

Court File No. CV-22-00690513-00CL

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

B E T W E E N:

**2046245 ONTARIO INC., 2222228 ONTARIO INC., 2473560 ONTARIO INC. and  
2473441 ONTARIO INC.**

Applicants

- and -

**2244039 ONTARIO INC. and 1526400 ONTARIO INC.**

Respondents

**IN THE MATTER OF AN APPLICATION PURSUANT TO SUBSECTION 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  
(Sale Approval Motion – July 19, 2023)**

**PART I. OVERVIEW**

1. This motion is brought by Albert Gelman Inc, in its capacity as the Court-appointed receiver (the “**Receiver**”), without security, of 2244039 Ontario Inc. (“**224Co.**”) and 1526400 Ontario Inc. (“**152Co.**” and collectively, the “**Debtors**”) for, among, other things, the approval of the transactions contemplated in asset purchase agreements (“**Asset Purchase Agreements**”) entered into between the Receiver and purchasers.

2. In particular, the Receiver seeks Orders:

- (i) approving and authorizing the Receiver to enter into and carry out the terms of the transaction (the “**Cherrycrest Transaction**”) contemplated by an agreement of purchase and sale dated June 15,

2023 between the Receiver and 1000567934 Ontario Inc. (the “**Cherrycrest Purchaser**”) for the sale of the property at 35 Cherrycrest Drive, Brampton, Ontario and certain other assets (the “**Cherrycrest Purchased Assets**”), together with any further minor amendments thereto deemed necessary by the Receiver in its sole discretion;

- (ii) vesting in the Cherrycrest Purchaser all right, title and interest of 224Co. in the Cherrycrest Purchased Assets, free from all Claims (as defined and described in the Order), upon closing of the Cherrycrest Transaction and the delivery of a Receiver’s certificate;
- (iii) approving and authorizing the Receiver to enter into and carry out the terms of the transaction (the “**Airport Road Transaction**”) contemplated by an agreement of purchase and sale dated June 14, 2023 between the Receiver and 2484460 Ontario Inc. (the “**Airport Road Purchaser**”) for the sale of the property at 12016 Airport Road, Calendon, Ontario and certain other assets (the “**Airport Road Purchased Assets**”), together with any further minor amendments thereto deemed necessary by the Receiver in its sole discretion;
- (iv) vesting in the Airport Road Purchaser all right, title and interest of 152Co. in and to the Airport Road Purchased Assets, free from all Claims (as defined and described in the Order), upon closing of the Airport Road Transaction and the delivery of a Receiver’s certificate;

- (v) approving the First Report to the Court of the Receiver dated July 7, 2023 (the “**First Report**”) and the Receiver’s conduct and activities set out therein;
- (vi) authorizing the Receiver to make the Interim Distributions (as defined and described in the First Report);
- (vii) sealing the Confidential Appendices to the First Report; and
- (viii) approving the fees of the Receiver and its counsel, Paliare Roland Rosenberg Rothstein LLP (“**Paliare**”) and Wildeboer Dellelce LLP (“**Wildeboer**”) for the periods detailed in the First Report.

3. This factum addresses the relief sought relating to the sale of the Cherrycrest Purchased Assets and the Airport Road Purchased Assets (collectively, the “**Purchased Assets**”) and the sealing of the Confidential Appendices.

## **PART II. FACTS**

### **A. Background**

4. 2046245 Ontario Inc., 2222228 Ontario Inc., 2473560 Ontario Inc. and 2473441 Ontario Inc. (collectively, the “**Lenders**”) commenced an application dated November 15, 2022 to appoint a receiver over the Debtors.<sup>1</sup>

5. The Lenders had provided financing to the Debtors through two credit facilities totalling approximately \$14,550,000, which facilities were secured by first and second

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<sup>1</sup> First Report at para 1., Motion Record dated July 7, 2023 (“MR”), Tab 2

mortgages on the properties at 35 Cherrycrest Road, Brampton, Ontario (the “**Cherrycrest Property**”) and 12016 Airport Road, Caledon, Ontario (the “**Airport Road Property**”) (collectively, the “**Properties**”).

