

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

BANK OF MONTREAL

Applicant

- and -

2495087 ONTARIO INC., 2496800 ONTARIO INC., 1527020 ONTARIO INC.,  
1651033 ONTARIO INC. ~~LTD.~~, 1496765 ONTARIO INC. ~~LTD.~~ and  
SUNSHINE PROPANE INC.

Respondents

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

**FACTUM OF THE RECEIVER**

**Re: Sale Approval  
Returnable: February 21, 2019**

February 19, 2019

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**PART I. NATURE OF THE MOTION**

1. This is a motion brought by RSM Canada Limited (“RSM”), in its capacity as court-appointed receiver and manager (the “Receiver”) of 1496765 Ontario Ltd. (“1496765”), 1651033 Ontario Ltd. (“1651033”), 1527020 Ontario Inc. (“1527020”), 2495087 Ontario Inc. (“2495087”), 2496800 Ontario Inc. (“2496800”), and Sunshine Propane Inc. (“Sunshine”) (collectively the “Debtors” or the “Companies”) for orders, among other things:
  - (a) authorizing and directing the Receiver to enter into and carry out the terms of the Etobicoke APS (as defined below), and vesting title to the Etobicoke Property in the Etobicoke Purchaser (each as defined below) free and clear of claims and encumbrances, upon closing of the transaction under the Etobicoke APS and the delivery of a Receiver’s certificate to the Etobicoke Purchaser;
  - (b) authorizing and directing the Receiver to enter into and carry out the terms of the Burlington APS (as defined below) and vesting title to the Burlington Property in the Burlington Purchaser (each as defined below), free and clear of claims and encumbrances, upon closing of the transaction under the Burlington APS and the delivery of a Receiver’s certificate to the Burlington Purchaser;
  - (c) authorizing and directing the Receiver to enter into and carry out the terms of the Port Colborne APS (as defined below), and vesting title to the Port Colborne Property in the Port Colborne Purchaser (each as defined below), free and clear of claims and encumbrances, upon closing of the

transaction under the Port Colborne APS and the delivery of a Receiver's certificate to the Port Colborne Purchaser;

- (d) approving the Receiver's First Report dated February 13, 2019 (the "First Report") and the Receiver's conduct and activities to February 11, 2019 discussed therein;
- (e) authorizing and directing the Receiver to deposit the Cash (as defined in the First Report) into the receivership trust account for the benefit of 1496765's creditors;
- (f) authorizing and directing the Receiver to attempt to access any data saved on the hard drives of the computers found at the Etobicoke Property, the Port Colborne Property and the Goderich Property or if that cannot be done, to destroy the hard drives;
- (g) authorizing the Receiver to sell or otherwise dispose of any remaining items at the Properties (as defined below), including personal property that may belong to individuals related to the Debtors, that are not removed under the Receiver's supervision from those Properties within three business days of the date of the Approval and Vesting Order issued in respect of that Property (as defined below);
- (h) authorizing the Receiver to make the Interim Distribution (defined below);
- (i) approving the fees and disbursements of the Receiver incurred to January 31, 2019;
- (j) approving the fees and disbursements of Paliare Roland incurred to January 31, 2019; and

- (k) sealing the following Confidential Appendices:
  - (i) Confidential Appendix “HH” to the First Report until the closing of the sale of the Etobicoke Property;
  - (ii) Confidential Appendix “II” to the First Report until the closing of the sale of the Burlington Property; and
  - (iii) Confidential Appendix “JJ” to the First Report until the closing of the sale of the Port Colborne Property; and
- (l) such further relief as this Honourable Court deems just.

## **PART II. OVERVIEW**

2. The Receiver has entered into agreements of purchase and sale to sell the Etobicoke Property, the Burlington Property, and the Port Colborne Property to parties, which to the best of the Receiver’s knowledge are arms-length third parties, subject to the approval of this court.
3. The Receiver believes that each of the agreements of purchase and sale represents a commercially reasonable disposition of the Etobicoke Property, the Burlington Property, and the Port Colborne Property (collectively, the “Properties”) respectively, and recommends that the court approve the pending transactions because:
  - (a) each of the Properties was publicly listed for sale;



