

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)**

B E T W E E N:

THE MANUFACTURERS LIFE INSURANCE COMPANY

Applicant

- and -

RIVERSIDE PROFESSIONAL CENTRE INC.

Respondent

APPLICATION UNDER Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended

**FACTUM OF THE APPLICANT
(Appointment of a Receiver)
(Returnable September 20, 2021)**

September 17, 2021

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PART I - INTRODUCTION

1. The Manufacturers Life Insurance Company (“**Manulife**”) brings this application for the appointment of MNP Ltd. (“**MNP**”) as receiver and manager of the assets, undertaking and property of Riverside Professional Corporation Inc. (“**Riverside**” or the “**Debtor**”).

2. Riverside is the owner of a medical office building in Ottawa, Ontario (the “**Property**”). The building is approximately 48,000 square feet and is spread over four storeys with direct access to The Ottawa Hospital (“**Ottawa Hospital**”).

3. This application to appoint a receiver is triggered by a confluence of events, including serious, substantial and ongoing defaults, which have led to Manulife’s loss of confidence in the Debtor’s ability to manage the Property and preserve Manulife’s collateral.

4. Manulife advanced a loan of \$7,500,000 (the “**Loan**”) to the Debtor pursuant to various loan and security documents. Approximately \$5,560,000 remains outstanding under the Loan, exclusive of legal fees.

5. The medical office building is located on property owned by the Ottawa Hospital. It is leased by the Ottawa Hospital to the Debtor pursuant to a ground lease (the “**Ground Lease**”). The Property and the Debtor’s leasehold interest in the Ground Lease form part of Manulife’s security.

6. Over the last two years, Riverside has been in default of substantial and ongoing municipal property tax obligations in connection with the Property. Currently, the Debtor

owes approximately \$624,000 on account of property taxes (the “**Outstanding Property Taxes**”). This obligation has accrued in priority to Manulife’s security.

7. Beyond a default of the loan and security documents with Manulife, the outstanding tax obligations constitute a default of the Ground Lease. Importantly, this default gives the Ottawa Hospital, as lessor, a basis to terminate the Ground Lease. As a consequence of the Outstanding Property Taxes, on May 4, 2021, the Ottawa Hospital noted the Debtor in default under the Ground Lease by issuing a default letter (the “**Default Letter**”).

8. Riverside is additionally involved in longstanding and acrimonious litigation, spanning more than ten years, with the Ottawa Hospital in respect of the Ground Lease. Riverside’s claims in the litigation were recently summarily dismissed in their entirety (with a \$398,000 adverse costs award).

9. Manulife has provided the Debtor with ample opportunity to remedy its defaults. Manulife has waited over seven months after issuing the initial default letter before issuing a notice of intention to enforce security. Additionally, Manulife initiated and engaged in discussions regarding a potential forbearance agreement, which efforts ultimately proved unsuccessful.

10. All the while, Manulife’s security position remains in peril due to the Debtor’s defaults under the loan and security documents, its entirely unsuccessful litigation strategy with its landlord, and the landlord’s ability to terminate the Ground Lease.

11. The Debtor’s defaults, its inability to satisfy information requests, and its outstanding tax obligations have resulted in Manulife losing confidence in the Debtor’s

management. This has left Manulife with no option but to seek the appointment of a receiver in order to preserve and protect its collateral.

PART II - FACTS

A. Background

12. The facts giving rise to this receivership application are detailed in the affidavit of Robert Amos sworn September 14, 2021 (the “**Amos Affidavit**”) and are only repeated here as necessary.

13. Riverside is an Ontario Corporation with a registered office in Toronto, Ontario.¹ Riverside operates and manages the Property.² The Property is owned by Ottawa Hospital and is located in the middle of the hospital’s campus.³ Riverside leases the Property from Ottawa Hospital under the Ground Lease.⁴

14. Riverside leases units within the Property to doctors, dentists, and other medical professionals;⁵ however, since 2018, approximately 29.55% of the Property has remained vacant.⁶

15. The Ground Lease is between Riverside and Ottawa Hospital.⁷ It has an initial term of 49 years (expiring in 2038) with an option to renew for a further 49-year term.⁸ The Ground Lease has been the subject of significant litigation commenced by Riverside

¹ Affidavit of Robert Amos sworn September 14, 2021 (“**Amos Affidavit**”) at para 10.

² Amos Affidavit at para 13.

³ Amos Affidavit at para 14.

⁴ Amos Affidavit at para 19.

⁵ Amos Affidavit at para 3.

⁶ Amos Affidavit at para 26.

⁷ Amos Affidavit at para 19.

