

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

B E T W E E N:

**C & K MORTGAGE SERVICES INC. o/a RESCOM CAPITAL and CANADIAN  
WESTERN TRUST COMPANY**

Plaintiffs

and

**11282751 CANADA INC., GAZI BELAYET HOSSAIN,  
STEVEN GALLEN and DEBRA GALLEN**

Defendants

**IN THE MATTER OF 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 THE RECEIVER**

June 7, 2024

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**SERVICE LIST**

**(as at June 4, 2024)**

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**PART I- OVERVIEW**

1. By Order of the Honourable Justice Osborne dated February 10, 2024, Rosen Goldberg Inc. (the “**Receiver**”) was appointed as the receiver over all the assets, undertakings and properties (collectively, the “**Property**”) of 11282751 Canada Inc. (the “**Debtor**”).
2. The Debtor’s Property includes, the property municipally known as 170 Burton Street, Barrie, Ontario (the “**Burton Property**”), for which the Plaintiffs have a first charge over, in the principal sum of \$4,400,000.00. The Debtor previously operated a Petro-Canada gas station and convenience store from the Burton Property.
3. The Receiver seeks, *inter alia*, an order (the “**Approval and Vesting Order**”):
  - a. approving the sales transaction (the “**Transaction**”) contemplated by an Agreement of Purchase and Sale, dated April 6, 2024 (the “**APS**”), between the Receiver, on behalf of the Debtor, and Jenco Technologies Inc. (“**Jenco**” or the “**Purchaser**”);

- b. Authorizing the Receiver to disclaim the Head Lease, Sublease and Retail Marketer Agreement, each dated September 9, 2019 and entered into by the Debtor and Suncor Energy Products Partnership; and
  - c. Authorizing and directing the Receiver to complete the Transaction and convey to the Purchaser all the Debtor's right, title and interest in and to the Burton Property.
4. The Receiver further seeks, *inter alia*, an order (the “**Distribution and Discharge Order**”):
- a. Approving the second report of the Receiver dated June 4, 2024 (the “**Second Report**”) and the activities of the Receiver described therein;
  - b. Sealing and keeping confidential the APS;
  - c. Approving the fees and disbursements of the Receiver and its counsel, including the Fee Accrual as detailed in the fee affidavits appended to the Second Report;
  - d. Authorizing the Receiver to distribute the net cash proceeds from the sale of the Burton Property to the Plaintiffs; and
  - e. Releasing and discharging the Receiver upon the filing of the Discharge Certificate.

## **PART II- THE FACTS**

5. The Plaintiffs have a first charge over the Burton Property in the principal sum of \$4,400,000.00 (the “**Plaintiffs' Charge**”). In addition to the Plaintiffs' Charge, the following charges/mortgages are registered against the Burton Property:
- a. A \$3,500,000.00 charge/mortgage in favour of 2489876 Ontario Inc. registered against title to the Burton Property on June 28, 2019, which was postponed to the Plaintiffs' Charge pursuant to a Postponement of Interest registered on December 15, 2021;

- b. A \$100,000 charge/mortgage in favour of Suncor Energy Inc. registered against title to the Burton Property on February 24, 2020, which was postponed to the Plaintiffs' Charge pursuant to a Postponement of Interest dated December 15, 2021;
- c. \$5,150,000 charge/mortgage in favour of Steven and Debra Gallen (collectively, the "**Gallens**") registered against title to the Property on August 17, 2023 ("**Gallen Charge**").

**Reference:** Second Report of the Receiver dated June 4, 2024 (the "**First Report**"), Motion Record, dated June 4, 2024, Tab 2, paras 5, 6.

- 6. On or about June 23, 2023, the Debtor abandoned the Petro-Canada gas station and convenience store operations at the Burton Property.

**Reference:** Second Report, Motion Record, dated June 4, 2024, Tab 2, para 7.

- 7. The Receiver was appointed over the Debtor's Property on February 10, 2024 pursuant to the Order of the Honourable Justice Osborne. On March 15, 2024, the Receiver brought a motion seeking the approval of the sale process (the "**Sale Process**") in respect of the Burton Property. The Honourable Madam Justice Conway granted the relief sought by the Receiver and approved the Sale Process (the "**Sale Process Order**").

