

**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

March 11, 2024

MANIS LAW
2300 Yonge Street, Suite 1600
Toronto, Ontario M4P 1E4

Howard F. Manis (LSO # 34336V)
Tel: 416-417-7257
Email: hmanis@manislaw.ca

Daniel Litsos (LSO # 79628V)
Email: dlitsos@manislaw.ca

Lawyers for the Receiver, Rosen Goldberg
Inc.

TO: SERVICE LIST

SERVICE LIST

(as at March 8, 2024)

<p>CHAITONS LLP 5000 Yonge Street, 10th Floor Toronto, ON M2N 7E9</p> <p>George Benchetrit Tel: (416) 218-1141 Email: george@chaitons.com</p> <p>Laura Culleton Tel: (416) 218-1128 Email: laurac@chaitons.com</p> <p>Lawyers for C & K Mortgage Services Inc. o/a Rescom Capital and Canadian Western Trust Company</p>	<p>11282751 CANADA INC. 3 Vanvalley Drive Stouffville, ON L4A 2E1</p> <p>Defendant</p>
<p>GAZI BELAYET HOSSAIN 3 Vanvalley Drive Stouffville, ON L4A 2E2 G_b_hossain@hotmail.com</p> <p>Defendant</p>	<p>YONGE-NORTON LAW CHAMBERS 5255 Yonge St Suite 1300, Toronto, ON M2N 6P4</p> <p>Jeffrey Frymer Tel: (416) 488-9712 Email: jhfrymer@ynlclaw.com</p> <p>Lawyers for Steven Gallen, Debra Gallen, 2489876 Ontario Inc. and Larden Investments Inc.</p>
<p>BLAKE, CASSELS & GRAYDON LLP 199 Bay Street, Suite 4000 Toronto, ON M5L 1A9</p> <p>Linc Rogers Tel: (416) 863-4168 Email: linc.rogers@blakes.com</p> <p>Jake Harris Tel: (416) 863-2523 Email: jake.harris@blakes.com</p> <p>Lawyers for Suncor Energy Products Partnership</p>	<p>HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE Insolvency Unit 33 King Street West, 6th floor Oshawa, Ontario L1H 8H5</p> <p>Email: insolvency.unit@ontario.ca</p>

DEPARTMENT OF JUSTICE

Tax Law Services Division
120 Adelaide Street West, Suite 400
Toronto, Ontario M5H 1T1

Email: AGC-PGC.Toronto-Tax-Fiscal@justice.gc.ca

Lawyers for Canada Revenue Agency

Email Service List:

george@chaitons.com; laurac@chaitons.com; jhfrymer@ynlclaw.com; linc.rogers@blakes.com;
jake.harris@blakes.com; AGC-PGC.Toronto-Tax-Fiscal@justice.gc.ca;
insolvency.unit@ontario.ca

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JUSTICE ACT*, R.S.O. 1990 C. C.43, AS AMENDED**

PART I- OVERVIEW

1. On February 10, 2024, the Honourable Justice Osborne granted an order (the “**Receivership Order**”) pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended (the “**BIA**”) and section 101 of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the “**CJA**”), appointing Rosen Goldberg Inc. (“**RGI**”) as receiver (the “**Receiver**”) over the defendant, 11282751 Canada Inc. (the “**Debtor**”), without security, of the lands and premises municipally known as 170 Burton Avenue, Barrie, Ontario (the “**Property**”), owned by the Debtor.
2. The Plaintiff, C & K Mortgage Services Inc., operating as Rescom Capital (the “**Lender**”) holds a first charge/mortgage in the principal sum of \$4,400,000.00 (the “**Charge**”) registered against title to the Property.
3. The Debtor operated a Petro Canada gas station and a convenience store from the Property. On or about December 12, 2023, the Lender inspected the Property and discovered that it

had been abandoned and the inventory removed.

4. The Lender issued a Notice of Intention to Enforce Security on or about December 12, 2023. The Loan subsequently matured on January 1, 2024.
5. The Receiver brings the within motion to, *inter alia*, approve the sale process of the Property.

PART II- THE FACTS

6. The Lender holds a registered first Charge against title to the Property and a General Security Agreement against the personal property of the Debtor.

