

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

B E T W E E N:

**EQUITYLINE MORTGAGE INVESTMENT CORPORATION, EQUITYLINE
SERVICES CORP., COMPUTERSHARE TRUST COMPANY OF CANADA AND
ELLE MORTGAGE CORPORATION**

Applicants

and

2545174 ONTARIO INC.

Respondent

FACTUM

(Returnable June 20, 2022)

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Lawyers for the Receiver, BDO Canada Limited

TO: THIS HONOURABLE COURT

AND TO: THE SERVICE LIST

PART I – OVERVIEW

1. Pursuant to the terms of the Order of the Honourable Justice McEwen dated December 14, 2021 (the "**Receivership Order**"), BDO Canada Limited ("**BDO**") was appointed as receiver and manager (in such capacity the "**Receiver**") over the assets, undertakings and properties of 2545174 Ontario Inc. ("**254**") pursuant to section 243 of the *Bankruptcy and Insolvency Act* ("**BIA**") and section 101 of the *Courts of Justice Act* ("**CJA**").¹

2. BDO was appointed Receiver pursuant to the application made by Equityline Mortgage Investment Corporation, Equityline Services Corp., Computershare Trust Company of Canada and Elle Mortgage Corporation (collectively "**Equityline**" or the "**Lender**") after various defaults on a secured loan in the amount of \$9,023,484.06. The Appointment Order gave the Receiver, among other things, the power to operate the business and to market and sell the assets, properties and undertakings of the Company.²

3. 254's primary asset is property known municipally as 478-494 Kingston Road, Pickering, Ontario (collectively the "**Property**"). The Property consists of an Esso-branded gas station (which includes both a Tim Hortons kiosk and variety store) and a 3-storey 6-unit office building (the "**Office Building**").³

4. This factum is filed in support of a motion by the Receiver seeking, among other ancillary relief, Orders:

- (a) approving the sale transaction contemplated by an accepted offer between the Receiver and 2430609 Ontario Inc. (the "**Purchaser**") made as of June 15, 2022 (the "**Asset Purchase Agreement**"), in respect of the sale of the Purchased Assets (as defined in the Asset Purchase Agreement) (the "**Transaction**");

1 First and Final Report of the Receiver dated June 15, 2022 (the "**First Report**"), para. 1, Appendix A

2 First Report, para. 2

3 First Report, para. 8

- (b) vesting in the Purchaser, 254's right, title and interest in and to the Purchased Assets;
 - (c) approving the Receiver's activities described in the First and Final Report of the Receiver dated June 15, 2022 (the "**First Report**");
 - (d) approving the Receiver's fees and disbursements and those of its counsel as set out in the First Report;
 - (e) sealing the confidential appendices to the Receiver's Confidential Supplement to the First Report (the "**Confidential Report**") until the closing of the Transaction, or further order of this Court;
 - (f) authorizing the Receiver to make a final disbursement of funds in its possession, as set out in the First Report; and
 - (g) authorizing the termination of the receivership proceedings and the discharge and release of the Receiver upon the Receiver filing a Certificate of Completion with the Court.
5. For the reasons set out herein and in the Report, the Receiver recommends and requests that this Honourable Court grant the relief as set out in the Receiver's Notice of Motion and draft Orders.

PART II – FACTS

Sales Process and Transaction:

6. The Receiver obtained listing proposals from Marcus & Millichap, Avison & Young, Colliers and Cushman Wakefield, all experienced realty brokerages. After reviewing the listing proposals with the Lender and negotiating the listing terms, the Receiver entered into a 6-month listing agreement with Marcus & Millichap Real Estate Investment Service Canada Inc. ("**Realtor**").

The listing agreement was entered into on February 16, 2022 and the Property was listed on MLS on February 23, 2022.⁴

7. The following marketing initiatives were taken by the Realtor:⁵

- (a) Sending personalized mailers to 221 Durham Region gas station owners;
- (b) Sending personalized mailers to 45 Ontario gas station owners;
- (c) Town of Pickering gas station owners were contacted by phone;
- (d) Listed on the MLS (listing #E5512634) on February 24, 2022;
- (e) LinkedIn post sent out on March 15, 2022;
- (f) 42 in person meetings were held by the Realtor with prospective purchasers;
- (g) On or about April 11, 2022 signage was installed on the Property advertising it for sale displayed in front of the Property;
- (h) Email blasts targeting Ontario gas station owners sent out on March 15, 2022 and April 20, 2022;
- (i) Email blast targeting all interested parties to date sent on April 19, 2022;
- (j) As of May 13, 2022, there were 10 site visits; and
- (k) As of May 13, 2022, there were 4 offers received.