⁸ Amos Affidavit at para 20.

against Ottawa Hospital around September 29, 2017.⁹ Riverside was wholly unsuccessful and currently faces an adverse cost award of approximately \$398,000.¹⁰

16. Manulife advanced the Loan to Riverside pursuant to a commitment letter dated December 15, 2011.¹¹ If the Loan was not in default and demand had not been made, the maturity date of the Loan was February 1, 2022.¹²

17. As security for the payment and performance of the Loan, the Debtor granted in favour of Manulife:

- (a) a charge (the “**Mortgage**”) against the Debtor’s leasehold interest in the Property. The Mortgage is registered against title to the Property;
- (b) a general security agreement in favor of Manulife over all of the Debtor’s personal property and undertaking. Manulife registered its security interest in accordance with the PPSA; and
- (c) a general assignment of leases and rents. The assignment is registered on title to the Property.¹³

⁹ Amos Affidavit at para 23.

¹⁰ Amos Affidavit at para 27.

¹¹ Amos Affidavit at para 11.

¹² Amos Affidavit at para 15.

¹³ Amos Affidavit at paras 13, 16-17.

B. Default under the Loan

18. The terms of the Loan and the Mortgage require the Debtor to pay municipal property taxes when due.¹⁴ The terms of the Ground Lease also require the Debtor to pay municipal taxes each year.¹⁵

19. As of May 7, 2021, the total outstanding tax balance was \$624,853.58, including \$528,870.61 in taxes and \$95,982.97 in penalties and interest in respect of unpaid property taxes for 2019, 2020 and 2021.¹⁶ The Outstanding Property Taxes remain unpaid, and interest and penalties continue to accrue.¹⁷

20. Property taxes accruing post-May 7, 2021 are being paid to Manulife under an escrow arrangement that Manulife established under the terms of the Mortgage.¹⁸ The Debtor was advised of Manulife's decision to establish the escrow account for future property taxes in a letter from Manulife's counsel to the Debtor's counsel dated March 30, 2021.¹⁹

21. By letter dated October 22, 2020, Manulife declared the Debtor in default of the terms of the Loan and the Mortgage because of the Outstanding Property Taxes.²⁰ Ottawa Hospital has also declared the Debtor in default of the terms of the Ground Lease.²¹

¹⁴ Amos Affidavit at para 29.

¹⁵ Amos Affidavit at para 29.

¹⁶ Amos Affidavit at para 30.

¹⁷ Amos Affidavit at paras 31-32.

¹⁸ Amos Affidavit at para 31.

¹⁹ Amos Affidavit at para 41.

²⁰ Amos Affidavit at para 34.

²¹ Amos Affidavit at para 46.

C. Failed Attempts at Consensual Resolution

22. On a phone call among counsel, the Debtor requested a discussion with Manulife to explore potential amendments to the Loan with Manulife.²² As part of its standard practices, Manulife required and obtained a Pre-Negotiation Letter setting out the terms of any such discussions.²³

23. The Pre-Negotiation Letter included as a Schedule a list of documents requested by Manulife (the “**Document Request**”) in order for Manulife engage in any discussions concerning a modification of the Loan terms.²⁴ Despite multiple follow ups by counsel over the course of months,²⁵ the Debtor only partially satisfied the Document Request.²⁶

24. As a result of the Debtor’s failure to satisfy the Document Request, discussions concerning a modification of the Loan ultimately did not occur. On May 6, 2021, Manulife sent a letter to Riverside advising that the Loan will not be renewed upon maturity and the Debtor should arrange alternative financing.²⁷

25. By letter dated June 11, 2021, Manulife demanded repayment of all amounts outstanding under the Loan and delivered a notice of intention to enforce security under Section 244 of the BIA.²⁸

²² Amos Affidavit at para 35.

²³ Amos Affidavit at para 36.

²⁴ Amos Affidavit at para 36.

²⁵ Amos Affidavit at paras 38-42.

²⁶ Amos Affidavit at paras 37-38.

²⁷ Amos Affidavit at para 43.

²⁸ Amos Affidavit at para 50.

26. The Debtor requested that Manulife forbear from enforcing its rights.²⁹ On July 28, 2021, the parties entered into a Standstill Agreement (the “**Standstill Agreement**”).³⁰

Among other things, under the Standstill Agreement, the Debtor acknowledged that:

- (a) the purpose of the Standstill Agreement was to provide the parties with a reasonable period of time to negotiate and execute a forbearance agreement;³¹
- (b) Manulife has a valid, enforceable and first-ranking perfected security interest in the Property, as well as all of the personal property the Debtor now has or hereafter acquires;³²
- (c) the Lender has delivered a demand for payment and a notice of intention to enforce security;³³ and
- (d) the Lender intended to proceed with an application to this Court for the appointment of a receiver if the parties did not finalize the terms of a forbearance agreement by August 17, 2021.³⁴

27. Despite Manulife’s efforts, the parties were unable to enter into an acceptable forbearance agreement before August 17, 2021.³⁵ Accordingly, Manulife brings this Application for the appointment of a receiver in respect of Riverside.

