

District of ONTARIO  
Division No. 07 - Hamilton  
Court File No.  
Estate No. 32-158012

ONTARIO  
SUPERIOR COURT OF JUSTICE  
IN BANKRUPTCY AND INSOLVENCY

**IN THE MATTER OF  
THE BANKRUPTCY OF**

**2011791 ONTARIO LTD.  
O/A TRIPLE M DEMOLITION  
OF THE CITY OF BRANTFORD,  
IN THE PROVINCE OF ONTARIO**

**FIRST REPORT TO THE COURT  
SUBMITTED BY KPMG INC.**

May 4, 2010

# *Table of Contents*

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	<u>Page</u>
1.0 Introduction and Purpose of Report.....	2
1.1 Introduction.....	2
1.2 Purpose of Trustee's First Report.....	3
2.0 Accounts Receivable.....	4
3.0 Construction Lien and Trust Claims Process.....	5
3.1 Trust Claims – Sub-trades & Suppliers.....	5
3.2 Triple M Customers and Accounts Due to Triple M.....	6
3.3 Other.....	6
4.0 Union Claims.....	8
5.0 Order Sought.....	9

## ***Listing of Appendices***

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- Appendix A - Sample Proof of Claim Form
- Appendix B - Sample Letter to Suppliers
- Appendix C - Sample Letter to Customers
- Appendix D - Advertisement

**1.1 Introduction**

- 1.1.1** 2011791 Ontario Ltd. (“2011791” or the “Company”) was incorporated on May 24, 2002 in the province of Ontario and has been operating under the trade name of Triple M Demolition (“Triple M”) since its inception. The Company operated out of owned premises located at 1440 Colborne Street East, Brantford, Ontario.
- 1.1.2** Triple M was a business unit of a larger corporation for approximately 40 years. In 2002 the original corporation was split into several pieces and 2011791 purchased the demolition portion of the business. During the last few years the Company expanded its business to include bulk and selective demolition, environmental abatement, equipment rental and salvage activities. The Company’s new service lines expanded its client base to include not only commercial but consumer customers as well. In 2009 the Company began to experience financial difficulties as a result of the slow down in the construction industry coupled with cost overruns on a number of significant service contracts. The excessive costs tightened the Company’s available cash and it soon began having difficulties making payments to its creditors.
- 1.1.3** Royal Bank of Canada (“RBC”) held a General Security Agreement, registered under the PPSA on November 13, 2003, which registration was renewed on October 24, 2008. RBC enforced its rights under the security agreement and privately appointed KPMG Inc. as its Receiver on November 5, 2009. The Receiver completed a sale for a significant portion of the Company’s assets which had been commenced by the Company prior to the Receiver’s appointment. The Receiver has paid RBC’s entire secured debt.
- 1.1.4** On November 13, 2009 the Company filed an assignment in bankruptcy and KPMG Inc. was named Trustee of the bankrupt estate (the “Trustee”).
- 1.1.5** The Trustee obtained an independent legal opinion of the RBC security confirming the RBC security was valid and enforceable as against the Trustee.
- 1.1.6** At the first meeting of creditors the dual role of KPMG Inc. as Receiver and Trustee was disclosed and the Trustee’s appointment was affirmed. In addition, the engagement of Devry, Smith & Frank LLP as the Trustee’s legal counsel was agreed to by the creditors and affirmed at the subsequent first meeting of the estate inspectors. The first meeting of creditors was held at the offices of the Trustee on December 1, 2009.
- 1.1.7** The Trustee took possession of the assets remaining after the Receiver’s sale, which included miscellaneous scrap bins, accounts receivable and the real property located at 1440 Colborne Street East, Brantford, Ontario (the “Real Property”).
- 1.1.8** The Company listed the Real Property for sale on October 13, 2009 with Royal LePage Hurley Real Estate. The Trustee continued this listing and received an unconditional offer for the full list price of \$495,000 on an “as is” basis. RBC had a mortgage registered against the Real Property. The Trustee required RBC to file its proof of security regarding the mortgage, which RBC did file, and after review of the proof of

security the Trustee redeemed the RBC mortgage in the amount of \$315,000 as there was considerable equity in the Real Property for the benefit of the estate. The Trustee obtained approval of the sale of the Real Property at the meeting of creditors held on December 1, 2009.

