

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

BETWEEN:

BANK OF MONTREAL

Applicant

– and –

2380630 ONTARIO INC. and 2386174 ONTARIO INCORPORATED

Respondents

IN THE MATTER OF AN APPLICATION PURSUANT TO 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

(Re: Motion Returnable July 19, 2019)

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PART I - OVERVIEW

1. This factum is filed by Albert Gelman Inc. ("**AGI**") in its capacity as Receiver, without security, over all of the assets, undertakings and properties ("**Property**") of 2380630 Ontario Inc. ("**OpCo**") and 2386174 Ontario Incorporated ("**LandCo**") (collectively, the "**Debtors**") acquired for, or used in relation to, a business carried on by the Debtors, in support of a motion for (i) an order approving the sale transaction (the "**Transaction**") contemplated by a binding Agreement of Purchase and Sale executed by the Receiver on May 24, 2019 (the "**Purchase Agreement**") between the Receiver and Sharmila Mahalingasivam (the "**Purchaser**"), and vesting in the Purchaser the Receiver's right, title and interest in and to the relevant real property and chattels absolutely free and clear of and from all encumbrances, and for (ii) an order that the Receiver be released and discharged as Receiver of the Property of the Debtors upon the filing of a Receiver's Certificate after the closing of the Transaction, and for ancillary relief.

PART II – FACTS

2. LandCo owns the land and buildings having a municipal address of 2093 Buckhorn Road, Selwyn, Ontario (the "**Real Property**").

Second Report of the Receiver, Motion Record, Tab 2, page 23, paragraph 9

3. OpCo carried on business as a convenience store and gas bar at the Real Property. The last available financial statements of OpCo, dated June 30, 2016, indicate that it owned the merchandise inventory, fuel inventory and computer system within the gas bar.

Second Report of the Receiver, Motion Record, Tab 2, page 23, paragraph 10

4. OpCo ceased operating the convenience store and gas bar several months prior to the Receiver's appointment. The Receiver has not carried on the operations of the gas bar.

Second Report of the Receiver, Motion Record, Tab 2, page 23, paragraph 11

Assets

5. The Real Property contains three structures.

- (i) a two story commercial building consisting of a convenience store on the first floor and an office/apartment unit on the second floor, as well as a gas bar which operated under the Esso brand name;
- (ii) a one-storey industrial building with floor space of approximately 8,500 square feet, which is leased to an arm's-length third party; and,
- (iii) a one-story residential building which is rented on a month to month basis to an arm's length third party.

Second Report of the Receiver, Motion Record, Tab 2, page 24, paragraph 14

6. The Receiver has collected rent from both tenants since shortly after the date of its appointment.

Second Report of the Receiver, Motion Record, Tab 2, page 24, paragraph 15

7. The merchandise inventory remaining at the date of the Receiver's appointment was perishable and had no value. The Receiver arranged for the fuel inventory to be removed from the storage tanks and disposed of. The valuable equipment and chattels owned by LandCo and Opco, (the furniture and equipment in the gas bar, the underground fuel storage tanks and the fuel pumps) are hereinafter the "**Chattels**".

Second Report of the Receiver, Motion Record, Tab 2, pages 23-24, paragraph 12-13

The Sales Process

8. In accordance with the Appointment Order, the Receiver entered into a multiple listing services agreement for the Real Property and Chattels with Ball Real Estate Inc. Brokerage and World Class Realty Point Brokerage (the "**Listing Agent**"), on January 19, 2019. The Real Property and Chattels were originally listed at \$1,250,000.

Second Report of the Receiver, Motion Record, Tab 2, page 25, paragraphs 21-22

The First Offer

9. On February 20, 2019, the Listing Agent presented the Receiver with an offer (the "**First Offer**"). The terms of the First Offer cast doubt on the commitment of the prospective purchaser.

- a) The Offer was conditional upon the purchaser being satisfied that the Real Property is suitable for the purchaser's requirements, after the purchaser has carried out a due diligence verification of the Real Property, including by way of example and without limitation "... the value and condition of the Real Property".
- b) The Offer was conditional on approval of the terms by the purchaser's solicitor.
- c) The Offer was conditional on the purchaser carrying out a feasibility and market needs study.

Second Report of the Receiver, Motion Record, Tab 2, page 25, paragraphs 23-24

10. The Receiver delivered a sign-back offer at a higher price, which included amended terms and conditions recommended by the Receiver's legal counsel. The prospective

purchaser did not respond to the Receiver's sign-back and no further negotiations took place.

