

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

B E T W E E N:

TANDIA FINANCIAL CREDIT UNION LIMITED

Applicant

- and -

**1557113 ONTARIO INC., 1870431 ONTARIO INC., 2500994 ONTARIO LTD. AND
2544924 ONTARIO INC.**

Respondents

**IN THE MATTER OF AN APPLICATION UNDER SECTION 243(1) OF THE
*BANKRUPTCY AND INSOLVENCY ACT, RSC 1985, c. B-3, AS AMENDED; AND
SECTION 101 OF THE COURTS OF JUSTICE ACT, RSO 1990, c. C.43, AS
AMENDED***

FACTUM OF COURT-APPOINTED RECEIVER, BDO CANADA LIMITED
(Motion returnable on February 7, 2024 at 10:00 a.m. by Zoom)

February 5, 2024

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TO: **SERVICE LIST**

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PART I - OVERVIEW

1. BDO Canada Limited, in its capacity as court-appointed receiver (the “**Receiver**”) of the respondents (the “**Debtors**”), moves for an order:

- (a) Approving the First Report of the Receiver dated January 31, 2024 (the “**First Report**”) and the activities and conduct of the Receiver described therein;
- (b) Approving the Receiver’s request to increase the amount that the Receiver is empowered to borrow under paragraph 22 of the order of Justice Osborne dated November 17, 2023 (the “**Appointment Order**”) from \$200,000 to \$500,000, with all further borrowings drawn by the Receiver in connection therewith being secured under the Receiver’s Borrowings Charge as defined in paragraph 22 of the Appointment Order;
- (c) Approving the proposed sale process (the “**Sale Process**”) outlined in the First Report;
- (d) Authorizing the Receiver to enter into listing agreements with Colliers Macaulay Nicolls Inc. (“**Colliers**”) for the sale of the Gas Stations (defined below);
- (e) Authorizing and directing the Receiver, *nunc pro tunc*, to redact from the First Report, the summary of listing proposals attached as **Confidential Appendix 1** to the First Report;
- (f) Sealing the unredacted version of the First Report, including Confidential Appendix 1, filed with this Court from the public record, until the earlier of the closing of the transactions for the sale of the Gas Stations or further order of this Court;
- (g) Approving the fees and disbursements of the Receiver for the period of November 17, 2023 to and including December 31, 2023; and
- (h) Approving the fees and disbursements of the Receiver’s independent counsel, Dickinson Wright LLP, for the period of November 17, 2023 to and including December 28, 2023.

2. The Debtors’ business primarily involves operating gas stations and owning the real property from which the gas stations are operated.

3. The Receiver seeks authorization to borrow an additional \$300,000 for the purpose of funding the day-to-day operations of the Gas Stations, including to purchase fuel.

4. The proposed Sale Process contemplates engaging Colliers to market the Gas Stations, including the underlying real properties, for sale on MLS, unpriced.

5. Confidential Appendix 1, over which the Receiver seeks a sealing order, contains estimates of value, which, if publicly disclosed, could negatively affect realizations. The Receiver seeks to seal the Confidential Appendix until the sale of the Gas Stations are completed or further order of the Court. A redacted version of the Confidential Appendix has been filed.

PART II - FACTS

A. Background

6. By the Appointment Order, the Receiver was appointed as receiver of all of the assets, undertakings and properties of the Debtors, including the real properties at: (i) 10201 Hwy 41, Kaladar, ON (“**Kaladar Property**”); (ii) 14265 Hwy 41, Cloyne, ON (“**Cloyne Property**”); (iii) 28 Monogram Place, Trenton, ON (“**Trenton Property**”); and (iv) 395 Bell Blvd, Belleville, ON (“**Belleville Property**” and collectively, the “**Real Properties**”), and all proceeds thereof (collectively, the “**Property**”).¹

7. The Appointment Order was made on application of the Debtors’ first-ranking secured creditor, Tandia Financial Credit Union Limited (“**Tandia**”), to whom the

¹ Appendix A, First Report of Receiver dated January 31, 2024 (“First Report”), Receiver’s Motion Record (“MR”), Tab 2, p. 27, Caselines Current E29.