**Reference:** Second Report, Motion Record, dated June 4, 2024, Tab 2, paras 1, 12, Appendix B, C.

- 8. The Receiver marketed the Burton Property as a turn-key operation but did not market it specifically as a Petro Canada station, the brand it previously operated under. The Debtor previously operated under three agreements with Suncor Energy Products Partnership ("**Suncor**"), a Head Lease, Sublease and Retail Marketer Agreement, each dated September 9, 2019 with respect to the operation of the gas station and convenience store.

**Reference:** Second Report, Motion Record, dated June 4, 2024, Tab 2, para 13, Appendix D, E, F.

9. The Receiver undertook a Sales Process which included, *inter alia*, circulating teasers to interested parties, preparing an information package, establishing a data room, prepared a confidentiality agreement, advertised in the Globe and Mail and prepared a form of offer (collectively, the “**Marketing Process**”).

**Reference:** Second Report, Motion Record, dated June 4, 2024, Tab 2, para 14.

10. The Marketing Process produced the following results: 39 teasers were sent out; 10 parties signed confidentiality agreements and obtained access to information that the Receiver had compiled; 3 interested parties attended at the Burton Property; and 1 offer was received.

**Reference:** Second Report, Motion Record, dated June 4, 2024, Tab 2, para 15.

11. Homelife Miracle Realty Limited (“**Homelife**”), a real estate brokerage active in the gas station market, presented an offer for the Burton Property to the Receiver from the Purchaser. The offer was presented on the proviso that the Receiver would pay Homelife’s commission of 5%.

**Reference:** Second Report, Motion Record, dated June 4, 2024, Tab 2, paras 16, 17.

12. The Receiver entered into the APS with the Purchaser on April 19, 2024. The APS provides that approximately 81% of the purchase price is to be financed by a mortgage provided by the Plaintiff.

**Reference:** Second Report, Motion Record, dated June 4, 2024, Tab 2, paras 17, 18, Appendix G, Confidential Appendix 1.

13. The Purchaser’s offer was subject to a due diligence period of seven business days. The Purchaser waived conditions thereafter.

**Reference:** Second Report, Motion Record, dated June 4, 2024, Tab 2, para 19, Appendix H.

14. The salient terms of the Transaction include: (1) the Burton Property is being sold on an “as is where is” and “without recourse” basis and without any representations and



warranties regarding the historical performance of the gas station and convenience store; (2) the assets being conveyed include the land and building, gas station equipment and convenience store chattels; (3) except for the customary condition of court approval the transaction is unconditional; (4) the Receiver is holding a deposit of \$300,000.00; (5) the purchase price, net of the Plaintiff's Charge, will be satisfied by cash on closing; and (6) closing will occur within 15 days after obtaining court approval.

**Reference:** Second Report, Motion Record, dated June 4, 2024, Tab 2, para 20.

### **PART III: THE ISSUES**

15. The issues to be determined by this Honourable Court are whether this Court should:

- a. Approve the Transaction as contemplated by the Approval and Vesting Order sought by the Receiver;
- b. Seal Confidential Appendix 1 appended to the Second Report pending closing of the Transaction;
- c. Approve the activities and fees of the Receiver and its counsel; and
- d. Discharge the Receiver upon filing of its Receiver's Certificate.

### **PART IV: LAW & ARGUMENT**

#### **A. The Transaction Should be Approved**

16. Section 100 of the *Courts of Justice Act* authorizes the Court to grant an order vesting "in any person an interest in real or personal property that the Court has authority to order be conveyed".

**Reference:** [Courts of Justice Act, R.S.O. 1990, c. C.43, section 100.](#)

17. Similarly, subsection 243(1) of the *Bankruptcy and Insolvency Act* vests the Court with jurisdiction to "grant a vesting order vesting property in the purchaser".

**Reference:** [Bankruptcy and Insolvency Act, R.S.C. 1985, c B-3, section 243\(1\).](#)

18. Finally, paragraph 3(1) of the Receivership Order empowers and authorizes the Receiver to “apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property”.

**Reference:** Second Report, Motion Record, dated June 4, 2024, Tab 2, para 1, Appendix A.

19. When considering whether to approve a sale transaction involving an insolvent debtor, the courts have relied on the factors set out by the Ontario Court of Appeal in *Royal Bank of Canada v. Soundair Corp.* (“*Soundair*”), which specifically address sales by receivers but apply in the broader insolvency context to any sale of a debtor’s assets. The factors include:

- a. Whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- b. Whether the interests of all parties have been considered;
- c. The integrity and efficacy of the process for obtaining offers; and
- d. Whether there has been unfairness in the working out of the process.