6. On December 1, 2022, the Receiver was appointed as receiver, without security, of the property, assets and undertaking of the Debtors pursuant to an Order of this Court (the “**Appointment Order**”).<sup>2</sup>

7. The Appointment Order was stayed until 9 a.m. on December 13, 2022 pursuant to certain conditions which included, among other things, repayment of certain of the loans to the Lenders as well as amending certain lending and security agreements. The conditions were not met and, as a result, the Appointment Order went into effect as of December 13, 2022 at 9 a.m.<sup>3</sup>

### **152Co.**

8. 152Co. is the owner of the Airport Road Property.<sup>4</sup>

9. The Airport Road Property is fully leased to both Shell Canada Products (“**Shell**”) who own and operate a Shell gas bar and Select retail store and The TDL Group Corp. (“**TDL**”) who own and operate a Tim Horton’s retail restaurant.<sup>5</sup>

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<sup>2</sup> First Report, at para. 2, MR, Tab 2

<sup>3</sup> First Report at para. 2, MR, Tab 2

<sup>4</sup> First Report at para. 13, MR, Tab 2

<sup>5</sup> First Report at para. 13, MR, Tab 2

**224Co.**

10. 224Co. is the owner of the Cherrycrest Property.<sup>6</sup>
11. 224Co. owns and operates an Esso gas bar, car wash and “On the Run” convenience store from the Cherrycrest Property.<sup>7</sup>
12. 224Co. also leases portions of the Cherrycrest Property to TDL, 1280438 Ontario Ltd (“**128Co.**”) and Bell Mobility Inc. (“**Bell**”).<sup>8</sup>
13. TDL owns and operates a takeout Tim Horton’s coffee bar within the “On the Run” convenience store.<sup>9</sup>
14. 128Co. operates a KFC/Taco Bell restaurant franchise from a stand alone building on the Cherrycrest Property<sup>10</sup>
15. Bell has a wireless communications tower located on the Cherrycrest Property.<sup>11</sup>

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<sup>6</sup> First Report at para. 20, MR, Tab 2

<sup>7</sup> First Report at para. 21, MR, Tab 2

<sup>8</sup> First Report at para. 22, MR, Tab 2

<sup>9</sup> First Report at para. 23, MR, Tab 2

<sup>10</sup> First Report at para. 24, MR, Tab 2

<sup>11</sup> First Report at para. 25, MR, Tab 2

**B. The Receiver's Sales Process**

16. The Receiver entered into listing agreements with Cushman & Wakefield ULC (“**C&W**”) on April 15, 2023 for the purposes of listing for sale both the Cherrycrest Property and the Airport Road Property.<sup>12</sup>

17. On May 1, 2023, both of the Properties were publicly listed on the Multiple Listing Service with no asking price. The listing was for a period of 46 days with the bid deadline set for June 15, 2023 at 4 p.m. (the “**Bid Deadline**”).<sup>13</sup>

18. C&W established a virtual data room for each real property, which included information, documents and certain financial records available to the Receiver. Prior to gaining access to the data room, a prospective purchaser was required to sign the Receiver's form of Non-Disclosure Agreement (an “**NDA**”).<sup>14</sup>

19. During the listing period, approximately 130 NDAs were signed for each of the Properties.<sup>15</sup>

20. The Receiver received 8 offers to purchase the Cherrycrest Property and 12 offers to purchase the Airport Road Property by the Bid Deadline.

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<sup>12</sup> First Report at para. 44, MR, Tab 2

<sup>13</sup> First Report at para. 45, MR, Tab 2

<sup>14</sup> First Report at para. 45, MR, Tab 2

<sup>15</sup> First Report at para. 46, MR, Tab 2

21. The Receiver believes that the marketing process conducted was appropriate for the type of property in question and that the marketing process provided sufficient market exposure to the properties.<sup>16</sup>

**C. Approval of the Asset Purchase Agreements**

22. The Asset Purchase Agreements for both Properties are substantially the same and both contain the following salient terms:<sup>17</sup>