8. At the Lender's request, the Property was initially listed at \$12,999,990. No offers were received. Subsequently, the Property was listed unpriced, and several offers were received. Each of the offers were significantly lower than the Lender's debt.⁶

4 First Report, para. 34

5 First Report, para. 35

6 First Report, para. 37

9. As of June, 14, 2022, four written offers were received (“**Offers**”), all of which are significantly lower than Equityline’s Debt. Equityline was not receptive to any of these offers as they would result in a substantial loss in relation to their debt.⁷

10. On June 15, 2022, the Purchaser, who the Receiver understands is a company related to Equityline, submitted an offer to purchase the Property which is a combination of an assumption of Equityline’s mortgage/credit bid plus a cash component. The cash component of the Purchaser’s offer, which will be approximately \$608,000 will be used to pay for the Receivership and operating costs, property tax arrears, break fee payable to the realtor, and source deduction arrears.⁸

Receiver’s fees and disbursements:

11. The fees and disbursements of the Receiver and its counsel are summarized in the Report. Detailed invoices are appended to the Report. The fees of the receiver and its counsel were incurred in connection with the administration of this receivership.⁹

12. The Receiver’s fees for the period ending June 1, 2022 encompass 468 hours at an average hourly rate of \$267.00 and disbursements of \$744.43, for a total of \$125,659.93, prior to applicable taxes. BDO is requesting that this Honourable Court approve its total fees and disbursements, inclusive of applicable taxes, in the amount of \$141,251.29.¹⁰

13. The fees of the receiver’s counsel Robins Appleby LLP for the period ending June 13, 2022 encompass 49.8 hours at an average hourly rate of \$565.57 and disbursements of \$182.48 for a total of \$28,347.98 prior to applicable taxes. The Receiver is requesting that this Honourable Court approve its counsel’s total fees and disbursements, inclusive of taxes, in the amount of \$32,020.72.¹¹

14. The fees of the receiver’s counsel Lipman Zener Waxman PC for the period ending June 14, 2022 encompass 54 hours at an average hourly rate of \$473.29 and disbursements of \$247.75 for a

7 First Report, para. 39

8 First Report, paras. 40 and 42

9 First Report, paras. 47-53, Appendices G, H, and I

10 First Report, para. 48

11 First Report, para. 49

total of \$25,805.25 prior to applicable taxes. The Receiver is requesting that this Honourable Court approve its counsel's total fees and disbursements, inclusive of taxes, in the amount of \$29,159.94.¹²

PART III – ISSUES

15. The issues to be determined on this motion and addressed in this factum are:
- (a) Should the Court approve the Transaction and grant a vesting order?
 - (b) Should the Court seal the Confidential Report on the terms sought?
 - (c) Should the Court approve the interim fees and disbursements of the Trustee and its counsel?

PART IV – LAW AND SUBMISSIONS

(a) The Court should approve the Transaction and grant a vesting order:

16. S. 243 of the BIA provides jurisdiction to the Court to authorize the receiver to enter into an agreement to sell property and in furtherance of that power, to grant an order vesting the purchased property in the purchaser.¹³

17. In addition, receivers have the powers set out in the orders appointing them. The Receivership Order in these proceedings provides for the power of the receiver to sell the property of 254.¹⁴

¹² First Report, para. 50

¹³ *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, [para. 85](#)

¹⁴ First Report, para. 1, Appendix A

18. In Ontario, the power to grant a vesting order is conferred by s. 100 of the *Courts of Justice Act*, which states that: “A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.”

19. It is well-established in Canadian insolvency law that a secured creditor is permitted to bid its debt in lieu of providing cash consideration; credit bids are widely used, including in the receivership context.¹⁵

20. The criteria to be used by the Court to determine whether to approve a transaction in a receivership are well-established and are set out in *Royal Bank v. Soundair Corp.* The *Soundair* test and related principles also apply when a bankruptcy trustee seeks approval of a transaction, as their obligations are similar.¹⁶

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) the interest of all parties;
- (c) the efficacy and integrity of the process by which offers were obtained; and
- (d) whether there has been unfairness in the working out of the process.