## **1.2 Purpose of Trustee's First Report**

**1.2.1** This constitutes the Trustee's first report (the "**First Report**") to the Court in this matter and is filed to:

- Obtain an Order approving the Construction Lien and Trust Claims Process, as set out in this First Report, whereby the Trustee can realize on the Company's accounts receivable in an equitable and efficient manner which takes into account the rights of creditors under the Construction Lien Act;
- Obtain an Order confirming the quantum of the secured claims pursuant to sections 81.3 and 81.4 of the *BIA*.

- 2.1.1** As at the date of bankruptcy the books and records of the Company indicated there were outstanding accounts receivable of \$1,049,244.
- 2.1.2** Most of Triple M's customers (the "Customers") have not paid their outstanding receivable because there are unpaid Triple M suppliers and sub-trades (the "Claimants") who have completed work in relation to the specific contracts/jobs between Triple M and the Customers and the Customers are concerned they will be required to satisfy the unpaid invoices of the Claimants.
- 2.1.3** Consequently, this may result in payment to the Claimants directly by the Customers from proceeds due to Triple M but not necessarily on a pari pasu basis and without notice to all potential claimants and/or prolonged and expensive litigation between each of the Trustee, the Customer and the Claimants.
- 2.1.4** The Trustee believes that a formal claims process is necessary to provide for equitable and cost efficient treatment of all claims. The total outstanding claims for each of Triple M's jobs/contracts has not yet been determined and the Trustee believes that the recommended Construction Lien and Trust Claims Process discussed below will resolve these issues.

The Construction Lien Act ("CLA") provides for a process whereby a Claimant with a bona fide claim can register a lien on title to preserve its claim. The Claimant has a 45 day period from the last day that services were provided or supplies delivered to register its lien on title to the subject property. Upon expiry of the 45 day period the Claimant loses its ability to register on title and preserve its lien.

If a Claimant has lost its ability to file a lien under the CLA, the CLA provides for a trust claim in favour of creditors for unpaid services rendered or supplies delivered to a specific job/contract against the funds outstanding from the customer for that specific job/contract after payment of any perfected liens under the CLA from the customers holdback. The funds due to Triple M from the Customers are imbued with that trust.

The CLA does not provide a formal process for dealing with the distribution of funds to Claimants who hold a valid trust claim against Triple M and whose lien rights have expired.

At the meeting of inspectors held on January 19, 2010 it was agreed that it would be in the best interest of the estate for the Trustee to establish and implement a formal claims process in order to deal with the collection of receivables from Customers and the related amounts due to the Claimants.

Accordingly, the Trustee proposes the following Construction Lien and Trust Claims Process:

### **3.1 Trust Claims – Sub-trades & Suppliers**

- (i) That all Claimants will be required to complete a Claim in the prescribed form attached hereto as Appendix A;
- (ii) That in proving a Claim with the Trustee, all Claimants shall include:
  - (A) a copy of the contract or subcontract including any change orders, amendments, purchase orders, or other related documents on which such Claim is asserted;
  - (B) the names of the parties to the contract or subcontract;
  - (C) the contract price and/or agreed billing rates for personnel and machinery and a statement of account, including the dates and amounts of payments received;
  - (D) a copy of any labour and material payment bond posted by a subcontractor with a contractor or by a subcontractor with a subcontractor; and;

- (E) any other documents or information as the Trustee may reasonably request for the purpose of assessing and determining any Claims in accordance with paragraph (i) of this First Report.
- (iii) That all Claims shall be determined and administered by the Trustee under the supervision of this Court pursuant to the Construction Lien and Trust Claims Process and any such determination or disposition of any Claim shall have the same force and effect as if made by a court of competent jurisdiction pursuant to the CLA. The Trustee may retain any consultant or assistant as it may require to assist in the review and determination of any Claim.

### **3.2 Triple M Customers and Accounts Due to Triple M**

- 3.2.1** That all Customers who are indebted to Triple M for services (whether construction, demolition or any other services) provided by Triple M for the period prior to November 13, 2009 are hereby directed to make payment of any and all such debts to the Trustee. The amount payable to the Trustee will be the outstanding receivable balance less any proven claim by the Customer for set-off. In order to prove a valid set-off the Customer must file a proof of claim with the Trustee with sufficient supporting documentation to prove the set-off claim;
- 3.2.2** That the Trustee will retain, in its bankruptcy estate trust account, the funds received from the Customers relating to the Triple M invoice(s) being paid by the Customers, which funds shall not be distributed by the Trustee to any party without further Order of this Court on notice to all Customers who have made payment to the Trustee; provided, however, that nothing in the Order nor the retention of funds referred to in this paragraph shall have the effect of giving rights to Customers which did not exist up to the making of this First Report;
- 3.2.3** That no Triple M supplier or sub-contractor with a valid Claim shall have any recourse against the Customers for having made such payment to the Trustee, and all Customers making such payment to the Trustee shall be deemed to have satisfied in full any and all obligations they may have had to Triple M.

