

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

**B E T W E E N:**

**BANK OF MONTREAL**

**Applicant**

- and -

**7132221 CANADA INC.**

**Respondent**

**APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT* R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. c-43, AS AMENDED**

**FACTUM OF BDO CANADA LIMITED, COURT APPOINTED RECEIVER  
OF 7132221 CANADA INC.**

**MILLER THOMSON LLP**  
One London Place  
255 Queens Avenue, Suite 2010  
London, ON N6A 5R8

**Tony Van Klink** LSO#: 29008M  
Tel: 519.931.3509  
Fax: 519.858.8511  
Email: tvanklink@millerthomson.com

**Lawyers for BDO Canada Limited,  
Court Appointed Receiver**

## **PART I - OVERVIEW**

1. This is a motion for, among other relief, approval of a sale agreement entered into by BDO Canada Limited (“**BDO**”), as court appointed Receiver (the “**Receiver**”), for the sale of the assets (the “**Assets**”) described in an Agreement of Purchase and Sale dated August 29, 2023 (the “**Purchase Agreement**”) made between the Receiver, as vendor, and Acme United Limited (the “**Purchaser**”), as purchaser, and the vesting of the Assets in the Purchaser free and clear of all claims and encumbrances.
2. The proposed sale satisfies the *Soundair* test. The market for the Assets was thoroughly canvassed in a sale and investment solicitation process undertaken by 7132221 Canada Inc. (the “**Debtor**”) with the assistance of BDO prior to the receivership, which did not produce a buyer, and in an expedited sale process undertaken by the Receiver. The secured creditors, Bank of Montreal (“**BMO**”) and BDC Capital Inc. (“**BDC**”) will suffer shortfalls on their secured claims if the transaction is approved. BMO and BDC support the transaction.

## **PART II - THE FACTS**

3. The Appointment Order is in the usual form and empowers the Receiver to market and solicit offers for the Property, as defined in the Appointment Order.<sup>1</sup>
4. Prior to the appointment of the Receiver, in February 2023 the Debtor, with the assistance of BDO as financial advisor, undertook a sale and investment solicitation process (“**SISP**”). 75 prospective purchasers, comprising 51 strategic targets and 24 financial targets were identified. Of those parties, 13 executed a non-disclosure agreement and were provided with a confidential

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<sup>1</sup> *Appointment Order, Paragraph 4(j)*

information memorandum and access to a virtual data room.<sup>2</sup>

5. The SISP produced a single expression of interest (“**EOI**”), but no binding letter of intent (“**LOI**”) or successful transaction.<sup>3</sup>

6. After the SISP was conducted, a further EOI was received, but it also did not result in a LOI or a transaction.<sup>4</sup>

7. Given the extensiveness of the SISP, the Receiver initiated an expedited sale process (the “**Sale Process**”).<sup>5</sup> The key milestones under the Sale Process were as follows:

<u>Milestone</u>	<u>Deadline</u>
Initiation of Sale Process	Thursday, July 13, 2023
Expression of Interest Date (EOI Deadline)	Friday, July 28, 2023 (5:00 PM Eastern Time)
Binding Letter of Intent Date (LOI Deadline)	Friday, August 4, 2023 (5:00 PM Eastern Time)
Bid Selection Date	Monday, August 7, 2023
Definitive Transaction Agreement	Friday, August 11, 2023
Hearing of the Sale Approval Motion / Transaction Execution Date	Subject to availability of the Court

8. 59 targets, including eight parties that were not part of the SISP, were identified as potential purchasers and provided with information related to the opportunity.<sup>6</sup>

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<sup>2</sup> First Report of the Receiver to the Court dated September 7, 2023 (the “**First Report**”), paragraphs 37-39