- (a) the purchase price is to be paid in cash on closing;
- (b) the purchaser was required to (and has) provided the Receiver with a cash deposit of 10% of the purchase price;
- (c) the assets being purchased include the Properties, certain contracts and books and records and, in the case of the Cherrycrest Transaction, some inventory;
- (d) the purchasers are purchasing the Purchased Assets on an “as is, where is” basis and the Receiver is providing no representations or warranties in respect of these assets;
- (e) the Asset Purchase Agreements are conditional only upon this Court approving them and vesting in the respective purchaser all of the respective

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<sup>16</sup> First Report at para. 53(b) and 55(h), MR, Tab 2

<sup>17</sup> First Report at para. 51, MR, Tab 2

Debtor's right, title and interest in and to those assets free and clear of any and all encumbrances (other than certain permitted encumbrances);

23. The Receiver is of the view that in each case, sufficient efforts were made to obtain the best price for the Purchased Assets and the marketing process was conducted fairly. The Receiver regards the Asset Purchase Agreements as the most advantageous offer for the Purchased Assets.<sup>18</sup>

24. The Receiver therefore recommends that this Court approve the Asset Purchase Agreements and grant the orders vesting title in the Cherrycrest Purchased Assets to the Cherrycrest Purchaser and title to the Airport Road Purchased Assets to the Airport Road Purchaser.<sup>19</sup>

***D. Proposed Interim Distribution***

25. Concurrent with or following the closing of the sale of the Properties, the Receiver proposes to make the following payments (the "**Interim Distribution**") as described in the First Report<sup>20</sup>:

- (a) payment of the amount due on closing for any realty taxes owing on either or both of the Properties as at the closing date;
- (b) payment of the unpaid fees of the Receiver and its counsel, Paliare Roland and Wildeboer Dellelce, as approved by this Court;

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<sup>18</sup> First Report at paras. 53-56, MR, Tab 2

<sup>19</sup> First Report at paras. 54 and 59, MR, Tab 2

<sup>20</sup> First Report at para. 67, MR, Tab 2

- (c) payment of the sums due to the Canada Revenue Agency (“**CRA**”) in priority as follows:
  - (i) in respect of 224Co, the unpaid source deductions deemed trust in the sum of \$8,606.59 and the HST deemed trust, in full, once assessed by CRA;
  - (ii) in respect of 152Co, the HST deemed trust in the amount of \$164,555.98 and unpaid source deductions deemed trust in the amount of \$2,684.85; and
- (d) payment to the Lenders up to the amount of the total indebtedness owing to such Lenders and allocated as consideration for the Cherrycrest Property and the Airport Road Property, which amounts may be adjusted at the Receiver’s discretion on receiving updated loan amounts from the Lender

26. As set out in the First Report, the Receiver received an opinion from Paliare that, based on the assumptions and subject to the qualifications set out therein, that: (i) 204, 222 and 560 have a valid and enforceable first charge in accordance with its terms against the Properties; and (ii) 204, 222 and 441 have a valid and enforceable second charge in accordance with its terms against the Properties.<sup>21</sup>

***E. The Confidential Appendices***

27. On this motion, the Receiver also seeks an order sealing the Confidential Appendices related to the Cherrycrest Transaction (Confidential Appendices A, C and E)

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<sup>21</sup> First Report at paras. 33 and 36, MR, Tab 2.

pending closing of that transaction and sealing the Confidential Appendices related to the Airport Road Transaction (Confidential Appendices B, D and F) pending the closing of that transaction.

28. The Confidential Appendices contain the appraisals<sup>22</sup>, a summary of the other offers received<sup>23</sup> and the unredacted copies of the Asset Purchase Agreements.<sup>24</sup>

### **PART III. ISSUES, LAW & ARGUMENT**

29. The Receiver's motion raises the following two legal issues:

- (a) should the Court approve the Asset Purchase Agreements?
- (b) is it appropriate for the Court to seal the Confidential Appendices to the First Report pending the closing of the respective transaction contemplated by the Asset Purchase Agreements?