Second Report of the Receiver, Motion Record, Tab 2, page 26, paragraphs 25-26

Second Offer

11. On the recommendation of the Listing Agent, the listing price was reduced to \$999,900 on March 11, 2019.

Second Report of the Receiver, Motion Record, Tab 2, page 26, paragraph 27

12. On April 2, 2019 the Receiver obtained an offer from a second prospective buyer ("**Second Offer**"). The Receiver signed back the Second Offer at a higher price and with altered terms and conditions, as recommended by the Receiver's legal counsel. The Second Offer was fully accepted on April 17, 2019, subject to approval of this Court.

Second Report of the Receiver, Motion Record, Tab 2, page 26, paragraphs 28-30

13. The prospective purchaser subsequently defaulted in providing the deposit required pursuant to the Second Offer. The Receiver issued a Notice of Breach and Termination of Contract on May 3, 2019.

Second Report of the Receiver, Motion Record, Tab 2, page 26, paragraphs 31-32

Third Offer

14. On May 17, 2019, the Receiver obtained an offer from a third prospective buyer (the "**Third Offer**"). The Receiver negotiated a higher price, as well as changes and additions to the terms and conditions. The amended Third Offer was fully accepted on May 20, 2019. The prospective buyer fully waived all conditions on June 21, 2019, and provided the Receiver with the deposit contemplated in the agreement.

Second Report of the Receiver, Motion Record, Tab 2, pages 26-27, paragraphs 33-35

15. The Receiver seeks an order approving the sale of the Real Property and Chattels pursuant to the accepted Third Offer (again, the “**Transaction**”).

Second Report of the Receiver, Motion Record, Tab 2, page 27, paragraph 36

16. It is the opinion of the Receiver that the Transaction represents the best and highest realization available for the Real Property and Chattels.

Second Report of the Receiver, Motion Record, Tab 2, page 27, paragraph 37

17. The details of the sales process and the offers described below are set out in the the Confidential Second Report of the Receiver dated July 16, 2019 (the “**Confidential Second Report**”), which the Receiver requests be sealed until after the Transaction has closed.

The Discharge of the Receiver

18. In addition to an order approving the Transaction, the Receiver seeks its discharge and release from liability. The Transaction will dispose of the Debtors’ assets, and once the cost of the receivership has been recovered, and certain claims by the Canada Revenue Agency paid, the balance of the proceeds will be paid to the Bank of Montreal, the Debtors’ senior secured lender. The Bank of Montreal supports the Transaction and the granting of the order sought.

Second Report of the Receiver, Motion Record, Tab 2, page 21-22, paragraph 5, page 27-29, paragraphs 38-49, and page 66, paragraphs 66-68

19. With respect to the discharge and release of liability, the only unusual circumstance concerns six vehicles (the “**Vehicles**”) registered against the Debtors in the *PPSA* system

(two against OpCo, four against LandCo). The existence of the Vehicles and their corresponding PPSA registrations were not disclosed by the Debtors and the Vehicles have not, despite demands, been delivered to the Receiver. The Receiver does not know where the Vehicles are, and has advised Nissan Credit and Ford Credit that it (the Receiver) does not claim an interest in those vehicles. The Receiver has learned that one of the Vehicles had been reported stolen and that another had been involved in an accident, concerning which a personal injury insurance claim was made.

Second Report of the Receiver, Motion Record, Tab 2, pages 29-32, paragraphs 51-62

20. The Receiver has determined that there is no equity in any of these vehicles. Further, the Receiver is not in possession or control of any of the vehicles and, accordingly, the Receiver seeks an Order specifically divesting the Receiver of any interest in the vehicles and discharging it of any liability in respect of any claim which has arisen or may arise in the future in respect of any of the Vehicles.

Second Report of the Receiver, Motion Record, Tab 2, page 32, paragraph 63

PART III - LAW AND ARGUMENT

The Sale of Assets

21. The criteria for approval of a sale recommended by a receiver are well established. They were set out by the Ontario Court of Appeal in *Royal Bank v. Soundair Corp.*, and affirmed in numerous decisions thereafter.

- i. Whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- ii. whether the interests of all parties have been considered;
- iii. the efficacy and integrity of the process by which offers are obtained; and

- iv. whether there has been unfairness in the working out of the process.

***Royal Bank of Canada v. Soundair Corporation*, (1991), 4 O.R. (3d) 1 (Ont. C.A.) (WL) ("Soundair") at para. 16, Tab 1 of the Receiver's Brief of Authorities**

22. There are many ways that a receiver can go about selling an asset. Where, as here, the asset is an unusual one, the Court should be open to creative processes to maximize recovery for the estate and should exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset.

***Soundair, supra* at paras. 46-47, Tab 1 of the Receiver's Brief of Authorities**

***Katz, Re*, (1991), 6 C.B.R. (3d) 211, 1991 CarswellOnt 192 (Ont. Gen. Div.) (WL) ("*Katz*") at paras. 5 and 11, Tab 2 of the Receiver's Brief of Authorities**

***Bank of Montreal v. Calgary West Hospitality Inc.*, 2011 CarswellAlta 698 (Alta. Q. B.) (WL) ("*Calgary West*") at paras. 30 to 37, Tab 3 of the Receiver's Brief of Authorities**

23. Given the specific nature and location of the Real Property, the market for the Real Property and Chattels appears to be limited. The Property was exposed to that market for five months, and only one serious offer was received.

