

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N :

ORTHO STUDIO EXPRESS, INC.

Applicant

- and -

DIGITAL ORTHODONTIC CARE INC.

Respondent

**APPLICATION UNDER SUBSECTION 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 C.43, AS AMENDED**

**FACTUM OF THE APPLICANT
(returnable May 12, 2023)**

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PART I - INTRODUCTION

1. Ortho Studio Express, Inc. (“**Ortho**”) brings this application for the following relief:
 - (a) An Order appointing Richter Inc. (“**Richter**”), as receiver (the “**Receiver**”), over all the property, assets and undertakings of Digital Orthodontic Care Inc. (“**DOC**”) or the “**Debtor**”) pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”) and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the “**CJA**”);
 - (b) abridging, if necessary, the time for service of this application and deeming service good and sufficient; and
 - (c) costs of this application award to the applicant on a partial indemnity basis.
2. DOC is indebted to Ortho in the amount of USD \$5,055,000.00, together with additional accrued and unpaid interest and fees, costs, and expenses (the “**Indebtedness**”) pursuant to a Line of Credit Grid Promissory Note dated March 20, 2020 (the “**Promissory Note**”).
3. The relief sought in this application is necessary because DOC is incapable of repaying the Applicant and is unable to maintain the value of Ortho’s collateral, which is at imminent risk due to threats by DOC’s landlord.
4. The appointment of Richter as receiver is just and convenient in the circumstances.

PART II - THE FACTS

5. The facts relevant to this application are set out in detail in the Affidavit of Mark Cassidy, sworn May 8, 2023, and included as Tab 2 of the Application Record herein. Below is a brief summary of those facts.

A. Overview of the parties

6. Ortho is a U.S.-based investment firm, which holds various investments in companies in the orthodontics industry. It is a fully owned subsidiary of American Orthodontics, which is based in Sheboygan, Wisconsin.¹

7. DOC is a corporation organized under the *Business Corporations Act*, RSO 1990 c B.16. DOC operates under the business name SureCure Orthodontic Aligners and sells orthodontic aligners. Its business premises are located in Milton, Ontario, but its registered address is in Toronto.²

8. Ortho owns a minority stake in DOC.³

B. Indebtedness and Security

9. In March 2020, Ortho agreed to provide DOC a loan of up to USD\$5,000,000.00 by way of the Promissory Note. All of DOC's obligations to Ortho under the Promissory Note are secured by way of a General Security Agreement dated March 20, 2020.⁴

¹ Affidavit of Mark Cassidy sworn May 8, 2023, at para 3 [“Cassidy Affidavit”].

² Cassidy Affidavit at para 4 and Exhibit A.

³ Cassidy Affidavit at para 5(d).

⁴ Cassidy Affidavit at paras 8-11 and Exhibit C.

10. DOC granted a first ranking security interest in favour of Ortho in all present and after-acquired personal property of DOC (the “**Collateral**”), as evidenced by the registration of financing statements in favour of Ortho under the *Personal Property Security Act* (Ontario).⁵

11. DOC drew the full amount available under the Promissory Note. It provided for interest to accrue at a fixed annual interest rate equal to 4% of the value of the loan, paid on a quarterly basis.⁶ The note matured on March 20, 2023.⁷

12. DOC repeatedly failed to make principal and interest payments under the Promissory Note, including repayment of the principal in full on the maturity of the Promissory Note on March 20, 2023. These constituted events of default under Section 8(a) of the Promissory Note.⁸

13. On March 22, 2023, the Debtor and Ortho entered a forbearance agreement (the “**Forbearance Agreement**”) in which the Debtor acknowledged its default, confirmed that it would pay Ortho the interest, principal and other obligations under the Promissory Note by July 18, 2023 at the latest, and agreed that Ortho could terminate its forbearance and proceed to enforce its rights pursuant to the Promissory Note, among other acknowledgements.⁹

14. On May 2, 2023, DOC advised Ortho that the landlord of DOC’s facility in Milton had sent a demand letter regarding rent arrears. The letter threatened that the landlord would take steps against property owned by DOC that forms part of the collateral supporting the Promissory Note.¹⁰

⁵ Cassidy Affidavit, Exhibit D.

⁶ Cassidy Affidavit at para 15 and Exhibit B.

⁷ Cassidy Affidavit at para 10.

⁸ Cassidy Affidavit at paras 16, 18, 20-22 and Exhibits B, E, G-H.

⁹ Cassidy Affidavit at para 25 and Exhibit K.

¹⁰ Cassidy Affidavit at para 27 and Exhibit L.

DOC's failure to make timely rent payments constituted further event of default under Section 8(e) of the Promissory Note.¹¹

15. On May 3, 2023, Ortho sent DOC a Notice of Intent to Enforce Security. DOC subsequently consented to the early enforcement of Ortho's security.¹²

16. As of today, DOC is indebted to Ortho under the Promissory Note in the amount of USD\$5,055,000.00, together with additional accrued and unpaid interest and fees, costs, and expenses.¹³

PART III - ISSUES AND THE LAW

17. This application raises the following issues:

- (a) Is it just and convenient to appoint a receiver over all the property, assets and undertakings of DOC?
- (b) Is it necessary in the interest of justice to abridge the time for service?

A. The Test for Appointment of a Receiver is met

18. Pursuant to section 243(1) of the BIA, the Court may, on application by a secured creditor, appoint a receiver where it considers it to be just or convenient to do so:

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:¹⁴

¹¹ Cassidy Affidavit at para 28 and Exhibit B.

¹² Cassidy Affidavit at paras 29-30.

¹³ Cassidy Affidavit at para 16.