#### ***A. The Court Should Approve the Asset Purchase Agreements***

30. The factors to be considered by this Court in its assessment of the approval of a sale by a receiver are well established. A court should consider:

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

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<sup>22</sup> Confidential Appendix "A" contains the appraisal for Cherrycrest Property and Confidential Appendix "B" contains the appraisal for the Airport Road Property.

<sup>23</sup> Confidential Appendix "C" contains a summary of the other offers for the Cherrycrest Property and Confidential Appendix "D" contains a summary of the other offers for the Airport Road Property.

<sup>24</sup> Confidential Appendix "E" contains the unredacted Asset Purchase Agreement for Cherrycrest Property and Confidential Appendix "F" contains the unredacted Asset Purchase Agreement for the Airport Road Property.

- (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.<sup>25</sup>

31. Having regard to the foregoing, the Receiver submits and recommends that this Court should approve the Asset Purchase Agreements in order to give effect to the transactions contemplated therein. In particular, the Receiver notes the following:

- (a) the Real Properties were exposed to the market through a public MLS listing for 46 days which, in the Receiver's opinion, provided sufficient market exposure;
- (b) the offer contained in each Asset Purchase Agreement was for greater consideration than any of the other offers made to the Receiver;
- (c) in each case, the consideration for the respective Purchased Assets was greater than the appraised amount for such Purchased Assets; and
- (d) neither Asset Purchase Agreements contains any condition which would delay closing.

32. As the Ontario Court of Appeal agreed with and adopted in *Soundair*:

If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of

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<sup>25</sup> *Royal Bank v. Soundair Corp.*, [1991 CanLII 2727 \(ONCA\)](#) at para 16.

receivers and in the perception of any others who might have occasion to deal with them. It 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. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.<sup>26</sup>

33. In the present case, there are no exceptional circumstances which would warrant a rejection of the Receiver's recommendation.

34. In all, the marketing process was fair and transparent and yielded the most advantageous offer for the Properties. There is no basis to interfere with the Receiver's recommendation to approve the Asset Purchase Agreements.

**B. The Court Should Seal the Confidential Appendix**

35. As noted above, the Receiver seeks an Order sealing the Confidential Appendices related to the Cherrycrest Transaction (Confidential Appendices A, C and E) pending closing of that transaction and sealing Confidential Appendices B, D and F pending the closing of the Airport Road Transaction.

36. The limited circumstances in which this Court should seal part of a record before it were described by the Supreme Court of Canada in the case of *SierraClub of Canada v. Canada (Minister of Finance)*.<sup>27</sup>

37. In that case, that court observed that a confidentiality order should be granted in only two circumstances:

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<sup>26</sup> *Soundair* at para 21.

<sup>27</sup> *SierraClub of Canada v. Canada (Minister of Finance)*, [2002 SCC 41 \(CanLII\)](#) at para. 45.

- (a) when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and
- (b) when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

38. In the context of court-supervised sale proceedings, this Court has routinely applied *SierraClub* and held that it is appropriate to seal information and documentation filed in support of a motion to approve a sale where the materials “disclose the valuations of the assets under sale, the details of the bids received by the court-appointed officer and the purchase price contained in the offer for which court approval is sought”.<sup>28</sup>

39. Sealing these materials is necessary to ensure that the Receiver can maximize value for the Purchased Assets if the contemplated transaction does not close and the Receiver (or someone else) has to market the Purchased Assets for sale again.<sup>29</sup>

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 14<sup>th</sup> day of July, 2023.



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Paliare Roland Rosenberg Rothstein LLP

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<sup>28</sup> *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, [2014 ONSC 1173 \(CanLII\)](#) at para. 32 [*GE Canada*].

<sup>29</sup> [GE Canada](#) at paras. 32-34.

## SCHEDULE A – TABLE OF AUTHORITIES

### CASE LAW

1. *Royal Bank v. Soundair Corp.*, [1991 CanLII 2727 \(ONCA\)](#)
2. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#)
3. *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, [2014 ONSC 1173](#)

**2046245 ONTARIO INC., et al.**  
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-and-

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT  
TORONTO

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**FACTUM OF THE RECEIVER  
(MOTION RETURNABLE JULY 19, 2023)**

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