AR, Tab 2, CaseLines pg. A24.

PART III - ISSUE & ARGUMENT

12. The sole issue before the Court is whether it is just and convenient in the circumstances for this Court to appoint the Receiver.¹³ In the circumstances, it is both just and convenient to appoint the Receiver. Moreover, the Trustee consents to the appointment of the Receiver.
13. In considering whether it is just or convenient to appoint a receiver, the Court should have regard to all of the circumstances, focusing particularly on the nature of the property and the rights and interests of all parties relating thereto. This includes the rights of a secured creditor under its security.¹⁴
14. This Court has accepted the following factors as relevant: (a) the existence of a debt and a default, (b) the quality of the security in issue, (c) the fact that the creditor has a right to appoint a receiver under the loan documentation, (d) the likelihood of maximizing the return to the parties, and (e) the risk to the security holder.¹⁵
15. All of these factors favour the appointment of the Receiver:
 - (a) DMI owes the Lender more than US\$21.6 million and CA\$520,000;
 - (b) DMI has defaulted under its agreements with the Lender. The Lender demanded repayment. The defaults remain outstanding and the demand unsatisfied;
 - (c) the GSA provides for the appointment of a receiver as a remedy for the Lender. The appointment of a receiver is not considered an extraordinary remedy as a result;¹⁶

¹³ *BIA*, s. 243(1); *Courts of Justice Act*, RSO 1990, c C43, s. 101(1).

¹⁴ *Bank of Nova Scotia v Freure Village on Clair Creek*, 1996 CanLII 8258 at para 10 (ONSC [Commercial List]); *2806401 Ontario Inc o/a Allied Track Services Inc.*, 2022 ONSC 5509 [*Allied Track*] at para 12; *Canadian Equipment Finance and Leasing Inc v The Hypoint Company Limited*, 2022 ONSC 6186 [*Hypoint*] at para 23.

¹⁵ *Allied Track* at para 13.

¹⁶ *Allied Track* at para 14; *Hypoint* at para 24.

- (d) it is uncontested that the appointment of the Receiver will be the most effective and cost-efficient means of realizing on DMI's assets, particularly its accounts receivable; and
- (e) given that DMI's accounts receivable are aged, the risk of delaying realizing on such assets is material and prejudicial to the Lender.

16. As a matter of cost efficiency, the draft Order included in the Application Record contemplates that the Receiver will be authorized to retain the same counsel as the Lender in respect of any aspect where there is no actual or potential conflict of interest.¹⁷ This Court has authorized substantially identical provisions in recent receivership orders.¹⁸

PART IV - RELIEF REQUESTED

17. The Lender seeks an Order substantially in the form included in the Application Record, which appoints KPMG Inc. as the Receiver of DMI's Property.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of July, 2023.

Thornton Grout Finnigan LLP
Lawyers for the Applicant, HSBC Bank Canada

¹⁷ Draft Order (appointing Receiver), para. 4, AR, Tab 4, CaseLines pg. 184.

¹⁸ [Order of Justice Centa dated June 15, 2023](#) at para 4 in *StateView Homes (Hampton Heights) Inc.*, CV-23-00700356-00CL; [Order of Justice Kimmel dated April 17, 2023](#) at para 25 in *LDI Lakeside Developments Inc.*, CV-23-00694059-00CL; [Order of Justice Gilmore dated August 3, 2022](#) at para 26 in *Applewood Marketplace Inc.*, CV-22-00684878-00CL; [Order of Justice Cavanagh dated January 13, 2022](#) at para 25 in *Areacor Inc.*, CV-22-00674747-00CL.

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. [*Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CarswellOnt 2328, \[1996\] O.J. No. 508 \(S.C.J. \[Commercial List\]\).](#)
2. [*2806401 Ontario Inc. o/a Allied Track Services Inc.*, 2022 ONSC 5509.](#)
3. [*Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186.](#)
4. [Order of Justice Centa dated June 15, 2023 in *StateView Homes \(Hampton Heights\) Inc.*, CV-23-00700356-00CL.](#)
5. [Order of Justice Kimmel dated April 17, 2023 in *LDI Lakeside Developments Inc.*, CV-23-00694059-00CL.](#)
6. [Order of Justice Gilmore dated August 3, 2022 in *Applewood Marketplace Inc.*, CV-22-00684878-00CL.](#)
7. [Order of Justice Cavanagh dated January 13, 2022 in *Areacor Inc.*, CV-22-00674747-00CL.](#)

IN THE MATTER OF section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended, and section 101 of the *Courts of Justice Act*, RSO 1990, c C46, as amended

HSBC BANK CANADA

- and -

DMI EXIM LIMITED

Applicant

Respondent

Court File No. CV-23-00703534-00CL

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Proceedings commenced at Toronto, Ontario

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