Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

TRISURA GUARANTEE INSURANCE COMPANY

Applicant

- and -

EBERSOLE EXCAVATING INC. AND D&S RAILWAY CONSTRUCTION INC.

Respondents

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 47 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
(Appointment of Interim Receiver)

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PART I – THE APPLICATION

1. The Applicant, Trisura Guarantee Insurance Company ("**Trisura**") seeks an order appointing Grant Thornton Limited ("**GTL**") as interim receiver (the "**Interim Receiver**") of the assets, property and undertaking (the "**Property**") of Ebersole Excavating Inc. ("**Ebersole**") and D & S Railway Construction Inc. ("**D&S**", and together with Ebersole, the "**Debtors**") pursuant to section 47(1) of the *Bankruptcy and Insolvency Act* ("**BIA**") and section 101 of the *Courts of Justice Act.*

2. Trisura issued certain performance and labour and material bonds (collectively, the "**Bonds**") whereby the Debtors are the principals under the Bonds.

3. Pursuant to an Indemnity Agreement dated March 4, 2008 (the "**Indemnity Agreement**") in favour of Trisura by the Debtors, Darrell Ebersole and Sandra Ebersole (collectively, the

"**Indemnitors**"), the Indemnitors have agreed to indemnify Trisura against any and all losses, charges, expenses, costs, claims, demands and liabilities of whatsoever kind or nature which Trisura may sustain or incur by reason of, *inter alia*, having executed or procured the execution of the Bonds.

4. As security for the payment and performance of the obligations under the Indemnity Agreement, the Indemnitors provided security to Trisura pursuant to the provisions of the Indemnity Agreement.

5. The Indemnitors are in default of their obligations to Trisura. Furthermore, events of default have occurred under the Indemnity Agreement. Trisura has demanded payment from the Indemnitors and, through its counsel, Borden Ladner Gervais LLP ("**BLG**"), delivered a Notice of Intention to Enforce Security ("**NITES**") under the BIA to each of the Indemnitors.

6. Due to a number of concerns Trisura has and as a result of certain information Trisura has learned, Trisura has concluded that it cannot wait the ten days prescribed by the NITES to bring its application for the appointment of a national receiver. There is a significant risk that the value of the Property of the Debtors will be significantly eroded if an interim receiver is not immediately appointed. Accordingly, Trisura is seeking the appointment of GTL as interim receiver of the Property to preserve and protect the Property for Trisura and the other stakeholders.

PART II – THE FACTS

BACKGROUND

7. Ebersole is an Ontario corporation that was incorporated on February 9, 1996. Darrell W. Ebersole ("**Darrell**") is the President and a Director. Sandra L. Ebersole ("**Sandra**") is also a Director.

Affidavit of Stuart Detsky, sworn November 24, 2014 (the "Detsky Affidavit") at paragraph 3.

8. D&S is an Ontario corporation that was incorporated on April 2, 2003. Darrell is the President and a Director. Sandra is also a Director.

Detsky Affidavit, at paragraph 4.

9. Ebersole Excavating is in the business of site preparation services including, excavating, grading, sewer and water systems and septic systems across southwestern Ontario.

Detsky Affidavit, at paragraph 5.

10. D&S is in the business of railway construction and repair across southwestern Ontario.

Detsky Affidavit, at paragraph 6.

11. Both Ebersole Excavating and D&S have a registered office located at 2194 East Avenue, Stevensville, Ontario (the "**Premises**"). The Premises are used both for the purposes of the business of the Debtors and as the residence for Sandra. Darrell previously resided at the Premises, but has since moved.

Detsky Affidavit, at paragraph 7.

Dealings between Trisura and the Debtors

12. Trisura established a surety bonding facility for each of the Debtors to issue various Bonds. As security for payment and performance of the obligations owed by the Debtors to Trisura under the surety bonding facility, each of the Debtors, Darrell and Sandra executed an Indemnity Agreement in favour of Trisura.

Detsky Affidavit, at paragraph 8.

13. In general, a Performance Bond ("**Performance Bond**") guarantees to the owner of a project (called the "**Obligee**" in the Performance Bond) that the contractor (called the "**Principal**" in the Performance Bond) will perform the contract. The Performance Bond further provides that if the Principal defaults in the performance of the contract, the surety will arrange for completion so long as the Obligee has performed its obligations under the contract and complied with the terms and conditions of the Performance Bond.

