

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

BANK OF MONTREAL

Applicant

-and-

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

Respondents

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

**FACTUM OF 2495087 ONTARIO INC., 2496800 ONTARIO INC., 1527020
ONTARIO INC., 1651033 ONTARIO LTD AND 1496765 ONTARIO LTD**

PART I-OVERVIEW

1. On this Motion, the Moving Party, RSM Canada Limited (the “Receiver”) is seeking, inter alia, the Court’s approval of three Agreements of Purchase and Sale.
2. The three Agreements of Purchase and Sale relate to the properties described below owned by the following Debtor Companies: Etobicoke Property (owned by

1496765 Ontario Ltd), Burlington Property (owned by 1651033 Ontario Ltd) and Port Colborne Property (owned by 1527020 Ontario Inc).

PART II-THE FACTS

1. In its Motion Record, the Receiver states that it has entered into three Agreements of Purchase and Sale with respect to the following properties: 5462 Dundas Street West, Etobicoke, Ontario (“Etobicoke Property”), 5223 Dundas Street, Burlington, Ontario (“Burlington Property”) and 633 Main Street West, Port Colborne, Ontario (“Port Colborne Property”).

Affidavit of Rauf Khan sworn February 28, 2019 at paragraph 3

2. The evidence suggests that the Receiver’s Listing Agent, Avison Young (“Avison”), ignored, disregarded and/or failed to consider favourable offers and/or potentially better offers than the aforesaid Agreements entered into by the Receiver with respect to the Etobicoke and Burlington Properties.

Affidavit of Rauf Khan sworn February 28, 2019 at paragraphs 4 to 10

3. Further, the evidence indicates that there are better offers than the above-referenced Agreements entered into by the Receiver.

Affidavit of Rauf Khan sworn February 28, 2019 at paragraph 11

PART III-ISSUES AND THE LAW

Issue One: Should the Court approve the Receiver's Agreements of Purchase and Sale?

4. The above-referenced Debtor Companies agree with the Receiver that the factors to be considered on this Motion are those set out at paragraph 16 of the Court of Appeal's *Soundair* decision. The Debtor Companies disagree, however, with the Receiver's assertion that the *Soundair* test has been met and in this regard, they submit that the Receiver has failed to provide them with evidence sufficient to determine whether the test has been met or not.

5. As has been held in previous case law:
 - a. Part of the duty of a receiver is to place before the Court, sufficient evidence to enable the Court to understand the implications for all parties of any proposed sale;

9-Ball Interests Inc. v. Traditional Life Sciences Inc., 2012 ONSC 2788, at paragraph 30

 - b. Even in the absence of misconduct, the sales process will be flawed if there is a lack of clarity regarding how it was conducted;

Clark v. Carson, 2011 ONSC 6256, at paragraphs 31 to 32

 - c. The Court should not approve a sale where it does not appear that the sale is in the best interests of the parties;

Canrock Ventures LLC v. Ambercore Software Inc., 2011 ONSC 1138, at paragraph 2: and

- d. All interested parties are entitled to transparency in the process of realizing on an asset, and to be assured that their interests in the process has been protected.

Re Wagman, 2006 CarswellOnt 2388 (S.C.J. (Reg.)), at paragraph 10

6. In breach of these duties, however, the Receiver has failed to provide the Respondents with any information regarding the sales other than the bald assertions that are summarized at paragraph 29 of the Receiver's Factum.
7. The Debtor Companies further note that, although Justice Galligan in *Soundair* agreed that an Agreement of Purchase and Sale should not be set aside simply because a later and higher bid was made, His Honour did agree though that the existence of a second offer of a substantially higher amount should be considered by the Court in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

Royal Bank v. Soundair Corp., 1991 CarswellOnt 205 (C.A.), at paragraphs 22 and 26 to 31

8. At the present time, while the Debtor Companies are not in a position to know whether the other offers were substantially higher than those that were accepted, their evidence establishes that offers did exist, and if those offers were substantially higher, it would appear clear that the Receiver did not properly carry out its

functions and, therefore, the Agreements of Purchase and Sale should not be approved.

9. In addition, the evidence indicates that the Receiver's Listing Agent, Avison, ignored, disregarded and/or failed to consider better offers than the aforesaid Agreements entered into by the Receiver. As such, the Receiver's Agreements of Purchase and Sale should not be approved.

Issue Two: Should the Court seal the Confidential Appendices?

10. While the Debtor Companies understand the need to maintain confidentiality in order to protect the integrity and fairness of the sales process, they note that in other cases, the matter has been resolved by means of a Confidentiality Agreement between the receiver and the party, and they submit that such an agreement would be appropriate in this case as well.

GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc., 2014 ONSC 1173, at paragraphs 32 to 37

PART IV-ORDER REQUESTED

11. That the Motion brought by the Receiver be dismissed with costs in the Debtor Companies' favour.

All of which is respectfully submitted.

Date: February 28, 2019

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SCHEDULE “A”-LIST OF AUTHORITIES

1. *9-Ball Interests Inc. v. Traditional Life Sciences Inc.*, 2012 ONSC 2788.
2. *Clark v. Carson*, 2011 ONSC 6256.
3. *Canrock Ventures LLC v. Ambercore Software Inc.*, 2011 ONSC 1138.
4. *Re Wagman*, 2006 CarswellOnt 2388 (S.C.J. (Reg.)).
5. *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205 (C.A.).
6. *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, 2014 ONSC 1173.