Debtors were collectively indebted in the approximate amount of \$12.027 million as at August, 2023.²

8. In the endorsement, pursuant to which the Appointment Order was made, Justice Osborne directed the order to be held in abeyance subject to certain of the Debtors' closing the refinancing the Kaladar Property and the Trenton Property on or before November 30, 2023, failing which, the Appointment order would become effective on December 1, 2023. Having failed to close the refinancing, the Appointment Order became effective on December 1, 2023 (the "**Receivership Date**").³

B. The Receiver's Activities

9. The Debtors' business includes operating Shell branded gas stations from the Kaladar Property ("**Kaladar Shell**") and the Cloyne Property ("**Cloyne Shell**") and Esso branded gas stations from the Trenton Property ("**Trenton Esso**") and the Belleville Property ("**Belleville Esso**", and collectively, the "**Gas Stations**").⁴

10. After the Appointment Order was made, the Receiver communicated with several known gas station managers to assist the Receiver with the day-to-day operations of the Gas Stations. The Receiver selected KRS Group of Companies Inc. ("**KRS**").⁵

11. The Receiver's activities since the Receivership Date include:⁶

- (a) entering into an operations management agreement with KRS effective as of the Receivership Date and pursuant to which KRS agreed to assist the Receiver with re-opening and operating the Gas Stations in exchange for, among other things, payment of a monthly management fee of \$10,000;

² First Report at para 1.1.4, MR, Tab 2, p. 15, Caselines Current E17.

³ Appendix B at para 6, First Report, MR, Tab 2, p. 48, Caselines Current E50; First Report at para 1.1.3, MR, Tab 2, p. 15, Caselines Current E17.

⁴ First Report at para 1.2, MR, Tab 2, pp. 15-16, Caselines Current E17-E18.

⁵ First Report at para 2.6, MR, Tab 2, pp. 19-20, Caselines Current E21-E22.

⁶ First Report at section 2.0, MR, Tab 2, pp. 18-20, Caselines Current E20-E22.

- (b) taking possession of the Gas Stations. Although the Gas Stations were open and selling to the public as at the Receivership Date, the Kaladar Shell and Trenton Esso had no fuel inventory and, consequently, were not selling fuel and the Cloyne Shell had limited fuel inventory and its pylon was broken, so it was not selling fuel;
- (c) re-commencing operations at the Gas Stations, including arranging for the further supply of fuel to the Gas Stations and undertaking various repairs;
- (d) obtaining a new environmental insurance policy for 2500994 Ontario Ltd., whose policy had lapsed for non-payment prior to the Receiver's appointment; and
- (e) considering various proposals for marketing and selling the Property and formulating the proposed Sale Process.

C. Receiver's Borrowing Limit

12. In undertaking its mandate, the Receiver borrowed \$200,000 from Tandia to fund, among other things, the purchase of fuel loads and other operating costs, including KRS' management fee, payroll, utilities and undertaking repairs.⁷

13. Although as of January 31, 2024, the Receiver had \$98,978.15 in its estate trust account, there are trade payables of \$64,287.66 owing plus approximately \$34,000 owing to fuel suppliers. Additional fuel loads will be required in the near future. It is expected that the additional fuel loads will cost approximately \$160,000.⁸

D. Proposed Sale Process

14. The Receiver evaluated listing proposals from four reputable real estate brokerages to market the Gas Stations, including the Real Properties, for sale.⁹

15. Three of the four brokerages recommended that the Gas Stations be listed without a specific listing price. The Receiver agrees with this view as a proposed listing

⁷ First Report at section 5.0, MR, Tab 2, p. 25, Caselines Current E27.

⁸ First Report at section 5.0, MR, Tab 2, p. 25, Caselines Current E27.

