

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

and

AMAX HEALTH INC.

Respondent

**FACTUM OF THE MOVING PARTY, RSM CANADA LIMITED,
IN ITS CAPACITY AS COURT-APPOINTED
RECEIVER OF AMAX HEALTH INC.**

August 22, 2019

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B E T W E E N:

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**FACTUM OF THE MOVING PARTY, RSM CANADA LIMITED, IN ITS
CAPACITY AS COURT-APPOINTED RECEIVER OF
AMAX HEALTH INC.**

PART I - INTRODUCTION

1. This motion is brought by RSM Canada Limited, in its capacity as court-appointed receiver of Amax Health Inc. (the “**Receiver**”) for, *inter alia*, an Order approving the Second Report of the Receiver, dated August 22, 2019 (the “**Second Report**”), authorizing the Receiver to enter into and complete the Asset Purchase Agreement, dated August 22, 2019, and sealing the Confidential Appendix 1 and 2 to the Second Report until further Order of the Court.

PART II - SUMMARY OF FACTS

2. The Receiver was appointed by this Honourable Court as receiver of the assets, property and undertaking (the “**Property**”) of Amax Health Inc. (“**Amax**”) on June 4, 2019 (the “**Appointment Order**”).

Reference: Motion Record, First Report of the Receiver, dated July 17, 2019 (the “First Report”), Appendix “A”, Order of the Honourable Mr. Justice A. Whitten dated June 4, 2019

3. Amax is a distributor of dental supplies and small equipment throughout Canada. Pursuant to the Appointment Order, the Receiver took possession of the Property and initiated a process for the sale of the Property (the "**Sales Process**").

Reference: First Report at paragraphs 1, 22 and 57

4. On June 24, 2019, the Receiver commenced marketing the Property and preparing a marketing brochure which was subsequently forwarded to various competitors of Amax as well as a number of auctioneers/liquidators. The Receiver also placed notices advertising the Property for sale in the National Post on June 27, 109 and July 4, 2019.

Reference: First Report at paragraph 58

5. As part of the Sales Process, the Receiver prepared a confidentiality agreement (the "**CA**") and the Receiver's Confidential Information Memorandum, dated Jun 25, 2019 (the "**CIM**"), which contained the Receiver's terms and conditions of sale. The CIM was sent to those parties who have executed the CA. The CIM also contained, among other things, detailed listings of all inventory and equipment lots and information regarding customer lists and private label brands.

Reference: First Report at paragraph 59

6. In the event the CIM was publically disclosed, the Sale Process might have been prejudiced. By Order of Mr. Justice Parayeski, dated July 25, 2019, the CIM was sealed as confidential.

Reference: First Report at paragraph 61

7. In furtherance of the Sale Process, 12 offers were submitted to the Receiver and based on the results of the offers, the Receiver accepted the bid from 15509349 Canada Inc., (the “**Purchaser**”) as the highest and best offer.

Reference: Second Report at paragraphs 17 and 18

8. A summary of the offers (the “**Summary of Offers**”) received by the Receiver are set out in Confidential Appendix 1 to the Second Report.

Reference: Second Report at paragraph 17

9. The Receiver subsequently entered into an Asset Purchase Agreement with the Purchaser, dated August 22, 2019 (the “**Agreement**”) subject to Court approval.

Reference: Second Report at paragraph 19

10. In the event that the Summary of Offers and the Agreement are publically disclosed, the Sale Process may be prejudiced.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

Issue: Should this Court grant an Order sealing the Summary of Offers and Agreement to the Second Report?

11. Section 137(2) of the *Courts of Justice Act* provides the Court with the discretion to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record, notwithstanding the general principle that Court should be open and public.

Reference: *Courts of Justice Act*, R.S.O. 1990, c. C.43, section 137(2)

12. In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada held that Courts should exercise their discretion to grant sealing Orders where:

- a) the Order is necessary to prevent risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and,
- b) the salutary effects of the Order outweigh the deleterious effects.

Reference: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 53, 2 SCR 322 [Sierra Club]

13. The Sierra Club principle has led the Court to adopt a standard practice of sealing portions of a Court report by a Court-appointed officer that is filed in support of a motion to approve a sale of assets or sales process, which disclose the valuation of the assets under sale, the details of the bids received by the Court-appointed officer or the purchase price contained in the offer for which Court approval is sought.

Reference: *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, 2014 ONSC 1173, at paragraph 32 [GE Canada]

14. In granting sealing Orders in sale approval motions, the Court has recognized that documents relating to the proposed sale contain highly sensitive commercial information which, if disclosed prior to the closing of a sale transaction, could pose a serious risk to a sale process in the event the proposed transaction does not close and that such Orders ensure that competitors or potential bidders do not obtain an unfair advantage.

Reference: GE Canada at paragraph 33

***Elleway Acquisitions Limited v. 435876 Canada Inc.*, 2013 ONSC 7009 at paragraph 48**

15. The Summary of Offers and Agreement contain sensitive commercial information relating to the Property, the Sales Process, customer lists and private label brands. The Receiver therefore seeks a sealing Order over the Summary of Offers and Agreement in order to avoid any prejudice to stakeholders should the Sales Process be compromised.

PART IV - ORDER REQUESTED

16. The Receiver submits that the test for a sealing Order has been met and that the Court should grant an Order sealing the Summary of Offers and Agreement, contained in Confidential Appendix 1 and 2 respectively to the Second Report, pending further Order of this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of August, 2019.



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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41

2. *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, 2014 ONSC 1174

3. *Elleway Acquisitions Limited v. 435876 Canada Inc.*, 2013 ONSC 7009

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Courts of Justice Act, E.S.O. 1990, c. C. 43

Documents public

137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

Court lists public

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

Copies

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see. R.S.O. 1990, c. C.43, s. 137.

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-and- **AMAX HEALTH INC.**
Respondent

Court File No. 19-69485

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT HAMILTON

**FACTUM OF THE MOVING PARTY, RSM CANADA
LIMITED, IN ITS CAPACITY AS
COURT-APPOINTED RECEIVER**

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RCP-E 4C (May 1, 2016)