Detsky Affidavit, at paragraph 9.

14. In general, a Labour and Material Payment Bond (“**L&M Bond**”) guarantees to the Obligee that the suppliers of materials and subcontractors to the Principal on the bonded projects will be paid their outstanding accounts in accordance with the terms and conditions of the L&M Bond.

Detsky Affidavit, at paragraph 10.

Claims on the Bonds

15. Over the last few months, Trisura began to receive notices from subcontractors and suppliers on the Trisura Bonded Projects under the L&M Bond. Trisura has received ten (10) L&M Bond claims in the approximate amount of $516,554.09, as a result of the Debtors’ alleged failure to pay its subcontractors and suppliers on the Trisura Bonded Projects. Trisura has received notification from certain Obligees of potential claims under the L&M Bonds and it expects to receive further claims under the L&M Bonds as subcontractors and suppliers learn of the insolvency proceedings commenced by Ebersole Excavating.

Detsky Affidavit, at paragraph 12.

16. On or about July 28, 2014, Trisura received a claim on the Performance Bond from the Regional Municipality of Niagara (“**Niagara Region**”). Trisura continues to work with Niagara Region in connection with the claim made on the Performance Bond.

Detsky Affidavit, at paragraph 13.

Commencement of Insolvency Proceedings by Ebersole Excavating

17. On June 19, 2014, Ebersole Excavating filed a Notice of Intention to Make a Proposal (“**NOI**”) under the *Bankruptcy and Insolvency Act* (“**BIA**”) and BDO Canada Limited (“**BDO**”) agreed to act as the proposal trustee (the “**Proposal Trustee**”). Ebersole Excavating filed a proposal with the Official Receiver on July 18, 2014. The proposal (the “**Proposal**”) was subsequently approved by the creditors and approved by the Court.

Detsky Affidavit, at paragraph 14.

18. The Proposal of Ebersole Excavating provides as follows under the heading "Secured Creditors, Lien Claimants and Trust Creditors":

> The claim of Secured Creditors shall, subject to the provisions of the Act, be paid in accordance with the arrangements between the Company and the holder of such claims which were in effect on the Date of Filing or such other terms as may be mutually agreed between them following the Date of Filing.

Accordingly, the Proposal carves out secured creditors from the proposed compromise set out therein.

Detsky Affidavit, at paragraph 16.

Default of the Debtors under the Surety Bonding Facility

19. The Debtors have committed various events of default under the Indemnity Agreement. Accordingly, by letter dated June 30, 2014, Trisura demanded payment from D&S, Darrell and Sandra (the "**Trisura Demand Letter**"). The Trisura Demand Letter provided that Trisura had received several notices of claim for payment from claimants with respect to the Trisura Bonded Projects and that it was expecting to receive a claim from Niagara Region pursuant to the Performance Bond issued in respect of that project. Since the delivery of the Trisura Demand Letter on June 30, 2014, a claim has been filed by Niagara Region.

Detsky Affidavit, at paragraph 17.

20. In the Trisura Demand Letter, Trisura advised certain of the Indemnitors (as defined in the Indemnity Agreement) that Trisura had incurred Indemnity Losses (as defined in the Indemnity Agreement) in the amount of approximately $403,000. Since the Trisura Demand Letter was issued, Trisura has in fact and will incur further losses in connection with the Trisura Bonded Projects.

Detsky Affidavit, at paragraph 18.

21. On November 19, 2014, Borden Ladner Gervais LLP ("**BLG**"), the lawyers for Trisura, delivered letters to each of the Debtors, Darrell and Sandra advising of the occurrence of various events of default under the Indemnity Agreement, demanding payment in respect of the Indemnity Losses (as defined in the Indemnity Agreement) and advising the Debtors, Darrell and

Sandra of Trisura's intention to enforce its security, pursuant to the Indemnity Agreement. BLG, on behalf of Trisura, also delivered to the Debtors, Darrell and Sandra a NITES in respect of the Indemnity Losses (as defined in the Indemnity Agreement) incurred under the Indemnity Agreement as part of its correspondence on November 19, 2014 (the "**BLG Demand Letters**").

Detsky Affidavit, at paragraph 19.