21. Absent clear evidence that a proposed sale is improvident or that there was an abuse of process, the Court is to grant deference to the recommendations of a receiver to sell a debtor’s assets. Only in such exceptional circumstances will the Court intervene and proceed contrary to the recommendations of its officer.¹⁷

15 *Elleway Acquisitions Ltd. v. 4358376 Canada Inc.*, 2013 ONSC 7009, [paras. 38-41](#); *8527504 Canada Inc. v. Liquibrands Inc.*, 2015 ONSC 5912, [paras. 20-21](#)

16 *Royal Bank v. Soundair Corp.* (1991), 4 OR (3d) 1, [para. 16](#)

22. The Court should approve the Transaction, the Asset Purchase Agreement and grant a vesting order based on the application of the *Soundair* test:¹⁸

- (a) **Efforts to get the best price:** The market was widely canvassed in the sales process, resulting in four other offers from potential purchasers. The proposed Asset Purchase Agreement represents the highest and best offer for the Purchased Property;
- (b) **Interests of the parties:** If cash was paid in the Transaction lieu of a credit bid/assumption of Equityline's mortgage, such cash would all accrue to the benefit of Equityline. As first ranking mortgage holder, Equityline supports the Transaction, notwithstanding that it stands to suffer a shortfall. Furthermore, the non-real estate assets to be purchased in the Asset Purchase Agreement, including, among other things, fuel, tobacco products, concessions, pre-paid phone cards, and retail equipment and shelving have limited saleable value on their own, and would not exceed the amount owing to Equityline under its Receiver's certificate. Therefore, in the Receiver's opinion, no other party will be prejudiced by the proposed Transaction, by virtue of the credit bid component;¹⁹
- (c) **Efficacy and integrity of the process:** The sales process, with the assistance of the Realtor, was run with integrity. All interested parties were given an opportunity to participate in the sales process. No objections or concerns regarding the sales process have been brought to the Receiver's attention. Furthermore, the Transaction was negotiated in good faith, and is the best and highest price under the circumstances; and
- (d) **There was no unfairness:** In the Receiver's view, there has been no unfairness in the conduct of the sales process. No party has been prejudiced or excluded, and the range of competitive offers received informs the Receiver's conclusion that the proposed Transaction is the highest and best offer available for the Purchased Property.

¹⁸ *Royal Bank v. Soundair Corp.* (1991), 4 OR (3d) 1, [paras. 14 and 21](#); *Skyepharm PLC v. Hyal Pharmaceutical Corp.*, 1999 CanLII 15007, [paras. 3 and 4](#)

(b) The Confidential Report should remain sealed:

23. In *Sherman Estate v. Donovan*, the Supreme Court held that a person asking the court to exercise discretion so as to limit the open court presumption must establish that:²⁰

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

24. Courts have employed the test for a sealing order, as set out in *Sherman Estate*, in the insolvency context to authorize sealing orders over confidential or commercially sensitive documents.²¹

25. The Confidential Report contains commercially sensitive information including: (i) an unredacted copy of the Asset Purchase Agreement, and (ii) a summary of the material terms of each of the offers received. If such documents were not sealed, the information contained therein may negatively impact realization of the Purchased Assets, in the event that the Transaction fails to close, and the Receiver is required to go back to market.²²

26. In the circumstances, the sealing order sought is the least restrictive means to maintain the confidentiality of this commercially sensitive information. Accordingly, the Receiver submits that the salutary effects of the sealing order outweigh the deleterious effects of restricting access to the Confidential Report, and that the requested sealing order is appropriate.