**Reference:** [\*Royal Bank of Canada v. Soundair Corp.\*](#), [1991] CarswellOnt 205.

20. Each of the *Soundair* principles have been satisfied.

21. The Sale Process was reasonable and not unfair. In assessing the reasonableness of a sale process, the Court is not required to examine in minute detail all of the circumstances leading up to the acceptance of a particular offer.

**Reference:** [\*Royal Bank of Canada v. Soundair Corp.\*](#), [1991] CarswellOnt 205, at paras 48-49.

22. The Court should merely be satisfied that the Receiver has not acted improvidently. Here, the comprehensive marketing process undertaken by the Receiver involved contacting over

39 potential bidders and provided sufficient time for potential bidders to conduct due diligence, attend the Burton Property and adequately assess the sale opportunity.

**Reference:** Second Report, Motion Record, dated June 4, 2024, Tab 2, para 15.

23. The Receiver also applied for Court approval of the Sale Process and obtained the Sale Process Order.

**Reference:** Second Report, Motion Record, dated June 4, 2024, Tab 2, paras 12, 13, Appendix B, C.

24. In support of the relief sought in this motion, the Receiver has filed the Second Report. The Receiver is of the view that the Sale Process was commercially reasonable and appropriate in the circumstances. The Transaction represents the greatest recovery available in the circumstances, given the number of gas stations that are for sale in southern Ontario.

**Reference:** Second Report, Motion Record, dated June 4, 2024, Tab 2, para 22.

25. The purchase price obtained is fair and reasonable in the circumstances. To justify this position, the Receiver must demonstrate that sufficient efforts has been made to obtain the best price and that the Receiver has not acted improvidently based on the information available at the time the offer is accepted.

**Reference:** [\*Terrace Bay Pulp Inc. \(Re\)\*](#), 2012 ONSC 4247 at paras 50-55.

26. The decision to accept a particular offer is a matter of business judgment that should not be interfered with in the absence of evidence of imprudence or unfairness. The purchase price represents the highest bid received within the Sale Process and the Receiver believes that the commercial terms of the Transaction are reasonable.

**Reference:** [\*Royal Bank of Canada v. Soundair Corp.\*](#), [1991] CarswellOnt 205, at paras 21, 30, 31 and [\*Terrace Bay Pulp Inc. \(Re\)\*](#), 2012 ONSC 4247 at paras 45, 52-54.

27. With respect to the vesting of title to the Burton Property free and clear of all interests, liens, charges and encumbrances, the court has held that “it is normal relief given in an asset sale”.

**Reference:** [Nelson Education Limited \(Re\)](#), 2015 ONSC 5557 at para 40.

28. Based on the foregoing, it is the informed business judgment of the Receiver that the approval of the Transaction is in the best interests of the Debtor and their stakeholders. In the absence of any indication that the Receiver has acted improvidently, its business judgment is entitled to deference by this Court.

**Reference:** Second Report, Motion Record, dated June 4, 2024, Tab 2, paras 22, 32.

#### **B. Confidential Appendix 1 Should be Sealed**

29. The Receiver is seeking a sealing order in respect of the APS appended as Confidential Appendix 1 to the Second Report.

30. Courts commonly grant sealing orders in insolvency proceedings relating to information regarding the sales process. The rationale for granting sealing orders in respect of the purchase price contained in an agreement of purchase and sale is that it allows realizations to be maximized for stakeholders in the event the transaction is not completed.

**Reference:** [Carole J Hunter and Toni Vanderlaan, Signed, Sealed, Delivered: An Analysis of Sealing Orders in Insolvency Proceedings](#), 2023 21 *Annual Review of Insolvency Law*, 2023 CanLII Docs 3084, at s. III(2)(i).

31. In *Sherman Estate v. Donovan*, the Supreme Court of Canada articulated the three core prerequisites for granting sealing orders, which requires the applicant to establish that (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

**Reference:** [\*Sherman Estate v. Donovan\*](#), 2021 SCC 25, at para 38.

32. The three prerequisites articulated by the Supreme Court of Canada in the *Sherman Estate v. Donovan* matter have been met. It is in the public interest for the parties to preserve the ability to maximize value until the Transaction closes, and no alternative measures will prevent this risk. No party will be prejudiced if the purchase price and deposit information contained in the APS is sealed at this time.