¹⁴ [RSC 1985, c B-3, s. 243](#) [*"BIA"*].

- (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 the court considers advisable.

19. Section 101(1) of the CJA provides for the appointment of a receiver by interlocutory order where the appointment is “just or convenient”:

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.¹⁵

20. In deciding whether it is “just and convenient” to appoint a receiver, a court must have regard to all of the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation to the property.¹⁶

21. The factors to be considered in determining whether it is appropriate to appoint a receiver include, among others:¹⁷

- (a) 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 assets while litigation takes place;
- (b) the nature of the property;
- (c) the preservation and protection of the property pending judicial resolution;
- (d) the fact that the creditor has a right to appointment under the loan documentation;

¹⁵ [RSO 1990, c C.43, s. 101](#) [“CJA ”].

¹⁶ *Canadian Equipment Finance and Leasing Inc. v The Hypoint Company Limited, et al*, [2022 ONSC 6186 at para 22-23](#) [“*CEF v Hypoint*”]; *Bank of Montreal v Carnival National Leasing Ltd.*, [2011 ONSC 1007 at para 24](#) [“*BMO v Carnival*”]; *Bank of Nova Scotia v Freure Village on Clair Creek*, [1996 CanLII 8258 \(Ont Gen Div\) at para 10](#) [“*BNS v Freure Village*”].

¹⁷ *CEF v Hypoint* at [para 25](#).

- (e) the conduct of the parties; and
- (f) the likelihood of maximizing return to the parties.

22. It is not necessary for the secured creditor to establish that it will suffer irreparable harm if the receiver is not appointed.¹⁸

23. The circumstances of this case support the appointment of the Receiver. The Indebtedness is payable under the parties' loan documents. The Debtor is unable to satisfy obligation to pay. This is not in dispute. The Debtor acknowledged under the Forbearance Agreement that it is unable to pay the Indebtedness, and has consented to the enforcement of Ortho's security.

24. The fact that the Debtor consented to the appointment of a receiver in the Promissory Note is an important factor supporting the appointment. As noted by Justice Morawetz in *Bank of Montreal v. Sherco Properties Inc.*:¹⁹

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.

25. The Promissory Note specifically contemplates the appointment of a receiver upon the occurrence of an event of default:

5.2 Remedies

Upon the occurrence of an Event of Default, the Security Interest shall immediately become enforceable and the Secured Party may, forthwith or at any time thereafter and without notice to the Debtor except as required by the PPSA or by this Agreement:

...

- (e) appoint or reappoint by instrument in writing any person to be an agent or any person to be a receiver, manager or receiver and manager (herein called a

¹⁸ *CEF v Hypoint* at [para 26](#); *BMO v Carnival* at [paras 28-29](#).

¹⁹ *Bank of Montreal v Sherco Properties Inc.*, [2013 ONSC 7023 at para 42](#).

“Receiver”) of the Collateral and to remove any Receiver so appointed and to appoint another if the Secured Party so desires;²⁰

26. In the present case, there is a real need for the appointment of a receiver to preserve and protect the property, given that DOC’s landlord may otherwise take steps to distrain property that is part of Ortho’s collateral.²¹

27. The proposed receivership will create an efficient and appropriate venue for the determination of any competing claims to DOC’s property. Accordingly, the appointment of a receiver is just and convenient. It is an appropriate enforcement mechanism in the circumstances.

B. The Interests of Justice Favour Abridging Service

28. The Court has discretion further to Rule 2.03 to abridge the time for service where it is necessary in the interest of justice.²² This is an appropriate case in which to exercise that discretion.

29. DOC has consented to the early enforcement of Ortho’s security.²³ Ortho acted quickly after learning of the demand letter by DOC’s landlord to protect its interest in the Collateral. Given the pending threats of DOC’s landlord to distrain assets that form part of Ortho’s collateral, there is an imminent threat to Ortho’s security if a receiver is not appointed.

²⁰ Cassidy Affidavit, Exhibit B.

²¹ Cassidy Affidavit, Exhibit L.

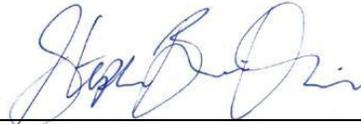
²² *Fleming Door Products Ltd. v Hazell*, [2008 CanLII 38961 at para 30](#).

²³ Cassidy Affidavit, Exhibits L-N.

C. ORDERS REQUESTED

30. For the reasons set out above, the applicant respectfully requests that the Court grant the relief sought on this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of May, 2023.



Stephen Brown-Okruhlik
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Lawyers for the **Applicant**

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Bank of Montreal v Carnival National Leasing Ltd.*, [2011 ONSC 1007](#)
2. *Bank of Nova Scotia v Freure Village on Clair Creek*, [1996 CanLII 8258](#)
3. *Bank of Montreal v Sherco Properties Inc.*, [2013 ONSC 7023](#)
4. *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, [2022 ONSC 6186](#)
5. *Fleming Door Products Ltd. v Hazell*, [2008 CanLII 38961](#)

**SCHEDULE “B”
RELEVANT STATUTES**

1. ***Bankruptcy and Insolvency Act***, [RSC 1985, c. B-3](#), as amended

Court may appoint a 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 the court considers advisable.

2. ***Courts of Justice Act***, [RSO 1990, c C.43](#), as amended

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.

137(2) Sealing documents

A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

3. ***Rules of Civil Procedure***, [RRO 1990, Reg 194](#), as amended

Court May Dispense with Compliance

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time. R.R.O. 1990, Reg. 194, r. 2.03.

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Respondent

Court File No.: [CV-23-00699238-00CL](#)

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Proceeding commenced at Toronto

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