- (b) each of the Properties was exposed to the market for a sufficient period of time in the sales process conducted by the Receiver and Avison Young (“Avison”);
  - (c) each of the Properties was marketed by Avison, an experienced commercial real estate agency;
  - (d) the sale process led to multiple offers for each of the Etobicoke Property, the Burlington Property and the Port Colborne Property, and culminated with three agreements of purchase and sale with purchasers who, to the best of the Receiver’s knowledge, are third party arm’s length purchasers;
  - (e) the selling price for each of the Properties is reasonable given the values set out in the applicable appraisals and/or other information provided to the Receiver; and
  - (f) all of the agreements of purchase and sale have the support of Bank of Montreal (“BMO”) which holds the primary or only, as the case may be, registered interest on title to the applicable property.
4. The Receiver has filed under seal certain confidential appendices to the First Report, which contain, among other things, the appraisals on the Etobicoke Property, the Burlington Property and the Port Colborne Property, summaries of the offers received for the Etobicoke Property, the Burlington Property and the Port Colborne Property, and the agreements of purchase and sale between the

Receiver and the purchaser for each of the Etobicoke Property, the Burlington Property and the Port Colborne Property.

5. The Receiver requests that each of these confidential appendices be sealed (pending closing of the transaction to which the confidential appendix relates) in order to avoid prejudice in the event that the contemplated sales do not close.

### **PART III. FACTS**

#### **The Properties**

6. Each of the Debtor companies owns a real estate property that is its primary realizable asset. Specifically:
  - (a) 1496765 holds legal and beneficial title to a 0.4 acre real property municipally known as 5462 Dundas Street, Etobicoke, Ontario (the “Etobicoke Property”);<sup>1</sup>
  - (b) 1651033 holds legal and beneficial title to a 1.2 acre real property municipally known as 5223 Dundas Street, Burlington, Ontario (the “Burlington Property”);<sup>2</sup>
  - (c) 1527020 holds legal and beneficial title to a 1.9 acre real property municipally known as 633 Main Street West, Port Colborne, Ontario (the “Port Colborne Property”);<sup>3</sup>

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<sup>1</sup> First Report, at para. 15.

<sup>2</sup> First Report, at para. 18.

<sup>3</sup> First Report, at para. 20.

- (d) 2495087 holds legal and beneficial title to the real property municipally known as 591 and 595 Goderich Street, Port Elgin, Ontario (the “Port Elgin Property”);<sup>4</sup> and
- (e) 2496800 holds legal and beneficial title to a 0.5 acre real property municipally known as 274 Bayfield Road, Goderich, Ontario (the “Goderich Property”).<sup>5</sup>
7. BMO is the primary secured creditor of each of the Debtors. As of July 27, 2018, the Debtors were indebted to BMO in the amount of \$9,992,297.94.<sup>6</sup> The security held by BMO consists of mortgages over the Debtors’ real property, as well as security agreements over the other assets of the Companies.<sup>7</sup>

### **The Receivership**

8. On August 29, 2018, the Receiver was appointed receiver and manager of all of the assets, undertakings and properties of each of the Respondent Companies.<sup>8</sup>

### **Marketing Process**

9. The Receiver retained Avison to list the Properties for sale.<sup>9</sup>
10. On December 3, 2018 Avison launched its marketing campaign for the Properties, which campaign ran through January 18, 2019.<sup>10</sup>

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<sup>4</sup> First Report, at para 22.

<sup>5</sup> First Report, at para. 25.

<sup>6</sup> First Report, at para. 9.

<sup>7</sup> First Report, at para. 13.

<sup>8</sup> First Report, at para. 1.

<sup>9</sup> First Report, at para 107.

11. The marketing campaign included the following activities:
- (a) an email communication was sent to over 1,200 contacts on Avison's mailing list;
  - (b) marketing brochures for each of the Properties, and on a combined basis, were prepared and distributed to parties that contacted Avison for more information;
  - (c) on or about December 17, 2018, the Properties were listed on the TREB MLS, and on the local MLS of the real estate boards for Port Colborne, Port Elgin and Goderich;
  - (d) the Properties were listed on Avison's website and on Loopnet; and
  - (e) an electronic data room was set up to provide access to confidential information on the Properties to parties who signed a confidentiality agreement.<sup>11</sup>

### **The Offers for the Properties**

12. As at January 22, 2019, twenty offers had been submitted to Avison for the various Properties. The Receiver reviewed the offers received with Avison and BMO, and gave certain offerors a chance to improve or amend their offers.<sup>12</sup>

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<sup>10</sup> First Report, at para 108.

<sup>11</sup> First Report, at para 109.

<sup>12</sup> First Report, at para 111.

