

**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: April 12, 2019**

April 9, 2019

**PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**

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Lawyers for the Receiver

**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 Port Elgin APS (as defined below) and vesting title to the Port Elgin Property in the Port Elgin Purchaser (each as defined below), or as it may further direct in writing, free and clear of claims and encumbrances, upon closing of the transaction under the Port Elgin APS and the delivery of a Receiver’s certificate to the Port Elgin Purchaser;
  - (b) approving the Receiver’s Second Report dated March 29, 2019 (the “**Second Report**”) and the Receiver’s conduct and activities to March 28, 2019 discussed therein;
  - (c) authorizing the Receiver to destroy the Non-debtor Documents and Personal Documents (each as defined in the Second Report);
  - (d) authorizing the Receiver to make the 2495087 Interim Distribution (as defined in the Second Report);
  - (e) approving the fees and disbursements of the Receiver incurred to February 28, 2019;

- (f) approving the fees and disbursements of Paliare Roland incurred to February 28, 2019;
- (g) sealing the Confidential Appendix “L” to the Second Report until the closing of the sale of the Port Colborne Property (defined below);
- (h) sealing the Confidential Appendix “N” to the Second Report until the closing of the sale of the Port Elgin Property; and
- (i) such further relief as this Honourable Court deems just.

## **PART II. OVERVIEW**

2. The Receiver has entered into an agreement of purchase and sale with Amalethan Xavier, in trust for a company to be incorporated (the “Port Elgin Purchaser”) to sell the real property municipally known as 591 and 595 Goderich Street, Port Elgin, Ontario (the “Port Elgin Property”) (the “Port Elgin APS”), subject to the approval of this court.
3. To the best of the Receiver’s knowledge, the Port Elgin Purchaser is an arms-length third party.
4. The Receiver believes that the Port Elgin APS represents a commercially reasonable disposition of the Port Elgin Property, and recommends that the court approve the pending transaction because:
  - (a) the Port Elgin Property was publicly listed for sale;
  - (b) the Port Elgin Property was exposed to the market for a sufficient period of time in the sales process conducted by the Receiver and Avison Young (“Avison”);

- (c) the Port Elgin Property was marketed by Avison, an experienced commercial real estate agency;
  - (d) the sale process led to multiple offers for the Port Elgin Property, and culminated with the Port Elgin APS with the Port Elgin Purchaser who, to the best of the Receiver's knowledge, is a third party arm's length purchaser;
  - (e) the selling price for the Port Elgin Property is reasonable given the value set out in the applicable appraisal and/or other information provided to the Receiver; and
  - (f) the Port Elgin APS has the support of Bank of Montreal ("BMO") which holds the only registered interest on title to the Port Elgin Property.
5. The Receiver has filed under seal certain confidential appendices to the Second Report, which contain, among other things, the appraisal on the Port Elgin Property, summaries of the offers received for the Port Elgin Property, a copy of the Port Elgin APS as well as an amendment to the agreement of purchase and sale for the Port Colborne Property.
6. The Receiver requests that these confidential appendices be sealed (Appendix "L" pending closing of the transaction relating to the Port Colborne Property and Appendix "N" pending closing of the transaction relating to the Port Elgin Property) in order to avoid prejudice in the event that the contemplated sales do not close.

**PART III. FACTS****The Properties**

7. Each of the Debtor companies (other than Sunshine) owns a real estate property that, to the Receiver's knowledge, is its primary realizable asset. Specifically:
- (a) 1496765 held, prior to its sale, 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 held, prior to its sale, 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>
  - (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") (collectively, the "Properties").<sup>5</sup>

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<sup>1</sup> Second Report, at para. 16.

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

<sup>3</sup> Second Report, at para. 19.

<sup>4</sup> Second Report, at para. 20.

## The Receivership

8. 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>
9. 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

10. The Receiver retained Avison to list the Properties for sale.<sup>9</sup>
11. On December 3, 2018 Avison launched its marketing campaign for the Properties, which campaign ran through January 18, 2019.<sup>10</sup>
12. The marketing campaign included the following activities:
  - (a) an email communication was sent to over 1,200 contacts on Avison's mailing list;

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<sup>5</sup> Second Report, at para. 22.

<sup>6</sup> Second Report, at para. 14.

<sup>7</sup> Second Report, at para. 15.

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

<sup>9</sup> Receiver's First Report, dated February 13, 2019, attached to the Second Report as Appendix "B" [the "**First Report**"] at para 107.

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

- (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**

13. As at January 22, 2019, twenty offers had been submitted to Avison for the various Properties held by the Debtors. 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>
14. The Receiver subsequently entered into agreements of purchase and sale for each of the Etobicoke Property, the Burlington Property and the Port Colborne Property for which approval was sought and granted by this Court on March 4, 2019.