⁹ First Report at para 3.2.1, MR, Tab 2, p. 21, Caselines Current E23.

price could have the effect of either understating the potential value of the Gas Stations or set a price that is far too high for the market and thereby eliminate interest from potential purchasers.¹⁰

16. Having considered the listing proposals, the Receiver, with the concurrence of Tandia, proposes to enter into listing agreements with Colliers to market each of the Gas Stations, including the Real Properties, for sale.¹¹

17. The Receiver selected Colliers based on experience, ability to attract national exposure and lower commission rate structure. The proposed Sale Process includes that the Gas Stations be listed individually for sale as each is owned by a different Debtor. However, nothing will prevent prospective buyers from making offers for all of the Gas Stations.¹²

18. The proposed Sale Process includes that:¹³

- (a) The Gas Stations will be market on an “as is, where is” basis;
- (b) The Gas Stations will be listed for \$1.00 on MLS;
- (c) The Gas Stations will be transferred free and clear of all liens and claims by way of an approval and vesting order;
- (d) The Receiver will review and evaluate each offer received by considering factors such as the proposed purchase price, net value, deposit amount, the counterparties to such transactions, transaction speed and certainty, transaction costs, and the feasibility and timing of transaction completion, and such other matters as the Receiver may consider; and
- (e) The Receiver may extend the Sale Process, acting reasonably, with a view to completing a transparent and equitable sales process to generate interest in and offers for the Gas Stations.

¹⁰ First Report at paras 3.2.4 to 3.2.5, Tab 2, p. 22, Caselines Current E24.

¹¹ First Report at paras 3.2.10 to 3.2.11, Tab 2, p. 22, Caselines Current E24.

¹² First Report at para 3.2.7, MR, Tab 2, p. 22, Caselines Current E24.

¹³ First Report at paras 3.2.5, 3.2.8, and 3.3, MR, Tab 2, pp. 22-23, Caselines Current E24-E25.

PART III - ISSUE

19. The issue on this motion is whether an order, substantially in the form attached at Tab 3 to the Receiver's motion record, should be granted.

PART IV - LAW AND ARGUMENT

A. The Receiver's Borrowing Charge Should be Increased

20. Paragraph 22 of the Appointment Order empowers the Receiver to borrow such monies from time to time as it may consider necessary or desirable, provided that the outstanding amount does not exceed \$200,000 (the "**Borrowing Limit**"), for the purpose of funding the exercise of its powers and duties.¹⁴

21. The Gas Stations have not reached operational profitability and the Receiver has reached its Borrowing Limit. The Receiver seeks authority to borrow an additional \$300,000 to fund ongoing operations of the Gas Stations, including to pay for fuel supply and KRS' management fees. The Receiver therefore requests that the Borrowing Limit be increased to \$500,000. Similar relief has been granted in other non-contested motions.¹⁵

B. The Proposed Sale Process Should be Approved

22. Paragraphs 3(d) and (j) of the Appointment Order authorize the Receiver to engage real estate brokers and to market any and all of the Property for sale.¹⁶

¹⁴ Appendix A, First Report, MR, Tab 2, p. 38, Caselines Current E40.

¹⁵ *Kingsett Mortgage Corporation et al v Vandyk et al*, CV-23-00709180-00CL (Endorsement of Steele J. dated December 21, 2023); *BCIMC Construction Fund Corporation v. 33 Yorkville Residences Inc.*, CV-20-00637297-00CL (Endorsement of Conway J. dated October 9, 2020).

¹⁶ Appendix A, First Report, MR, Tab 2, pp. 29-31, Caselines Current E31-E33.

23. Although the decision to approve a particular form of sale process is distinct from the approval of a proposed sale, the reasonableness and adequacy of a proposed sale process must be assessed in light of the *Soundair* factors. When reviewing a proposed marketing and sale process, the court should assess:¹⁷

- (a) the fairness, transparency and integrity of the proposed process;
- (b) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
- (c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

24. The proposed sale process need not be perfect, only reasonable, and a court should also give significant weight to the recommendation of its receiver, a court-appointed officer with significant expertise in insolvency proceedings.¹⁸

25. The Receiver should be authorized to enter into listing agreements with Colliers and the proposed Sale Process should be approved:

- (a) The Sale Process is fair, open and transparent and is intended to canvass the market broadly on an efficient basis to obtain the highest and best prices;
- (b) The Sale Process and the timelines are flexible and provide sufficient time to obtain bids that maximize value for the Gas Stations; and
- (c) The Sale Process was formulated after considering various listing proposals from reputable real estate brokerages.