13. The Receiver then reviewed all offers received, including any amended offers, and worked through Avison to have the terms of the offers that the Receiver proposed to accept finalized in order that the Receiver would be in a position to accept those offers.<sup>13</sup>
  
14. Based on the offers received, the Receiver entered into the following three agreements of purchase and sale for which approval is being sought on this motion:
  - (a) with 2677323 Ontario Inc. (the “Etobicoke Purchaser”) for the Etobicoke Property (the “Etobicoke APS”);
  
  - (b) with Harsha Nimrani in trust corporation to be incorporated (the “Burlington Purchaser”) for the Burlington Property (the “Burlington APS”);  
and
  
  - (c) with 2573702 Ontario Inc. (the “Port Colborne Purchaser”) for the Port Colborne Property (the “Port Colborne APS”).<sup>14</sup>
  
15. The Receiver also entered into an agreement of purchase and sale for the Port Elgin Property but that agreement remains conditional and the Receiver is not seeking approval of that transaction at this time.<sup>15</sup>
  
16. The Applicant in this proceeding, BMO, has advised the Receiver that it consents to the sale by the Receiver of the Etobicoke Property, the Burlington Property

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<sup>13</sup> First Report, at para 112.

<sup>14</sup> First Report, at para 114.

<sup>15</sup> First Report, at para 115.

and the Port Colborne Property on the terms set out in the Etobicoke APS, the Burlington APS, and the Port Colborne APS, respectively.

17. The offers for the Properties are all firm, as the Purchasers have waived conditions. The Receiver has received a deposit of 10% of the respective purchase prices from each of the purchasers. The Properties are being sold on as “as is, where is” basis.<sup>16</sup>
18. The terms of the agreements of purchase and sale, including the purchase price for each Property, are reasonable in light of the value set out in the appraisals for the respective Property and/or other information received by the Receiver.<sup>17</sup>
19. The marketing process undertaken by the Receiver was reasonable and appropriate for the type of property in question, and provided sufficient market exposure to the Properties.<sup>18</sup>
20. The Receiver recommends the approval of the Etobicoke APS, the Burlington APS and the Port Colborne APS by this Honourable Court.<sup>19</sup>

### **Proposed Distribution**

21. The Receiver obtained a legal opinion from Paliare Roland Rosenberg Rothstein LLP (“Paliare Roland”) that the mortgages over the Etobicoke Property, the Burlington Property and the Port Colborne Property granted in favour of BMO are

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<sup>16</sup> First Report, at para 117.

<sup>17</sup> First Report, at para 117, 120.

<sup>18</sup> First Report, at para 119.

<sup>19</sup> First Report, at para 120.

each valid and enforceable first ranking security interests against title to those Properties.<sup>20</sup>

22. The Receiver proposes to make the following payments from the net proceeds of sale from the Etobicoke Property, Burlington Property and/or Port Colborne Property, after payment of the property taxes and commissions payable in respect of any Property sold:
- (a) unpaid accounts relating to operating expenses;
  - (b) to the Receiver, an amount equal to the unpaid accounts of the Receiver relating to the Receiver's fees; and
  - (c) to Paliare Roland, an amount equal to the unpaid accounts of Paliare Roland.
23. Following the payments referred to in Paragraph 22, the Receiver proposes to make the following payments from the net proceeds of sale from the Etobicoke Property:
- (a) to CRA, \$2,601.00 owed on account of 1496765's source deductions deemed trust liability;
  - (b) to BMO:
    - (i) the advances totaling \$99,000 under Receiver Certificates # 2, 6 and 9 plus accrued interest; and

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<sup>20</sup> First Report, at para 132.

- (ii) an amount not exceeding the outstanding indebtedness of 1496765 to BMO secured by BMO's first mortgage over the Etobicoke Property;

24. Following the payments referred to in Paragraph 22, the Receiver proposes to make the following payments from the net proceeds of sale from the Burlington Property:

(a) to BMO:

- (i) the advances totaling \$87,000 under Receiver Certificates # 1, 8 and 11 plus accrued interest; and
- (ii) an amount not exceeding the outstanding indebtedness of 1651033 to BMO secured by BMO's first mortgage over the Burlington Property.

25. Following the payments referred to in Paragraph 22, the Receiver proposes to make the following payments from the net proceeds of sale from the Port Colborne Property:

(a) to BMO:

- (i) the advances totaling \$99,000 under Receiver Certificates # 3, 7 and 10 plus accrued interest; and



- (ii) an amount not exceeding the outstanding indebtedness of 1527020 to BMO secured by BMO's first mortgage over the Port Colborne Property.

