

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

B E T W E E N:

**CAMERON STEPHENS MORTGAGE CAPITAL LTD.**

Applicant

**-and-**

**CONACHER KINGSTON HOLDINGS INC. and 5004591 ONTARIO INC.**

Respondents

**SUPPLEMENTARY FACTUM OF THE RECEIVER**  
**(Returnable December 4, 2024)**

December 3, 2024

**Paliare Roland Rosenberg Rothstein LLP**  
155 Wellington Street West, 35th Floor  
Toronto ON M5V 3H1  
Tel: 416.646.4300  
Fax: 416.646.4301

**Jeffrey Larry** (LSO# 44608D)  
Tel: 416.646-4330  
[jeff.larry@paliareroland.com](mailto:jeff.larry@paliareroland.com)

**Ryan Shah** (LSO# 88250C)  
Tel: 416.646-6356  
[ryan.shah@paliareroland.com](mailto:ryan.shah@paliareroland.com)

**Lawyers for the Receiver, TDB Restructuring  
Limited**

**TO: Service List**

**A. Background**

1. This is a motion brought by TDB Restructuring Ltd, in its capacity as the Court-appointed receiver (the “**Receiver**”) for the approval of the sale transaction contemplated by an agreement of purchase and sale between the Receiver and Arjun Anand in trust (the “**Purchaser**”) made as of September 26, 2024 (the “**APS**”).

2. The Receiver’s motion to approve the APS is scheduled for December 4, 2024. In connection with that motion, the Receiver filed a factum addressing its recommendation that the APS should be approved (the “**First Factum**”).<sup>1</sup>

3. The day before hearing, the Receiver received two additional offers as well as one expression of intent to submit an offer for the purchase of the Toronto Property, each of which was higher than the offer made by the Purchaser.

4. The Receiver has placed these offers before the Court in a Confidential Second Supplement to the Third Report of the Receiver.

5. The additional offers put the following additional issue before the Court: under what circumstances should a court consider or accept a late, but higher offer from an unsuccessful bidder?

---

<sup>1</sup> Unless otherwise defined, all capitalized terms shall have the meanings ascribed to such terms in the First Factum.

**B. The Consideration of Late but Higher Bids**

6. In an effort to assist the Court on this motion, the Receiver has canvassed the relevant caselaw in circumstances where, as here, a higher offer is presented after the conclusion of the sales process but before the sale approval motion.

7. The case law establishes that where the sales process was fair, the Court will only refuse to approve the existing offer where the new offer is “substantially higher” than the existing offer.

8. In this case, the Receiver is of the view that the high threshold for setting aside the APS is not met.

9. Courts have rarely refused to approve the original offer on the basis that a new offer is “substantially higher”. Ultimately, where the receiver’s process is fair, and its decision to enter into an agreement of purchase and sale was reasonable and sound at the time it was made, courts are generally unwilling to set aside this decision simply because a later, higher bid is made.<sup>2</sup>

10. Where the difference between the accepted offer and the late, higher offer is not “substantial”, courts generally decline to interfere with the receiver’s sales process. For example:

---

<sup>2</sup> *Crown Trust Co. et al. v. Rosenberg et al.*, [1986 CanLII 2760](#) (Ont. Sup. Ct.) citing *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C. Bkcy.).

- (a) In *Re 1730960 Ontario Ltd*, the court held that an 8% difference was insufficient to suggest that the accepted offer was artificially low and should be rejected by the courts.<sup>3</sup>
- (b) In the CCAA context, Chief Justice Morawetz (as he now is) refused to postpone the approval of an asset purchase agreement where a late entrant made a non-binding offer that was 30% higher than the offer that was subject to approval. Even in that case, Justice Morawetz was satisfied that the higher offer, on its face, did not “lead to an inference that the strategy employed by the Monitor was inadequate, unsuccessful, or improvident, nor the price was unreasonable.”<sup>4</sup>
- (c) Recently, the Saskatchewan Court of Appeal rejected the appeal of a disappointed purchaser who had tendered a \$2.8 million late offer, which was 27.3% higher than the \$2.2 million successful offer approved by the Court. In the Court’s view, accepting a late bid would damage the integrity of the court-mandated sales process, impacting on the ability to secure the highest possible price in other cases.<sup>5</sup>

**C. Application to the APS**

11. Where there is a late but higher offer, the threshold question for the court remains the same: whether the purchase price in the receiver’s recommended agreement of

---

<sup>3</sup> *1730960 Ontario Ltd. (Re)*, [2009 CanLII 37909](#) at [para. 26](#) (Ont. Sup. Ct.).

<sup>4</sup> *Terrace Bay Pulp Inc., Re*, [2012 ONSC 4247](#) at [para. 54](#).

<sup>5</sup> *Smith Street Lands Ltd. v KEB Hana Bank of Canada*, [2020 SKCA 41](#) at [paras. 38-41](#).

purchase and sale is “so unreasonably low ... that the receiver was improvident in accepting it.”<sup>6</sup>

12. In this case, the First Factum sets out the comprehensive marketing efforts undertaken by the Receiver. The existence of the other offers confirms the reasonableness of the purchase price, since the late offers are only marginally (6.7%-14.2%) higher. The purchase price in the APS before the court falls squarely within the range of offers received, and importantly, was compliant with the sales process.

13. Finally, the overriding concern with integrity, fairness and predictability of the court-ordered sales process militate in favour of the approval of the conforming, successful bid. As Justice Cumming pointed out in *Re 1730960 Ontario Ltd*, “[i]t is unfair and objectionable for a party to wait until another bid is made and has been accepted by the Receiver and then to make a bid which is marginally higher and ask the Court to not approve the agreement of purchase and sale resulting from the accepted bid.”<sup>7</sup>

14. Here, the Purchaser has acted in good faith and is a *bona fide* third party purchaser. The existence of marginally higher bids, submitted on the eve of the hearing, are not sufficient to displace the Receiver’s recommendation set out in its Third Report.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 3<sup>rd</sup> day of December, 2024



---

Jeffrey Larry / Ryan Shah

---

<sup>6</sup> *Royal Bank v. Soundair*, 1991 CarswellOnt 205 at para. 30.

<sup>7</sup> *1730960 Ontario Ltd. (Re)*, [2009 CanLII 37909](#) at [para. 26](#) (Ont. Sup. Ct.).

**CAMERON STEPHENS MORTGAGE CAPITAL LTD.**

-and-

**CONACHER KINGSTON HOLDINGS INC. et al.**

Applicant

Respondents

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT  
TORONTO

**SUPPLEMENTARY FACTUM OF THE RECEIVER FOR  
(RETURNABLE DECEMBER 4, 2024)**

**PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**

155 Wellington Street West  
35th Floor  
Toronto, ON M5V 3H1

**Jeffrey Larry** (LSO# 44608D)

Tel: 416.646.4330

[jeff.larry@paliareroland.com](mailto:jeff.larry@paliareroland.com)

**Ryan Shah** (LSO# 88250C)

Tel: 416.646-6356

[ryan.shah@paliareroland.com](mailto:ryan.shah@paliareroland.com)

Lawyers for the Receiver, TDB Restructuring Limited