Reference: First Report of the Receiver dated March 8, 2024 (“**First Report**”), Motion Record, Tab 2, at para 5.

7. In addition to the Lender’s Charge, the following charges are registered against title to the Property:

- a. A \$3,500,000.00 charge/mortgage in favour of 2489876 Ontario Inc., which was postponed to the Lender’s Charge;
- b. A \$100,000.00 charge/mortgage in favour of Suncor Energy Inc., which was postponed to the Lender’s Charge; and
- c. A \$5,150,000.00 charge/mortgage in favour of Steven Gallen and Debra Gallen, registered against title to the Property on August 17, 2023.

Reference: First Report, Motion Record, Tab 2, at para 6(a)-(c).

8. The Debtor operated a Petro Canada gas station and convenience store from the Property. On or about December 12, 2023, the Lender issued a Notice of Intention to Enforce Security after having discovered that the Debtor had abandoned the Property, removed the inventory and ceased operations.

Reference: First Report, Motion Record, Tab 2, at para 7.

9. On or about February 7, 2024, the Lender brought a motion for the appointment of the Receiver. On or about February 10, 2024, the Honourable Justice Osborne issued the Receivership Order, thereby appointing RGI as Receiver over the Property.

Reference: First Report, Motion Record, Tab 2, at para 1.

10. Since its appointment, the Receiver has undertaken several activities, including but not limited to: taking possession of the Property, correspondence and communications with stakeholders and appraisers, preparing the statutory reports, attending the Property, established and maintained a Case Website and reviewed various reports and financial information pertaining to the Property.

Reference: First Report, Motion Record, Tab 2, at para 10.

11. After considering its realization options, including both a listing process as well as a tender process, the Receiver believes that a tender process will provide the best opportunity to maximize recoveries in a timely manner.

Reference: First Report, Motion Record, Tab 2, at para 11.

12. The Receiver proposes a sale process of approximately five weeks, the key milestones for which include:

- a. the distribution of a teaser to potentially interested parties following the issuance of the Order approving the Sale Process;
- b. providing access to a virtual data room to potentially interested parties upon execution of a satisfactory confidentiality agreement;
- c. a bid deadline 30 days after the date the teaser is distributed;
- d. a period for the review and negotiation of bids after the bid deadline;
- e. selection of a successful bid immediately following the review and negotiation period; and

- f. seeking Court approval of a sale transaction as soon as possible after the selection of a successful bid.

(collectively, the “**Sale Process**”)

Reference: First Report, Motion Record, Tab 2, at para 14.

PART III: THE ISSUE

13. The issue to be considered on this motion is whether this Honourable Court should approve the Sale Process.

PART IV: LAW & ARGUMENT

14. Section 243(1) of the BIA provides the Court with broad discretion with respect to the powers it grants receivers to exercise control over the property of a company in a receivership and in making orders generally:

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

Reference: *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3, s.243(1).

15. The Receivership Order was granted pursuant to subsection 243(1) of the BIA and section 101 of the CJA and explicitly authorizes and empowers the Receiver to market any and all of the property of the Debtor, which includes the Property. This includes advertising and soliciting offers in respect of the Property and negotiating such terms and conditions to sale as the Receiver in its discretion may deem appropriate.

Reference: First Report, Motion Record, Tab 2, at para 1, Appendix A.

16. In accordance with the Receivership Order, the Receiver has developed the Sale Process to solicit tenders with a view to identifying and closing a transaction that maximizes value for the Debtor's stakeholders.

Reference: First Report, Motion Record, Tab 2, at para 14.

17. The Ontario Court of Appeal has recognized that the purpose of a receivership is to enhance and facilitate the preservation and realization of receivership assets for the benefit of creditors, and that this purpose is generally achieved through a liquidation of the debtor's assets.

Reference: [*Third Eye Capital Corp v Dianor Resources Inc*, 2019 ONCA 508](#) at para 73.

18. Sale processes are routinely approved and undertaken in receivership proceedings to facilitate such sales.

Reference: [*2056706 Ontario Inc v Pure Global Cannabis Inc*, 2021 ONSC 5533](#) at para 11.