**Reference:** Second Report, Motion Record, dated June 4, 2024, Tab 2, paras 3, 17.

### **C. The Fees and Activities of the Receiver and its Counsel should be Approved**

33. The activities of the Receiver described in the Second Report were all necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Receivership Order and were in each case in the best interests of the Debtor and its stakeholders generally.

34. The jurisdiction of this Court to pass the accounts of the Receiver and its counsel is confirmed in the Receivership Order, which directs that: “the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Superior Court of Justice”.

**Reference:** Second Report, Motion Record, dated June 4, 2024, Tab 2, para 1, Appendix A.

35. In accordance with the Receivership Order, the Receiver seeks the approval of the professional fees incurred by it and its legal counsel, Manis Law, including their estimate Fee Accrual to complete this proceeding.

**Reference:** Second Report, Motion Record, dated June 4, 2024, Tab 2, paras 26-29, Appendix J, K.

36. On a motion to pass accounts, the Court must consider the “overriding principle of reasonableness”, focusing on the overall value contributed by the Receiver and its counsel. The Court does not engage in a docket-by-docket or line-by-line assessment of the accounts as minute details of each element of a professional service may not be instructive when looked at in isolation.

**Reference:** [Nortel Networks Inc.](#), 2022 ONSC 6680, at para 10.

37. In *Bank of Nova Scotia v. Diemer*, the Ontario Court of Appeal stated “the focus of the fair and reasonable assessment should be on what was accomplished, and not how much time it took.”.

**Reference:** [Bank of Nova Scotia v. Diemer](#), 2014 ONCA 851 at para 45.

38. The Receiver and its counsel have charged standard hourly rates that are consistent with market rates for insolvency services of this nature rendered by other firms in the City of Toronto. Such rates have been approved by this Court in numerous other matters and should be approved here.

#### **D. The Receiver Should be Discharged**

39. Pursuant to Rule 41.06 of the *Rules of Civil Procedure*, a Receiver may be discharged only by the order of a judge.

**Reference:** [Rules of Civil Procedure, R.R.O. 1990, Reg 194](#), Rule 41.06.

40. The court may exercise its discretion to grant an order for discharge of the Receiver.

41. If this court grants the relief sought by the Receiver and following the closing of the Transaction, the Receiver will have monetized all the known Property and completed its duties and obligations.

**Reference:** Second Report, Motion Record, dated June 4, 2024, Tab 2, paras 30, 31.

42. The Receiver's discharge would be effective upon filing a Certificate with the Court confirming closing of the Transaction, as well as final distributions to the Plaintiffs.

43. Granting the Receiver's discharge on this motion avoids the costs of a subsequent motion in these proceeding solely for the purpose of seeking a discharge and as such is in the interests of all parties.

**Reference:** Second Report, Motion Record, dated June 4, 2024, Tab 2, para 31.

**PART V: ORDER REQUESTED**

44. The Receiver respectfully requests that this Honourable Court grant the relief sought in the Approval and Vesting Order and Distribution and Discharge Order.

**ALL OF WHICH IS RESPECTUFLLY SUBMITTED**, this 7<sup>th</sup> day of June 2024.



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Lawyers for the Receiver, Rosen  
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**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. [Royal Bank of Canada v. Soundair Corp.](#), [1991] CarswellOnt 205
2. [Terrace Bay Pulp Inc. \(Re\)](#), 2012 ONSC 4247
3. [Nelson Education Limited \(Re\)](#), 2015 ONSC 5557
4. [Sherman Estate v. Donovan](#), 2021 SCC 25
5. [Nortel Networks Inc.](#), 2022 ONSC 6680
6. [Bank of Nova Scotia v. Diemer](#), 2014 ONCA 851



**SCHEDULE “B”**  
**TEXT OF STATUTES, REGULATIONS & BY-LAWS**

**[Bankruptcy and Insolvency Act, R.S.C., 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.

**[Courts of Justice Act, R.S.O. 1990, c. C.43](#)**

**Vesting orders**

100 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. R.S.O. 1990, c. C.43, s. 100.

**Injunctions and receivers**

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

**Terms**

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

**[Rules of Civil Procedure R.R.O. 1990, Reg. 194](#)**

**Discharge**

41.06 A receiver may be discharged only by the order of a judge. R.R.O. 1990, Reg. 194, r. 41.06.

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Defendants

Court File No. CV-24-00712796-00CL

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**ONTARIO  
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(Commercial List)

Proceeding commenced at  
TORONTO

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**FACTUM OF THE RECEIVER**

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