<sup>3</sup> First Report, paragraph 40

<sup>4</sup> First Report, paragraph 41

<sup>5</sup> First Report, paragraph 43

<sup>6</sup> First Report, paragraph 44

9. Six parties expressed initial interest and were provided with access to a virtual data room.<sup>7</sup>
10. Three parties submitted an EOI. Two of those parties submitted a LOI.<sup>8</sup>
11. Both LOIs were conditional upon an assignment of the contract between the Debtor and The Canadian Red Cross Society (“**CRC**”). CRC advised the Receiver that it would not be willing to assign the CRC contract to one of the two parties that had submitted a LOI.<sup>9</sup>
12. On August 29, 2023, the Receiver entered into the Purchase Agreement with the Purchaser, subject to Court approval.<sup>10</sup> The Purchaser has entered into an Agreement with CRC for the assignment of the CRC contract, subject to the completion of the transaction provided for in the Purchase Agreement.
13. The Assets are comprised of inventory (excluding personal protective equipment (PPE) inventory), contracts including the CRC contract, and all websites, marketing lists and intellectual property. The purchase price is subject to an adjustment for unsellable and stale inventory and is payable in full on closing.<sup>11</sup>
14. The Receiver has filed with the Court a report in which the Receiver recommends that the Court approve the proposed transaction for the following reasons:

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<sup>7</sup> *First Report, paragraph 46.*

<sup>8</sup> *First Report, paragraph 46*

<sup>9</sup> *First Report, paragraph 47*

<sup>10</sup> *First Report, paragraph 49*

<sup>11</sup> *First Report, paragraphs 53 and 55*

- (a) **Efforts to get the best price:** The market was widely canvassed as a going concern sale during the SISP over a period of approximately six (6) weeks, resulting in only one (1) EOI submission and no subsequent LOI submissions. The market was canvassed again during the expedited Sale Process undertaken by the Receiver for a period of approximately three (3) weeks. The direct-contact marketing method used was sufficient to attract the interest of reasonable buyers and investors;
- (b) **Interest of the parties:** BMO and BDC were supportive of the process and were consulted regarding offers submitted as part of the SISP and Sale Process, notwithstanding that both will suffer a significant shortfall in the proposed transaction;
- (c) **Efficacy and integrity of the process:** The SISP and expedited Sale Process were both commercially reasonable and conducted with integrity. All interested parties were given an opportunity to participate in both processes. No objections or concerns regarding the SISP or the Sale Process have been brought to the Receiver's attention. Furthermore, the Purchase Agreement was negotiated in good faith, and is the best and highest price under the circumstances;
- (d) **There was no unfairness:** In the view of the Receiver, there has been no unfairness in the conduct of the SISP or expedited Sale Process. No party has been prejudiced or excluded;
- (e) **Other considerations:**
  - (i) The Receiver understands that the minimal interest in the Debtor as a going concern and for the Debtor's assets can be attributed to the current oversaturation of the PPE market as well as the fact that a significant portion of the Debtor's value is related to the CRC Contract which expires in 2025;

- (ii) the proposed transaction is the only viable transaction; and
- (iii) time is of the essence in respect of a value-maximizing sale transaction as a prolonged closure of the CRC eShop will further diminish the value of the Assets and cause BMO and BDC to suffer even greater shortfalls on their indebtedness.<sup>12</sup>

### **PART III - ISSUES AND ARGUMENT**

#### **Should the Proposed Sale be Approved?**

15. In reviewing a receiver's decision to accept an offer for the purchase of an asset, the Courts exercise considerable caution and grant considerable deference to the receiver's decision. As the Court of Appeal in *Re Regal Constellation Hotel Limited*<sup>13</sup> stated,

*“Although the Courts will carefully scrutinize the procedure followed by a receiver, they rely upon the exercise of their appointed receivers, and are reluctant to second guess the considered business decisions made by the receiver in arriving at its recommendations. The Court will assume that the receiver is acting properly unless the contrary is clearly shown.”*

16. A receiver's recommendation on an asset sale should be rejected only in exceptional circumstances. To do otherwise would “lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval” and would weaken the role and function of the receiver and lead to “immensely damaging results to the disposition of assets by court-appointed receivers.”<sup>14</sup>

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<sup>12</sup> *First Report*, paragraph 59

<sup>13</sup> 2004 CanLII 206 (ON CA)

<sup>14</sup> *Royal Bank of Canada v. Soundair Corp.* 1991 CanLII 2727 (ON CA)

**The Soundair Factors**

17. In *Royal Bank of Canada v. Soundair Corp.*, the Court of Appeal summarized the factors which the Court is to consider when determining whether to approve a sale of assets by a receiver.

They are:

- (a) whether the receiver has made 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.

***a) Whether the Receiver has made sufficient effort to get the best price and has not acted improvidently***

18. The market for the Assets was thoroughly canvassed twice: first by the Debtor with the assistance of BDO as financial advisor and a second time by BDO as Receiver.

