

Superior Court of Justice  
Commercial List**FILE/DIRECTION/ORDER**Bank of Montreal

Plaintiff(s)

AND

2495087 Ontario Inc. et al

Defendant(s)

Case Management  Yes  No by Judge: Chiappetta

Counsel	Telephone No:	Facsimile No:
<u>See attached</u>		

- Order     Direction for Registrar (No formal order need be taken out)  
 Above action transferred to the Commercial List at Toronto (No formal order need be taken out)

- Adjourned to: \_\_\_\_\_  
 Time Table approved (as follows):

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. (152702), 2495087 Ontario Inc (2495087), 249688 Ontario Inc (249688) and Sunshine Propane Inc. (Sunshine) (collectively the Debtors). The motion is for orders authorizing and directing the

March 4, 2019

Date

Chiappetta

Judge's Signature

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Receiver to enter into and carry out the terms of agreements of purchase and sale to sell the Etobicoke Property (149 675 holds legal and beneficial title to a 0.4 acre real property known as 5462 Dundas Street, Etobicoke Ontario), the Burlington Property (1651033 holds legal and beneficial title to a 1.2 acre real property municipally known as 5223 Dundas Street, Burlington Ontario), and the Port Colborne Property (1527020 holds legal and beneficial title to a 1.9 acre real property municipally known as 633 Main Street West, Port Colborne, Ontario). The motion seeks further ancillary orders.

The Debtors seek to adjourn this motion for two reasons. First they wish to cross-examine the listing agent and second they wish to unseal the Confidential Appendices related to each of

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the three properties. This matter was originally before the court on Feb 21, 2019. Justice McCuen granted an adjournment, upon what I have been advised by counsel, to hear serious allegations of impropriety in the sales process. He ordered the Debtors to serve its responding materials asap and he ordered the Confidential Appendices to remain sealed. The Debtors filed their responding materials. There is no evidence of impropriety, either actual or perceived, in terms of the sales process. At best the evidence demonstrates the agent did not return a couple of calls from a prospective purchaser of the Burlington and Etobicoke properties, Mr. Bhardwaj of SMV Financial Services and that SMV Financial Service's substantive efforts were made only after the property was sold, pending Court approval and normal closing procedures.

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This is to be contrasted with the significant and detailed evidence of the marketing efforts by an experienced commercial real estate agency. I see no reason therefore why further costs should be incurred and further delay should be endured by an adjournment to cross-examine the listing agent. There is simply no evidence of impropriety.

The Receiver has filed under seal certain confidential appendices to the First Report which contain, among other things, the appraisals on the Ethridge, Burlington and Port Carbonne Properties, summaries of the offers received for each property and the agreements of purchase and sale between the Receiver and the purchaser for each of the three properties. The Debtors want an adjournment to review the

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Confidential Appendices. I do not agree that this is a reason to adjourn a hearing on the merits. Nor do I agree that the Confidential Appendices should be unsealed pending the closing of the sale of the respective properties. I am satisfied that the test in Sierra Club of Canada v Canada (Minister of Finance) 2002 CarswellNat 822 (S.C.C.) at para 45 has been met. The Court requires the information and documentation to fulfill its supervising role. If the details of the transactions are made to the general public, however, the Receiver's ability to maximize returns in the event the contemplated transactions do not close may be prejudiced (Wells Fargo Financial Corporation of Canada v. Algonquin Group Inc; Court File No. 09-8289-L-00CL, December 11, 2009). The same is true should the details be made

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available to the Debtors. Counsel for the Debtors, in his submissions to the Court and put forward in affidavit evidence, advances the interests of Mr. Bhardwaj as a prospective purchase. Mr. Bhardwaj was in court today. In my view, should the Debtors be privy to the information of the Confidential Appendices there is a real risk that a potential purchaser may be privy as well. To this extent, the prejudice to the Receiver in maximizing returns in the event that the contemplated transaction does not close can not practically be extinguished, should the Debtors be granted disclosure of the Confidential Appendices. The adjournment is therefore not granted.

In considering the merits of the motion, I find the evidence establishes the following:

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1. Each of the Properties was publicly listed for sale.
2. Each of the Properties was exposed to the market for a sufficient period of time in the sales process conducted by the Receiver and an experienced commercial real estate agency.
3. Each of the Properties ~~was~~ was heavily marketed.
4. The sale process led to multiple offers for each of the properties and culminated with three agreements of purchase and sale with third party arm's length purchasers.
5. The selling price for each of the Properties is reasonable given the values set out in the applicable appraisals.
  - a. All of the agreements of purchase and sale have the support of Bank of Montreal which holds <sup>the</sup> primary or only, as the

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case may be, registered interest on title to the applicable property.

1. The offers for the Properties are all firm, as the Purchasers have waived conditions.
2. The Receiver has received a deposit of 10% <sup>of</sup> the respective purchase prices from each of the purchasers.
3. The Properties are being sold on a "as is, where is" basis.
4. The terms of the agreements of purchase and sale are reasonable in light of the value set out in the appraisals for the respective Property and/or other information received by the Receiver.
5. The marketing process was reasonable and appropriate for the type of property in question and provided sufficient market exposure to the Properties.
6. In accordance with legal opinion, the mortgages over the three properties

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granted in favour of BMO are each valid and enforceable first ranking security interests against title to those properties.

13. As of July 27, 2018, the Debtors were indebted to BMO in the amount of \$ 9,992,297.84.

14. The Distribution proposed, with a hold back on the Burlington Property more particularly described below, is reasonable.

The Debtors take no issue and are unopposed to the sale of the Port Colborne property.

The Debtors oppose the sale of the Etobicoke property arguing that there is a second mortgage on it. The second mortgagee was served with this motion and has neither responded nor attended. I see no reason, considering my reasons above, not to approve

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the sale of the Etobicoke Property.

Ms. Ibe attends today on behalf of her client SDM Construction Inc to oppose the sale of the Burlington Property. She advises, without evidence before the court from her client or Mr. Bhardwaj, that her client has a construction lien on the Burlington Property of over 2M and Mr. Bhardwaj is willing to purchase the Burlington Property for 2.7 M plus assume the 2M+construction lien. As a result, it is submitted, Mr. Bhardwaj's offer is superior and the court should not approve the sale of the Burlington Property in accordance with the Agreement before the court. I disagree. As noted above, the properties were heavily marketed. There is no evidence as to why Mr. Bhardwaj did not put this offer forward during the bidding process or prior to the bid deadline but puts it forward today.

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in open court, without evidence or a properly formatted offer, 2.5 weeks after the bid deadline. Second, the offer, even accepted as valid and true, is entirely impractical. The evidence demonstrates the value of the Burlington Property in the range of 2.7 M, as offered by Mr. Bhardwaj recently. Counsel asks the court to accept that Mr. Bhardwaj is willing today personally assume the entire value of the construction lien, effectively doubling the value of his offer to purchase. The offer is without detail, without clarity and most importantly without practicality as it fails millions of dollars outside the appraisal, information received by the Receiver and other offers on the property.

BMO's mortgage was placed on the property in April 2014. The construction lien was registered on the property

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years later in August 2018, for work  
that commenced a couple of years later.  
It would appear that SDM Construction Inc  
does not have a priority claim. Nevertheless  
BMO and the Receiver have agreed to a hold  
back equal to the maximum amount of  
the construction lien claim on the Burlington  
Property <sup>if accepted</sup> and an order shall go in accordance  
with that agreement. I see no other  
reason not to above the sale of the  
Burlington Property as requested.

Orders to go therefore in  
accordance with the 4 draft orders  
Signed by me today