Recent Events of Concern to Trisura

22. Over the last few months, the Debtors, Darrell and Sandra were represented by John MacDonald ("**MacDonald**") of JMA Accounting Professional Corporation ("**JMA Accounting**"). Representatives of Trisura have had various discussions with MacDonald from time to time, with respect to the Proposal filed by Ebersole Excavating and the status of the various Trisura Bonded Projects.

Detsky Affidavit, at paragraph 20.

23. At some point in the summer of 2014, Trisura was advised by MacDonald that Ebersole Excavating and/or D&S were considering a possible sale of certain assets. However, at no time was Trisura ever advised by representatives of Ebersole Excavating, D&S or by MacDonald, that Ebersole Excavating and/or D&S had in fact concluded a transaction for the sale of certain assets to a third party.

Detsky Affidavit, at paragraph 21.

24. In the afternoon of November 12, 2014, Trisura learned that certain of the assets of Ebersole Excavating and/or D&S were sold to Maynards Industrial Limited ("**Maynards**").

Detsky Affidavit, at paragraph 22.

25. The information that assets belonging to Ebersole Excavating and/or D&S had been sold to Maynards came as a complete surprise to Trisura, who had previously made registrations as against each of the Debtors, Darrell and Sandra pursuant to the provisions of the *Personal Property Security Act* (Ontario) ("**PPSA**").

Detsky Affidavit, at paragraph 23.

26. In light of the information learned by Trisura in the afternoon of November 12, 2014, Trisura instructed BLG to deliver a letter to each of Maynards and JMA Accounting (the "**Maynards Letter**") setting out the position of Trisura in connection with the transaction which Trisura understood had occurred between Ebersole Excavating and/or D&S and Maynards and requesting information and documents from each of Maynards and/or JMA Accounting with respect to the transaction.

Detsky Affidavit, at paragraph 24.

27. On November 14, 2014, BLG also delivered an email to Peter Naumis at BDO requesting information about recent events and the proposal proceedings of Ebersole Excavating. The November 14, 2014 email to BDO also attached a copy of the Maynards Letter.

Detsky Affidavit, at paragraph 25.

28. A review of the Purchase and Sale Agreement between D&S and Maynards discloses that the purchase price for the assets, which includes various pieces of equipment, is $1,350,000 and that the purchase price was paid to D&S.

Detsky Affidavit, at paragraph 28.

29. The obligations of Ebersole Excavating and D&S to Bank of Montreal ("**BMO**") have been repaid.

Detsky Affidavit, at paragraph 29.

30. On November 19, 2014, BLG received from Joel Farber at Fogler, Rubinoff LLP ("**Fogler**"), the lawyers for Maynards, a letter dated October 29, 2014 from Mr. Van Klink to the Debtors, with a payout statement in respect of the obligations owing to BMO (the "**Miller Thomson Letter**"). According to the payout statement attached to the Miller Thomson Letter, the amount owing to BMO as at October 31, 2014 was $728,737.27.

Detsky Affidavit, at paragraph 30.

31. The Purchase and Sale Agreement notes that the vendor is D&S. However, the financial statements for each of Ebersole Excavating and D&S disclose that both Ebersole Excavating and

D&S own equipment. Interestingly enough, the Maynards brochure advertising the sale of the equipment Maynards purported to purchase from D&S, has pictures of pieces of equipment that are clearly labelled as "Ebersole". The Statement of Affairs that was sworn by Darrell on behalf of Ebersole Excavating on July 18, 2014, list assets for Ebersole Excavating, including equipment in the amount of $453,940. In fact, some of the equipment included in the Maynards brochure would not be equipment that would typically be used by D&S in its operations.

Detsky Affidavit, at paragraph 31.

Request for the Appointment of an Interim Receiver and Urgency

32. Trisura has learned that Maynards intends to hold a public auction on December 4, 2014 to sell the equipment that Maynards purported to purchase from D&S. In connection therewith, representatives from Trisura were able to obtain a copy of the brochure advertising the public auction scheduled for December 4, 2014.

Detsky Affidavit, at paragraph 32.

33. Trisura is very concerned about the pending sale of the equipment by Maynards. BLG has put Maynards on notice of Trisura's interest in the equipment.

Detsky Affidavit, at paragraph 33.