²⁹ Amos Affidavit at paras 51-53.

³⁰ Amos Affidavit at para 54.

³¹ Amos Affidavit at para 54.

³² Amos Affidavit at para 54.

³³ Amos Affidavit at para 54.

³⁴ Amos Affidavit at para 54.

³⁵ Amos Affidavit at para 55.

PART III - ISSUES PRESENTED

28. The issue to be addressed before this Honourable Court is whether it is just or convenient for MNP to be appointed as receiver of the Property.

PART IV - LAW AND ANALYSIS

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

29. Pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (“**BIA**”), on the application of a secured creditor, a court may appoint a receiver to do any or all of the following if it is “just or convenient to do so”:³⁶

- (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.

30. The application must be filed in a court having jurisdiction in the judicial district of the locality of the debtor.³⁷

31. The BIA defines locality of a debtor as the principal place:³⁸

- (a) where the debtor has carried on business during the year immediately

³⁶ s 243(1), BIA.

³⁷ s 243(5), BIA.

³⁸ s 2, BIA.

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 captured by paragraph (a) or (b), where the greater portion of the property of the debtor is situated.

32. Where a notice of intention to enforce security is to be sent under section 244(1) of the BIA, a court cannot appoint a receiver until 10 days after the notice is sent unless the insolvent person consents to earlier enforcement, or the court considers it appropriate to appoint a receiver on an earlier date.³⁹

33. Riverside is in breach of the Loan, the Mortgage, and the GSA by failing to pay the municipal tax arrears when due. Riverside has also breached the Ground Lease, which is a breach of term 5.9 of the Mortgage.

34. As a result of these breaches, Riverside is in default of the Loan and, pursuant to terms 6.1 and 6.11 of the Mortgage and section 13 of the GSA, Manulife may enforce its security by appointing a receiver.⁴⁰

35. Manulife issued a notice of intention to enforce security on June 11, 2021. As such, this application may be returnable on September 20, 2021, because more than 10 days have passed after the notice was sent.

36. Further, the application is properly brought in Toronto because the Debtor's

³⁹ s 243(1.1), BIA.

⁴⁰ Terms 6.1 and 6.11, Mortgage, Exhibit "D" to the Amos Affidavit; s 13, GSA, Exhibit "F" to the Amos Affidavit.

registered office address is 100 King Street W, Suite #1600, Toronto, ON.⁴¹

B. It is Just and Convenient to Appoint a Receiver

37. In addition to section 243 of the BIA, a court may appoint a receiver pursuant to section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (“**CJA**”), if it is “just and convenient” to do so.⁴²

38. In determining whether or not it is just and convenient to appoint a receiver, a court must “have regard to all of the circumstances”.⁴³ Among other factors, a court should consider:⁴⁴

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

39. While the appointment of a receiver is ordinarily an extraordinary remedy, where a security agreement between a creditor and its debtor permits the same, the appointment of a receiver is not extraordinary because the creditor “is merely seeking to enforce a term of an agreement that was assented to by both parties.”⁴⁵

⁴¹ Corporate Profile Report for Riverside Professional Centre Inc., Exhibit “A” to the Amos Affidavit.

⁴² s 101, *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended.

⁴³ [Bank of Nova Scotia v Freure Village on Clair Creek, 1996 CanLII 8258 at para 10](#) (Ont Sup Ct J [Gen Div Commercial List]).

⁴⁴ [Meridian v. Okje Cho & Family Enterprise Ltd., 2021 ONSC 3755 at para 20.](#)

⁴⁵ [Elleway Acquisitions Ltd. v Cruise Professionals Ltd., 2013 ONSC 6866 at para 27; Meridian v. Okje Cho & Family Enterprise Ltd., 2021 ONSC 3755 \(CanLII\), at para 21.](#)

40. This court has appointed a receiver where a secured creditor's security was at risk.⁴⁶ In *BCIMC Construction Fund Corporation et al v. The Clover on Yonge Inc.*, this Court appointed a receiver over the debtors where the lender's security was "at risk of deteriorating". The lender had security over three construction projects that were over budget, economically unviable, where construction liens had been registered and where work had stopped on the projects because trades were not being paid. The Court reasoned that these "factors make it necessary to gain control of the projects quickly."⁴⁷