19. The Receiver has accepted the only viable offer after exposing the Assets to the market for a reasonable period of time. By doing so, the Receiver has acted reasonably, appropriately and providently.

***b) The interests of all parties***

20. The proposed sale maximizes the recovery from the Assets. Although the interests of the Respondent and the purchaser are also relevant, on a sale of assets the Receiver's primary concern

is to protect the interests of the creditors.<sup>15</sup>

21. A failure to approve the sale brings with it further delay, additional cost, risk, uncertainty and the substantial likelihood of a lower realization.

**c) *The efficacy and integrity of the process***

22. The integrity of the process is to be measured from the perspective of those for whose benefit it has been conducted, primarily the creditors.<sup>16</sup>

23. In *Soundair* and its progeny, the Courts emphasize the importance of protecting the integrity of the process and the procedures followed by a Court-appointed receiver. Doing so instills confidence of business persons in their dealings with receivers knowing that a Court will not lightly interfere with a receiver's decision to sell to the selected participant allowing the selected participant to have confidence that it will not be back doored in some way.<sup>17</sup>

**d) *Has there been unfairness in the working out of the process***

24. The sale process was open, fair and transparent to all parties. All parties had an opportunity to submit proposals to the Receiver.

**Sealing of the confidential appendices**

25. Section 137 (2) of the Courts of Justice Act provides that:

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<sup>15</sup> *Skyepharm PLC v. Hyal Pharmaceutical Corporation*, 1999 CanLII 15007 (ON SC; aff'd 2000 CanLII 5650 (ON CA)

<sup>16</sup> *Skyepharm PLC v. Hyal Pharmaceutical Corporation*, *supra*.

<sup>17</sup> *Re Regal Constellation Hotel Limited*, *supra*; *Skyepharm PLC v. Hyal Pharmaceutical Corporation*, *supra*

*“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.”*

26. As set out by the Supreme Court of Canada in *Sherman Estate v. Donovan*<sup>18</sup>, a sealing order should be granted if:

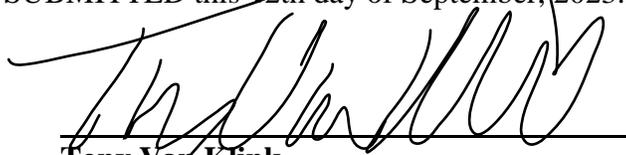
- (a) court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.

27. Ontario courts have applied the *Sherman Estate* test to seal confidential information affecting a sale process<sup>19</sup>.

#### **PART IV - ORDER REQUESTED**

28. That the motion be granted and an Approval and Vesting Order be made:

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of September, 2023.



**Tony Van Klink**  
**MILLER THOMSON LLP**

Lawyer for BDO Canada Limited,  
the Court appointed Receiver

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<sup>18</sup> *Sherman Estate v. Donovan*, 2021 SCC 25 (CanLII), at para. 38

<sup>19</sup> *FSC (Annex) Limited Partnership v. ADI 64 Prince Arthur L.P.*, 2021 ONSC 2039 (CanLii), at para. 71

**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. *Regal Constellation Hotel Ltd., Re*, 2004 CanLII 206 (ON CA)
2. *Royal Bank of Canada v. Soundair Corp.* 1991 CanLII 2727 (ON CA)
3. *Skyepharma PLC v. Hyal Pharmaceutical Corporation*, 1999 CanLII 15007 (ON SC; *aff’d* 2000 CanLII 5650 (ON CA))
4. *Sherman Estate v. Donovan*, 2021 SCC 25 (CanLII).
5. *FSC (Annex) Limited Partnership v. ADI 64 Prince Arthur L.P.*, 2021 ONSC 2039 (CanLii).

**SCHEDULE "B"**  
**RELEVANT STATUTES**

N/A

BANK OF MONTREAL

and

Applicant

7132221 CANADA INC.

Respondent

Court File No.: CV-23-00700033-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at TORONTO

**FACTUM OF BDO CANADA LIMITED**

**MILLER THOMSON LLP**

One London Place  
255 Queens Avenue, Suite 2010  
London, ON Canada N6A 5R8

**Tony Van Klink** LSO#: 29008M

Tel: 519.931.3509

Fax: 519.858.8511

Email: tvanklink@millerthomson.com

**Lawyers for BDO Canada Limited, the Court-  
appointed Receiver of the assets, undertakings  
and properties of 7132221 Canada Inc.**