C. The Confidential Appendix Should be Sealed

26. The unredacted summary of listing proposals, attached as Confidential Appendix 1 to the First Report, contains the brokers' views on potential value of the Gas Stations.

¹⁷ *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750 at para 6.

¹⁸ *Marchant Realty Partners Inc. v 2407553 Ontario Inc.*, 2021 ONCA 375 at para 19.

Public disclosure of such information prior to the completion of the transactions for the sale of the Gas Stations could negatively affect realizations. Accordingly, the Receiver seeks an order sealing Confidential Appendix 1 until the closing of the transaction(s) for the sale of the Gas Stations or further order of the court.

27. The Supreme Court of Canada in *Sherman Estate v Donovan* re-casted the test for a sealing order. The party seeking the sealing order must establish that:

- (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.

28. The proposed sealing order satisfies the test in *Sherman Estate*.

29. An important public interest includes commercial interests. The sealing order is sought to avoid a risk of impairing realizations by disclosing commercially sensitive information about the values of the Gas Stations. The order sought is appropriately limited in time and scope.¹⁹

D. The Activities and Conduct of the Receiver Should be Approved

30. There are good policy and practical reasons for the Court to approve the activities of a Receiver.²⁰

¹⁹ *Romspen Investment Corporation v. Tung Kee Investment Canada Ltd. et al.*, 2023 ONSC 5911 at paras 102-106; *Choice Properties Limited Partnership v. Penady (Barrie) Ltd.*, 2020 ONSC 3517 at para 10.

²⁰ *Triple-I Capital Partners Limited v 12411300 Canada Inc.*, 2023 ONSC 3400 at paras 65-67, citing Regional Senior Justice G.B. Morawetz (as he then was) in *Target Canada Co. (Re)*, 2015 ONSC 7574 at paras 12 and 23.

31. The activities of the Receiver, as set out in the First Report, were necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Appointment Order. The First Report and the Receiver's activities described therein should be approved. The form of order contains the qualifier that only the Receiver, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way the approval of the First Report.

PART V - ORDER REQUESTED

32. The Receiver respectfully requests an Order substantially in the form attached as Tab 3 to its motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of February, 2024.



David Seifer

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Kingsett Mortgage Corporation et al v Vandyk et al*, CV-23-00709180-00CL (Endorsement of Steele J. dated December 21, 2023)
2. *BCIMC Construction Fund Corporation v. 33 Yorkville Residences Inc.*, CV-20-00637297-00CL (Endorsement of Conway J. dated October 9, 2020)
3. *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750
4. *Marchant Realty Partners Inc. v 2407553 Ontario Inc.*, 2021 ONCA 375
5. *Romspen Investment Corporation v. Tung Kee Investment Canada Ltd. et al.*, 2023 ONSC 5911
6. *Choice Properties Limited Partnership v. Penady (Barrie) Ltd.*, 2020 ONSC 3517
7. *Triple-I Capital Partners Limited v 12411300 Canada Inc.*, 2023 ONSC 3400
8. *Target Canada Co. (Re)*, 2015 ONSC 7574

SCHEDULE "B"
RELEVANT STATUTES

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Court may appoint receiver

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.

TANDIA FINANCIAL CREDIT UNION LIMITED
Applicant

-and- 1557113 ONTARIO INC. et al
Respondents

Court File No. CV-23-00707172-00CL

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SUPERIOR COURT OF JUSTICE
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PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF THE COURT-APPOINTED RECIVER,
BDO CANADA LIMITED**

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