41. Similarly, in *RMB Australia Holdings Ltd. v. Seafield Resources Ltd.*, the Court appointed a receiver over the debtor because there was a risk the creditor's security could significantly deteriorate where it was unclear that the debtor could obtain additional financing to complete mining projects and the failure to obtain such financing would result in a revocation of loss of the debtor's title and interests.⁴⁸

42. If a court appoints a receiver pursuant to section 101 of the CJA, the order may include any terms as "are considered just."⁴⁹

43. In addition to Manulife's contractual rights, Manulife submits that it is just and convenient to appoint a receiver over the Property because its security is at risk of being completely eliminated. As a result of Riverside's failure to pay the Outstanding Tax Arrears, Ottawa Hospital may have terminate the Ground Lease under section 11.02 of

⁴⁶ [BCIMC Construction Fund Corporation et al v. The Clover on Yonge Inc.](#), 2020 ONSC 1953 at para 47; [Meridian v Okje Cho & Family Enterprise Ltd.](#), 2021 ONSC 3755 at para 22; [RMB Australia Holdings Ltd. v Seafield Resources Ltd.](#), 2014 ONSC 5205 at para 32.

⁴⁷ [BCIMC Construction Fund Corporation et al v. The Clover on Yonge Inc.](#), 2020 ONSC 1953 at para 47.

⁴⁸ [2014 ONSC 5205](#).

⁴⁹ s 101(2), CJA.

the agreement. Pursuant to section 11.02 of the Ground Lease, Ottawa Hospital may “immediately or any time thereafter re-enter” the Property if Riverside defaults in performing any of its covenants or obligations under the Ground Lease, Ottawa Hospital provides notice of the default, and Riverside fails to cure the default after 15 days.

44. Ottawa Hospital provided Riverside with the Default Letter on May 4, 2021. It is now more than 15 days after the Default Letter was sent. Accordingly, Ottawa Hospital may have the right to re-enter the Property thereby effectively terminating the Ground Lease.

45. The appointment of a receiver over the Property is also just and convenient because, among other things:

- (a) Riverside is in default of the Loan, Mortgage, and GSA, and these defaults are continuing;
- (b) Despite promising to do so, Riverside has failed to provide a plan for the repayment of the Outstanding Property Taxes;
- (c) As the major secured creditor, Manulife has the primary economic interest in Riverside;
- (d) Manulife has demanded repayment of the Loan and issued a notice of intention to enforce security. As of June 11, 2021, Riverside is indebted to Manulife in the amount of \$5,622,301.78, which remains unsatisfied; and
- (e) Manulife’s security agreement with Riverside gives Manulife the contractual right to appoint a receiver;

46. In all of the above circumstances, Manulife submits that a court-appointed receiver is required to take control of the Debtor, prevent the further deterioration of the Debtor's assets, and preserve the value of the Debtor's assets for all of the Debtor's stakeholders.

47. A receiver can realize on Riverside's assets in a fair and reasonable manner that balances the interests of all of the Debtor's stakeholders in a transparent and court-supervised process.

PART V - ORDER REQUESTED

48. For the reasons set out above, Manulife respectfully requests that this Court grant the proposed Receivership Order attached at Tab 3 of Manulife's application record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of September, 2021.



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**SCHEDULE “A”
LIST OF AUTHORITIES**

1. [*Bank of Nova Scotia v Freure Village on Clair Creek*](#), [1996] OJ No 5088 (Ont Sup Ct J [Gen Div Commercial List])
2. [*Meridian v. Okje Cho & Family Enterprise Ltd.*](#), 2021 ONSC 3755
3. [*Elleway Acquisitions Ltd. v Cruise Professionals Ltd.*](#), 2013 ONSC 6866
4. [*BCIMC Construction Fund Corporation et al v. The Clover on Yonge Inc.*](#), 2020 ONSC 1953
5. [*RMB Australia Holdings Ltd. v Seafeld Resources Ltd.*](#), 2014 ONSC 5205

**SCHEDULE “B”
RELEVANT STATUTES**

Bankruptcy and Insolvency Act, R.S.C. 1985 c. B.3, as amended

Interpretation

Definitions

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

Secured Creditors and Receivers

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a)** take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b)** exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
- (c)** take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a)** the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

...

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

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

Interlocutory Orders

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

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

THE MANUFACTURERS LIFE
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CENTRE INC.
Respondent

Court File No.: CV-21-00668726-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**
Proceeding commenced at Toronto

**FACTUM
(Receivership Application)**

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