18 First Report, para. 41

19 First Report, paras.10, 11-18, 24-33, and 41, Appendices B and D

20 *Sherman Estate v. Donovan*, 2021 SCC 24, [para. 38](#)

21 *Ontario Securities Commission v Bridging Finance Inc.*, 2021 ONSC 4347, [paras. 23-27](#)

22 First Report, para. 3

(c) The court should approve the fees of the Receiver and its counsel:

27. The general standard of review of the Court in reviewing the accounts of an insolvency professional is whether the amount claimed for remuneration and disbursements incurred in carrying out the receivership are “fair and reasonable”, which should be assessed in a holistic manner, rather than a line-by-line review of dockets, hours, explanations or disbursements. Furthermore, the court should not second-guess the amount of time claimed unless it is clearly excessive or overreaching.²³

28. Among others, the following factors are relevant in determining professional fees in an insolvency context:²⁴

- (a) The nature, extent and value of the assets handled;
- (b) The complications and difficulties encountered;
- (c) The receiver’s knowledge, experience and skill;
- (d) The diligence and thoroughness displayed;
- (e) The responsibilities assumed; and
- (f) The results of the receiver’s efforts.

29. It is respectfully submitted that the fees of the Receiver and its counsel are fair and reasonable, given the nature and the activities, as set out in detail in the First Report.

²³ *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365, [para. 19](#), affirmed 2014 ONCA 851

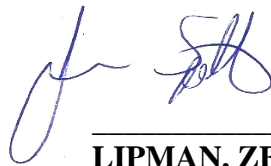
PART V – RELIEF REQUESTED

30. For the reasons above, the Receiver respectfully requests that this Court grant Orders:

- (a) approving the Transaction and the Asset Purchase Agreement;
- (b) vesting in the Purchaser, 254's right, title and interest in and to the Purchased Assets;
- (c) approving the Receiver's activities described in the First Report;
- (d) approving the Receiver's fees and disbursements and those of its counsel as set out in the First Report;
- (e) sealing the confidential appendices to Confidential Report until the closing of the Transaction, or further order of this Court;
- (f) authorizing the Receiver to make a final disbursement of funds in its possession, as set out in the First Report; and
- (g) authorizing the termination of the receivership proceedings and the discharge and release of the Receiver upon the Receiver filing a Certificate of Completion with the Court.

Dated: June 15, 2022

ALL OF WHICH IS RESPECTFULLY SUBMITTED



LIPMAN, ZENER & WAXMAN PC
Jason Spetter
Lawyers for the Receiver
BDO Canada Limited

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. [*Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*](#), 2019 ONCA 508
2. [*Elleway Acquisitions Ltd. v. 4358376 Canada Inc.*](#), 2013 ONSC 7009
3. [*8527504 Canada Inc. v. Liquibrands Inc.*](#), 2015 ONSC 5912, paras. 20-21
4. [*Royal Bank v. Soundair Corp.*](#), (1991), 4 OR (3d) 1
5. [*Skyepharma PLC v. Hyal Pharmaceutical Corp.*](#), 1999 CanLII 15007 (ON SC)
6. [*Sherman Estate v. Donovan*](#), 2021 SCC 24
7. [*Ontario Securities Commission v Bridging Finance Inc.*](#), 2021 ONSC 4347
8. [*Bank of Nova Scotia v. Diemer*](#), [2014 ONSC 365](#), affirmed [2014 ONCA 851](#)

**SCHEDULE “B”
STATUTORY PROVISIONS**

Courts of Justice Act, R.S.O. 1990, c. C.43: Section 100

Vesting orders

A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3:

- **243 (1)** Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
 - **(a)** take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
 - **(b)** exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
 - **(c)** take any other action that the court considers advisable.
- **Restriction on appointment of receiver**

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

 - **(a)** the insolvent person consents to an earlier enforcement under subsection 244(2); or
 - **(b)** the court considers it appropriate to appoint a receiver before then.
- **Definition of *receiver***

(2) Subject to subsections (3) and (4), in this Part, *receiver* means a person who

 - **(a)** is appointed under subsection (1); or
 - **(b)** is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

- **(i)** an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
 - **(ii)** a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.
- **Definition of *receiver* — subsection 248(2)**

(3) For the purposes of subsection 248(2), the definition *receiver* in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).
- **Trustee to be appointed**

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).
- **Place of filing**

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.
- **Orders respecting fees and disbursements**

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver’s claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.
- **Meaning of *disbursements***

(7) In subsection (6), *disbursements* does not include payments made in the operation of a business of the insolvent person or bankrupt.

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Court File No.: CV-21-00673121-00CL

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**PROCEEDING COMMENCED AT
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