34. Trisura does not have full particulars on the use of the funds derived from the Maynards transaction.

Detsky Affidavit, at paragraph 34.

35. In response to the BLG email of November 14, 2014, Mr. Naumis of BDO confirmed in an email to BLG on November 17, 2014, that Ebersole Excavating ceased operating prior to the filing of the NOI, the company had employees up until May, 2014 and that the last payroll was June 6, 2014.

Detsky Affidavit, at paragraph 35.

36. Under the terms of the Proposal filed by Ebersole Excavating, the "Backer" (as defined in the Proposal) is D&S. Trisura is concerned that the surplus proceeds from the Maynards sale

will be used by Ebersole Excavating and D&S to fund a proposal for a company that is no longer operating, simply to absolve the Directors of certain liabilities. This is confirmed in the BDO email of November 17, 2014.

Detsky Affidavit, at paragraph 36.

37. On November 12, 2014, BLG obtained Ontario Writ Locator searches on each of the Debtors, Darrell and Sandra. The Ontario Writ Locator searches disclosed that there is a writ of seizure and sale that has been filed in favour of Koppers Inc. as against D&S in the amount of $32,449.99.

Detsky Affidavit, at paragraph 37.

38. As a consequence of the troubling developments that Trisura has learned of in the last few days, the inability of Trisura to get information and documents from the Debtors and/or JMA Accounting, as its advisor, Trisura has lost confidence in the management of the Debtors.

Detsky Affidavit, at paragraph 39.

39. In order to prevent the imminent erosion of Trisura's security and to ensure that there is some ability to safeguard the assets of the Debtors and gather information and report back to the stakeholders and the Court, it is necessary that an interim receiver be appointed over the Property of the Debtors.

Detsky Affidavit, at paragraph 40.

40. Trisura is of the view that GTL would be well-suited to act as interim receiver of the Debtors. In connection therewith, GTL has agreed to accept the appointment, if so appointed by the Court.

Detsky Affidavit, at paragraph 41.

PART III – THE ISSUES

41. Is Trisura entitled to an order lifting the stay of proceedings pursuant to section 69.4 of the BIA such that Trisura can commence the within application for the appointment of an interim receiver over the Property of the Debtors?

46. The material prejudice under s. 69.4(a) is objective, not subjective, in that it refers to "the degree of the prejudice suffered vis-à-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor *qua* person, organization or entity."

> ***Re Cumberland Trading Inc.*, [1994] O.J. No. 132 at para 11.**

47. In the context of lifting a stay of proceedings in order to appoint an interim receiver during proposal proceedings, there does not need to be an actual immediate risk to assets, but rather "a realistic risk of asset dissipation if a Receiver is not appointed."

> ***Maxim Financial Services Inc. v. Corporate Cars Ltd. Partnership*, [2006] O.J. No. 4878 at paras 15-16.**

B. THE TEST FOR THE APPOINTMENT OF AN INTEIRM RECEIVER

48. Pursuant to subsection 47(1) of the *Bankruptcy and Insolvency Act*, the Court has the power to appoint an interim receiver of all or any part of the debtor's property if a court is satisfied that a notice is about to be sent or was sent under subsection 244(1) of the BIA. Subsection 47(1) of the BIA provides:

> 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.
>
> **Subsection 47(1) BIA.**

49. As a threshold issue, where an appointment is to be made under section 47(1) of the BIA, the Court must be satisfied that the appointment of an interim receiver is necessary to protect

either: (a) the debtor's estate, or (b) the interests of the creditor who sent a notice under section 244(1) of the BIA.

Subsection 47(3) BIA.

50. The test for the appointment of a receiver under 101 of the *Courts of Justice Act* is whether such appointment would be just or convenient. Section 101 of the *Courts of Justice Act* provides as follows:

> 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.

Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

51. In *Callidus Capital Corp. v. CarCap Inc.*, Madam Justice Mesbur set out the issues the Court will consider in determining whether to appoint an interim receiver. The Court must have regard to all the circumstances, but in particular to:

(a) the effect on the parties of appointing the receiver. This includes potential costs and the likelihood of maximizing return on and preserving the subject property;

(b) the parties' conduct; and

(c) the nature of the property and the rights and interests of all parties in relation to it.