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

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

15. On January 30, 2019, the Receiver entered into an agreement of purchase and sale for the Port Elgin Property.<sup>13</sup> The Receiver seeks approval for this transaction on this motion.
16. The Port Elgin APS was subject to a 30-day conditional period, which was due to expire on March 2, 2019. On February 26, 2019, the Port Elgin Purchaser requested a two-week extension of this conditional period, which the Receiver agreed to. On March 15, 2019, the Port Elgin Purchaser waived its condition and provided the applicable portion of the deposit.<sup>14</sup>
17. The Applicant in this proceeding, BMO, has advised the Receiver that it consents to the sale by the Receiver of the Port Elgin Property on the terms set out in the Port Elgin APS.
18. The offer for the Port Elgin Property is firm, as the Port Elgin Purchaser has waived conditions. The Receiver has received a deposit of 10% of the purchase price from the Port Elgin Purchaser. The Port Elgin Property is being sold on as “as is, where is” basis.<sup>15</sup>
19. The terms of the Port Elgin APS, including the purchase price for the Port Elgin Property, are reasonable in light of the information received by the Receiver and set out in Confidential Appendix “N”.<sup>16</sup>

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<sup>13</sup> Second Report, at paras. 47.

<sup>14</sup> Second Report, at paras. 48-9.

<sup>15</sup> Second Report, at para. 54.

<sup>16</sup> Second Report, at para 57.



20. The marketing process undertaken by the Receiver was reasonable and appropriate for the Port Elgin Property, and provided sufficient market exposure to the property.<sup>17</sup>
21. The Receiver recommends the approval of the Port Elgin APS by this Honourable Court.<sup>18</sup>

### **Proposed Distribution**

22. The Receiver obtained a legal opinion from Paliare Roland Rosenberg Rothstein LLP (“Paliare Roland”) that the mortgage over the Port Elgin Property granted in favour of BMO is a valid and enforceable first ranking security interest against title to the Port Elgin Property.<sup>19</sup>
23. The Receiver proposes to make the following payments from the net proceeds of sale from the Port Elgin Property, after payment of the property taxes and commissions payable in respect of the Port Elgin Property:
- (a) to BMO:
    - (i) the advances totaling \$99,000 under Receiver Certificates # 4 and 12 plus accrued interest; and

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<sup>17</sup> Second Report, at para 56.

<sup>18</sup> Second Report, at para 57.

<sup>19</sup> Second Report, at para 68.

- (ii) an amount not exceeding the outstanding indebtedness of 2495087 Ontario Inc. to BMO secured by BMO's first mortgage over the Port Elgin Property.

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

24. The Receiver's motion raises the following two legal issues:
- (a) should the court approve the Port Elgin APS?
  - (b) is it appropriate for the court to seal Confidential Appendix "L" and Confidential Appendix "N" to the Receiver's Second Report pending the closing of the transactions contemplated by the Port Colborne APS and Port Elgin APS respectively?

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

25. 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;
  - (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>20</sup>

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<sup>20</sup> *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205 (C.A.) at para 16.

26. Having regard to the foregoing, the Receiver submits that this court should approve the Port Elgin APS and the related relief sought by the Receiver in order to give effect to the transaction contemplated by the Port Elgin APS. In particular, the Receiver notes the following:

- (a) the Port Elgin Property was publicly listed for sale;
- (b) the Port Elgin Property was exposed to the market for a sufficient period of time in the sales process conducted by the Receiver and Avison;
- (c) the Port Elgin Property was marketed by Avison, an experienced commercial real estate agency;
- (d) the sale process led to multiple offers, and culminated with the Port Elgin APS with the Port Elgin Purchaser who, to the best of the Receiver's knowledge, is an arm's length purchaser;
- (e) the selling price for the Port Elgin Property is reasonable given the information provided to the Receiver; and
- (f) the Port Elgin APS has the support of BMO.

## The Court Should Seal the Confidential Appendices

27. As noted above, the Receiver seeks an Order sealing Confidential Appendix “L” and Confidential Appendix “N” to the Receiver’s Second Report pending the closing of the transactions contemplated by the Port Colborne APS and the Port Elgin APS, respectively.
28. 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>21</sup>
29. 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.
30. 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

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<sup>21</sup> *SierraClub of Canada v. Canada (Minister of Finance)*, 2002 CarswellNat 822 (S.C.C.) at para. 45 [“*SierraClub*”].

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>22</sup>

**PART V. ORDER REQUESTED**

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

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

April 9, 2019



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Jeffrey Larry/Elizabeth Rathbone

**Paliare Roland Rosenberg Rothstein LLP**

Lawyers for RSM Canada Limited

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<sup>22</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

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PROCEEDING COMMENCED AT  
TORONTO

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**FACTUM OF THE RECEIVER**

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