19. While the decision to approve a sale process is distinct from the decision to approve the ultimate sale, the Court has held that the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors that the Court will later take into account when considering the approval of the proposed sale resulting from that sale process.

Reference: [*CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750](#) ("CCM") at para 6.

20. In the case of *Royal Bank v. Soundair*, the Ontario Court of Appeal held that a court was to consider the following factors when deciding whether to approve the sale of property subject to a receivership:

- a. whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

- b. the efficacy and the integrity of the process by which offers are obtained;
- c. whether there has been unfairness in the working out of the process; and
- d. the interests of all parties.

Reference: [*Royal Bank of Canada v Soundair*, 1991 CanLII 2727 \(ONCA\)](#) (“**Soundair**”) at para 16.

21. In *CCM*, the Court held that the criteria identified in *Soundair* also informs the determination of whether to approve a court appointed receiver’s proposed sale process.

Specifically, the Court is to assess:

- a. the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver;
- b. the fairness, transparency and integrity of the proposed process; 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.

Reference: [*CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750](#) at para 6.

22. Each of the factors outlined in *Soundair* and *CCM* support the approval of the Sale Process at this time:

- a. *Whether the Sale Process is commercially efficient* - The Sale Process is proposed to be overseen and conducted by the Receiver who has already been contacted by numerous parties that may be interested in purchasing the Property;
- b. *Whether the Sale Process is fair and transparent* – The proposed Sale Process is a fair, open and transparent process that contemplates a broad marketing of the Property where the Receiver will engage with potential purchasers who, subject to the execution of a confidentiality agreement, will be provided with detailed information including access to a virtual data room. The proposed Sale Process

includes clear guidance on what will be considered a qualified bid. Any successful bid and the related transaction will be subject to Court approval at the Sale Approval Motion. The proposed Sale Process is consistent with many other sale processes approved by the Court for real property; and

- c. *Whether the Sale Process optimizes the chances of securing the best possible price*
- The proposed Sale Process is structured to ensure that the Receiver is best positioned to market the Property as broadly as possible. The timelines contemplated in the proposed Sale Process will ensure that the Property is canvassed for the appropriate amount of time while also ensuring that it is adequately succinct so as to provide interested buyers with transaction certainty.

Reference: First Report, Motion Record, Tab 2, at paras 11, 12, 14.

23. The Receiver submits that the relief sought on the within motion is appropriate in the circumstances and consistent with prior orders of this Honourable Court.

PART V: ORDER REQUESTED

24. The Receiver respectfully requests an Order:
- a. Approving the First Report of the Receiver and the activities of the Receiver described therein; and
 - b. Approving the Sale Process described in the First Report and directing the Receiver to conduct the Sale Process.

ALL OF WHICH IS RESPECTUFLLY SUBMITTED, this 11th day of March, 2024.



HOWARD MANIS

MANIS LAW

Lawyers

1600-2300 Yonge Street

Toronto, Ontario M4P 1P4

Howard F. Manis LSO #: 34366V

Tel: (416) 417-7257

Email: hmanis@manislaw.ca

Daniel Litsos LSO #: 79628V

Email: dlitsos@manislaw.ca

Lawyers for the Receiver, Rosen
Goldberg Inc.

SCHEDULE “A”

LIST OF AUTHORITIES

1. [*Third Eye Capital Corp v Dianor Resources Inc*, 2019 ONCA 508](#)
2. [*2056706 Ontario Inc v Pure Global Cannabis Inc*, 2021 ONSC 5533](#)
3. [*CCM Master Qualified Fund v blutip Power Technologies*](#)
4. [*Royal Bank of Canada v Soundair*, 1991 CanLII 2727 \(ONCA\)](#)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

[Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3](#)

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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](#)

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).

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Plaintiffs

- and -

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Defendants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at
TORONTO

FACTUM OF THE RECEIVER

MANIS LAW

2300 Yonge Street, Suite 1600
Toronto, Ontario, M4P 1E4

Howard Manis (LSO # 34336V)
Email: hmanis@manislaw.ca
Phone: (416)364-5289

Daniel Litsos (LSO #79628V)
Email: dlitsos@manislaw.ca

Lawyers for the Receiver, Rosen Goldberg Inc.