***Callidus Captial Corp. v. Carcap Inc.*, 2012 CarswellOnt 480, 2012 ONSC 163 (Ont. S. C. J. [Commercial List]) ("Callidus"), at para. 41.**

52. Additionally, the fact that the moving party has a right under its security documentation to appoint a receiver is an important factor to be considered. While the appointment of a receiver is generally viewed as an extraordinary remedy, in cases where the security documentation of the moving party provides for a private or court appointed receiver, the issue is reduced to a consideration of whether it is in the interests of all concerned to have the receiver appointed by

the Court. An additional factor that militates in favour appointing a receiver is loss of faith in the management of the debtor company.

Callidus, at paras. 43, 45 and 51.

53. It is not necessary for a creditor, whose security documentation provides for the appointment of a receiver, to demonstrate that it will suffer irreparable harm if the appointment of a receiver is not granted by the Court.

Callidus, paras. 42-44.

54. The Court will generally appoint a receiver when it is necessary to (a) enforce rights between the parties, (b) to preserve of assets pending judgment, or (b) where there is a serious apprehension about the safety of the assets.

Callidus, at paras. 43, 45.

55. An interim receiver will be appointed on very short notice if it is necessary to preserve and protect debtor's estate and the interests of the applicant creditor.

***Royal Bank v. Applied Energy Systems Inc.*, 2009 CarswellOnt 7797 (Ont. S.C.J. [Commercial List]), paras. 2, 4.**

56. In *Callidus*, following repeated unsuccessful attempts at securing new financing, Madam Justice Mesbur granted an order for an interim receiver in order to protect the secured creditor's security from further erosion and "to put a stop to the continued haemorrhaging of money".

Callidus, paras. 51, 53.

57. In *EMP Global Services Inc. v. Signifi Solutions Inc.*, Mr. Justice Cumming appointed an interim receiver with limited powers pending the return of the application for the appointment of a receiver and manager under section 243 of the BIA to protect the interests of the secured creditor on the basis that the debtor was insolvent, was unable to meet its liabilities as they

became due without incurring further liabilities, did not generate sufficient cash flow to meet current and future liabilities and continued to operate at a deficit.

> ***EMP Global Services Inc. v. Signifi Solutions Inc.*, 2012 CarswellOnt 281, 2012 ONSC 288 (Ont. S.C.J. [Commercial List]).**

C. <u>AN INTERIM RECEIVER OUGHT TO BE APPOINTED</u>

58. The appointment of an interim receiver is necessary and appropriate in this case.

59. The appointment of an interim receiver over the Property is necessary to preserve and protect the Property for Trisura and other stakeholders. Trisura cannot wait ten days following the delivery of the NITES to bring an application for the appointment of a national receiver. There is a significant risk that the value of the Property of the Debtors will be eroded if an interim receiver is not immediately appointed.

60. In order to prevent the imminent erosion of Trisura's security, it is necessary that an interim receiver be appointed over the Property of the Debtors. The interim receiver would be in a position to protect and preserve the collateral and invoke an orderly and managed process for dealing with the Property of the Debtors.

PART V – ORDER REQUESTED

61. Trisura respectfully requests:

(a) an order lifting the stay of proceedings pursuant to section 69.4 of the BIA such that Trisura can commence the within application for the appointment of an interim receiver over the Property of the Debtors; and

(b) an order appointing GTL as interim receiver of all of the assets, property and undertaking of the Debtors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

November 24, 2014

Roger Jaipargas, of Counsel to the Applicant

SCHEDULE "A"

LIST OF AUTHORITIES

Re Ma, [2001] O.J. No. 1189 (Ont. C.A.)

Re Cumberland Trading Inc., [1994] O.J. No. 132

Maxim Financial Services Inc. v. Corporate Cars Ltd. Partnership, [2006] O.J. No. 4878

Callidus Capital Corp. v. Carcap Inc., 2012 CarswellOnt 480, 2012 ONSC 163 (Ont. S.C.J. [Commercial List]).

Royal Bank v. Applied Energy Systems Inc., 2009 CarswellOnt 7797 (Ont. S.C.J. [Commercial List]).

EMP Global Services Inc. v. Signifi Solutions Inc., 2012 CarswellOnt 281, 2012 ONSC 288 (Ont. S.C.J. [Commercial List]).

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PROCEEDINGS COMMENCED AT TORONTO

FACTUM OF THE APPLICANT
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