24. In *Katz*, Justice Farley considered the test to be applied in reviewing a sale by the Receiver of an unusual asset (which in *Katz* was the sale of a lawsuit by a trustee). In reviewing the reasonableness of the process adopted by the trustee, Justice Farley held as follows:

There is no single best method to sell an asset. Certainly the tender process has its merits. One might question why the trustee did not wish to be involved in the middle of a bidding war but this clearly would be to second guess a considered business decision made by the trustee, which must be presumed to be acting properly. As Galligan J.A. in the Soundair case, supra, said at p. 20 [unreported]:

It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual

asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

Katz at para. 11, Tab 2 of the Receiver's Brief of Authorities

25. It is respectfully submitted that the Receiver has made proper and sufficient efforts to get the best price that it could for the Debtors' interests in the Real Property and Chattels.

- i. The Sales Process was conducted fairly and in accordance with commercial good sense. The Real Property was exposed to the market for a number of months and the best offer was accepted.

26. Again, the Bank of Montreal, the Debtors' senior secured creditor, supports the transaction.

27. Accordingly, the Receiver recommends that the Sale Transaction be approved by the Court.

The Sealing Order

28. The Receiver seeks to have the Confidential Second Report and the appendices annexed thereto sealed until further order of the Court. In *Sierra Club of Canada v. Canada (Minister of Finance)* the Supreme Court of Canada held that sealing orders should be granted in the following circumstances.

i. An order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk;

i. The salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

***Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (SCC), Tab 4 of the Receiver's**

Brief of Authorities

29. The information contained in the Confidential Second Report is commercially sensitive i, which, if disclosed prior to the closing of the Sale Transaction, may harm the sale process and prejudice stakeholders in the event that the sale transaction does not close for any reason. If the Sale Transaction does not close, it is likely that another sales process will be required and, in the absence of a sealing order, future bidders would have access to the amount that had already been accepted by the Receiver, which may adversely affect the ultimate realization. In such circumstance, a sealing order is appropriate.

Nortel Networks Corp., Re, 2009 CarswellOnt 4838 (Ont. S.C.J. -Comm. List) (WL), at paras. 38 to 39, Tab 5 of the Receiver's Brief of Authorities

PART IV - ORDER SOUGHT

30. Based on the foregoing, the Receiver seeks an order:
- a. approving the Second Report of the Receiver and the actions and activities of the Receiver described herein;
 - b. approving the Confidential Second Report of the Receiver, and sealing it until such time as the Transaction has closed, or further order of the Court;
 - c. approving the Transaction and vesting in the Purchaser the Receiver's right, title and interest in and to the Real Property and Chattels absolutely free and clear of, and from, all encumbrances;
 - d. divesting the Receiver of any interest in the Vehicles and releasing and discharging the Receiver from any and all liability that it now has or may hereafter have by reason of, or in any way arising out of the Vehicles;

- e. approving the fees and disbursements of the Receiver for the period of October 1, 2018 to July 8, 2019, plus an accrual of \$7,500 plus HST for the Receiver to complete its duties and mandate;
- f. approving the fees and disbursements of the Receiver's counsel, Fred Tayar & Associates Professional Corporation, and its real estate counsel, Meyer, Wassenaar & Banach LLP, plus an accrual of \$8,000, plus HST for counsel to assist the Receiver to complete its duties and mandate;
- g. authorizing a distribution in accordance with the recommended distribution as set out in this Second Report.
- h. releasing and discharging the Receiver upon the filing the Receiver's Certificate; and,
- i. releasing and discharging the Receiver from any and all liability that the Receiver now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of the Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Fred Tayar
of Counsel for the Receiver

Date: July 18, 2019

SCHEDULE "A"

1. *Royal Bank of Canada v. Soundair Corporation*, (1991), 4 O.R. (3d) 1 (Ont. C.A.) (WL)
2. *Katz, Re*, (1991), 6 C.B.R. (3d) 211, 1991 CarswellOnt 192 (Ont. Gen. Div.) (WL)
3. *Bank of Montreal v. Calgary West Hospitality Inc.* 2011 CarswellAlta 698 (Alta. Q.B.) (WL)
4. *Sierra Club of Canada v. Canada (Minister of Finance)* 2002 SCC 41 (SCC)
5. *Nortel Networks Corp., Re* 2009 CarswellOnt 4838 (Ont. S.C.J. -Comm. List) (WL)

BANK OF MONTREAL

Court File No.: CV-18-599726-00CL

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