### **3.3 Other**

- 3.3.1** That the fees and expenses incurred by the Trustee in connection with the carrying out of this Order and the Construction Lien and Trust Claims Process shall form a first charge on such segregated funds;
- 3.3.2** That all Claimants and Customers of Triple M will be notified via ordinary mail of the Construction Lien and Trust Claims Process. Such notice to be in the form as set out in Appendices B & C;

**3.3.3** That the Trustee will advertise notice of the Construction Lien and Trust Claims Process in the Hamilton Spectator and Brantford Expositor. Such advertisement to be in the form as set out in Appendix D.

The Company engaged the services of members of the Labourers International Union of North America locals 183, 625, 837, 1081 and 1089 as well as members of the International Union of Operating Engineers local 793 (collectively the "Unions"). Each of the Unions filed a proof of claim on behalf of their members.

- 4.1.1 The total claims filed by the Unions on behalf of their members (the "Union Members") amounted to \$136,611.56 and consisted of a secured claim pursuant to section 81.5 of the BIA for unremitted pension contributions of \$101,854.62 (the "Pension Claims") and a secured claim pursuant to section 81.3 of the BIA for unpaid wages of \$34,756.94 (the "Wage Claims").
- 4.1.2 The Trustee has accepted the Pension Claims as filed. Accordingly, at the second meeting of inspectors held on January 19, 2010, the Trustee was instructed by the inspector to pay the Pension Claims and those payments have been made.
- 4.1.3 The Wage Claims have been reviewed by the Trustee and it was determined that the Wage Claims include amounts withheld from the Union Members' pay on behalf of the Union as well as contributions which should have been made by Triple M directly.
- 4.1.4 It is unclear what amounts are to be included as part of the secured claim under Section 81.3 of the BIA. Accordingly, the Trustee seeks this Honourable Court's advice and direction with respect to the quantum of the Wage Claims that are secured pursuant to Section 81.3 of the BIA. The Trustee respectfully submits that the secured portion of the Wage Claims could be likened to the secured claim for source deductions under Section 67(3) where only those amounts actually deducted from the employee are deemed to possess a prior ranking security charge and those contributions due from the employer directly rank as an unsecured claim in the bankrupt estate.
- 4.1.5 If this view were adopted, of the total \$34,756.94 of Wage Claims only the portion withheld directly from the Union Members' pay and not remitted by the Company would enjoy a prior ranking charge on the current assets and the balance of the Wage Claims would rank as an ordinary unsecured claim.
- 4.1.6 The Trustee has confirmed the amount claimed by the Unions to have been withheld from the Union Members' pay was \$ 9,651.49.

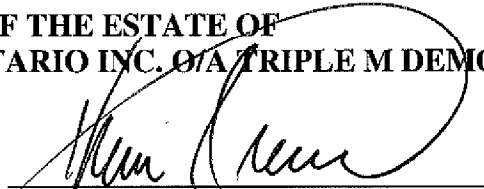
**5.1.1** We submit this **First Report** to this Honourable Court in support of our Motion respectfully requesting this Honourable Court to:

- (i) Approve the Construction Lien and Trust Claims Process Order authorizing and directing the Trustee to administer the Construction Lien and Trust Claims Process; and;
- (ii) Provide its advice and direction with respect to the quantum of the secured claims pursuant to Sections 81.3 and 81.4 of the *BIA*, and in particular, the treatment of certain Wage Claims made by the Union.

All of which is respectfully submitted this 4th day of May, 2010.

**KPMG INC.  
SOLELY IN ITS CAPACITY AS  
TRUSTEE OF THE ESTATE OF  
2011791 ONTARIO INC. ~~OR~~ TRIPLE M DEMOLITION**

Per:

  
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Kevin J. Treacy  
*Senior Vice President*