26. The Receiver proposes to hold back, in respect of each of the Companies, amounts to cover unpaid operating expenses, potential deemed trust claims and future professional fees.<sup>21</sup>

#### **PART IV. ISSUES, LAW AND ARGUMENT**

27. The Receiver's motion raises the following two legal issues:

- (a) should the court approve the Etobicoke APS, the Burlington APS, and the Port Colborne APS?
- (b) is it appropriate for the court to seal the confidential appendices to the Receiver's First Report pending the closing of the transactions contemplated by the Etobicoke APS, the Burlington APS and the Port Colborne APS?

#### **The Court Should Approve the APS**

28. The factors to be considered by this court in its assessment of the approval of a sale by a receiver are well established. A court should consider:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

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<sup>21</sup> First Report, at paras. 153-4.

- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers are obtained; and
- (d) whether there has been unfairness in the working out of the process.<sup>22</sup>

29. Having regard to the foregoing, the Receiver submits that this court should approve the Etobicoke APS, the Burlington APS and the Port Colborne APS and the related relief sought by the Receiver in order to give effect to the transactions contemplated by the Etobicoke APS, the Burlington APS and the Port Colborne APS. In particular, the Receiver notes the following:

- (a) each of the Properties was publicly listed for sale;
  - (b) each of the Properties was exposed to the market for a sufficient period of time in the sales process conducted by the Receiver and Avison;
  - (c) each of the Properties was marketed by Avison, an experienced commercial real estate agency;
  - (d) the sale process led to multiple offers, and culminated with agreements of purchase and sale with purchasers, who to the best of the Receiver's knowledge, are arm's length purchasers;
  - (e) the selling price for each of the Properties is reasonable given the values set out in the appraisals and/or other information provided to the Receiver;
- and

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<sup>22</sup> *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205 (C.A.) at para 16.

- (f) the Etobicoke APS, the Burlington APS and the Port Colborne APS have the support of BMO.

### **The Court Should Seal the Confidential Appendices**

30. As noted above, the Receiver seeks an Order sealing the Confidential Appendices related to each of the Etobicoke Property, the Burlington Property and the Port Colborne Property pending the closing of the sale of that respective Property.
31. The limited circumstances in which this court should seal part of a record before it were described by the Supreme Court of Canada in the case of *SierraClub of Canada v. Canada (Minister of Finance)*.<sup>23</sup>
32. In that case, that court observed that a confidentiality order should be granted in only two circumstances:
- (a) when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and,
  - (b) when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

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<sup>23</sup> *SierraClub of Canada v. Canada (Minister of Finance)*, 2002 CarswellNat 822 (S.C.C.) at para. 45 ["*SierraClub*"].

33. In the context of court-supervised sale proceedings, this court has routinely applied *SierraClub* and held that it is appropriate to seal information and documentation which needs to be provided to the court so that it can fulfill its supervisory role, but which, if made available to the general public, might prejudice the receiver's ability to maximize returns in the event that the contemplated transaction does not close.<sup>24</sup>

**PART V. ORDER REQUESTED**

34. Further to the foregoing, the Receiver respectfully requests orders substantially in the form attached as Appendices "A", "B", "C", and "D" to the Notice of Motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

February 19, 2019



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Jeffrey Larry/Elizabeth Rathbone

**Paliare Roland Rosenberg Rothstein LLP**

Lawyers for RSM Canada Limited

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<sup>24</sup> *Wells Fargo Financial Corporation Canada v. Algonquin Group Inc.*; Court File No. 09-8298-00CL, Endorsement of Morawetz J., dated December 11, 2009.

## SCHEDULE "A" – LIST OF AUTHORITIES

1. *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205 (C.A.)
2. *SierraClub of Canada v. Canada (Minister of Finance)*, 2002 CarswellNat 822 (S.C.C.)
3. *Wells Fargo Financial Corporation Canada v. Algonquin Group Inc.*, Court File No. 09-8298-00CL, Endorsement of Morawetz J., dated December 11, 2009

BANK OF MONTREAL  
**Applicant**

**-and-**

CV-18-00602537-00CL

2495087 ONTARIO INC. et al.  
**Respondents**

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**FACTUM OF THE RECEIVER**

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