ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-24-00721374-00CL **DATE: June 11, 2024**

NO. ON LIST: 2

TITLE OF PROCEEDING: BANK OF MONTREAL v. HOHS DRUGS LIMITED et al

BEFORE: JUSTICE CAVANAGH

PARTICIPANT INFORMATION

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ENDORSEMENT OF JUSTICE CAVANAGH:

[1] The Applicant, Bank of Montreal ("BMO"), brings this application for an order, among other things, appointing Grant Thornton Limited ("GTL") (the "proposed Receiver") as the receiver and manager of all of the issued and outstanding shares (the "Shares") in the capital of the respondent HOHS Drugs Limited (the "Debtor"), and all the assets, undertakings and properties of the Debtor acquired for or used in relation to the Debtor's pharmacy business.

[2] The Respondent Huan Dang is a respondent to this application because of his ownership of the shares of the Debtor.

[3] Subject to the requested appointment of the proposed Receiver, BMO also seeks approval of two transactions in respect of the Debtor's assets and business:

a. an Order approving a share purchase agreement dated April 4, 2024 (the "Manning SPA") between proposed Receiver and Frank Murgic Pharmacist Professional Corporation (the "Manning Purchaser") and the transaction contemplated thereby, being an acquisition of the Shares through a reverse vesting transaction; and

b. an Order approving an asset purchase agreement dated April 17, 2024 (the "Regency APA") between the proposed Receiver and 1000801194 Ontario Inc. (the "Regency Purchaser") and the transaction contemplated thereby, being an acquisition of the pharmacy located at 2737 Keele Street, Suite 1-8, Toronto (the "Regency Pharmacy") through an approval and vesting order.

[4] The respondents were represented at the hearing and do not oppose the relief sought by BMO.

[5] This application is supported by the affidavit of Leo Chun sworn May 29, 2024. In addition, the proposed Receiver prepared and filed a Pre-filing Report dated June 3, 2024. The proposed Receiver supports the requested approval orders.

[6] BMO is the first ranking secured creditor of the Debtor.

[7] The Debtor is in default of its obligations under the terms of, among other things, a credit agreement and security documents. The Debtor is indebted to BMO for the principal amount of over $5,363,688.18. BMO demanded repayment of the total indebtedness and issued notices of intention to enforce security ("NITES") under the *Bankruptcy and Insolvency Act* (the "BIA"). Under its security, BMO is entitled to appoint a receiver of the assets, undertakings and properties of the Debtor and to realize upon the Shares pursuant to the share security documents as described in the application materials.

[8] BMO worked diligently with the Debtor for almost two years to stabilize its business and to conduct a sale process to identify purchasers for the Debtor's assets and pharmacy business. Two transactions have been identified, both of which are required to be completed through a

receivership. If so appointed, the proposed Receiver, as Receiver, will take the necessary steps to implement the transactions on the terms and conditions set out in the applicable purchase agreements. The transactions, if completed, will permit the Debtor's pharmacy business to continue as a going concern. These transactions will provide stability and certainty for the Debtor's stakeholders, including customers, suppliers and employees.

[9] One creditor of the Debtor is McKesson Canada ("McKesson"), a principal provider of inventory to the Debtor. The Application Record was sent to McKesson by courier to its address for service on its *PPSA* registration. There was a signed receipt from a person named "Michael". However, when counsel for BMO attempted to serve its factum for this application to the same address, a report came back that McKesson was not at that location. The proposed Receiver had the same issue when it tried to serve its Pre-Filing Report. Counsel for BMO then found the head office address for McKesson on its web site and delivered by courier its Application Record, Factum, and the proposed Receiver's Pre-Filing Report to McKesson at the head office address. However, the courier package was refused. No one appeared for McKesson at the hearing of this application.

[10] The Debtor owns and operates two pharmacies in Toronto: the pharmacy located at 260 Spadina Avenue, Toronto (the "Toronto Manning Drug Mart") and the Regency Pharmacy. The Debtor is a "Pre-1954 Charter Company" as contemplated under section 142(4) of the *Drug and Pharmacies Regulations Act* (Ontario). This means that, unlike pharmacies incorporated after May 14, 1954, the owner of the pharmacy is not required to be a pharmacist. A consequence of this is that the Debtor's charter and articles of incorporation (the "Charter") have commercial value.

[11] The Debtor's assets consist primarily of pharmacy assets (inventory, accounts receivable, and service contracts), as well as the Charter. Mr. Dang purchased the Shares of the Debtor in 2018 for $2,600,000, plus an inventory adjustment.

[12] Evidence with respect to the credit facilities between BMO and the Debtor, the security held by BMO, and defaults by the Debtor are set out in the application materials and summarized in the factum of BMO at paragraphs 14-20. The Debtor has been in default of its obligations under its credit agreement with BMO since 2021.

[13] In the summer of 2022, Mr. Dang advised BMO of his intention to sell the pharmacy business and Charter. Despite attempts by the Debtor to identify a purchaser for the Regency Pharmacy and the Toronto Manning Drug Mart, no transaction was completed. In February 2023, BMO issued demand letters and NITES.

[14] In March 2023, BMO engaged MC2 Business Advisors Inc. ("MC2") to develop and implement with the Debtor and Mr. Dang a sale process for the assets of the Debtor and the Charter. MC2 is a boutique advisory firm which provides a full range of mergers and acquisitions, corporate finance and advisory services, and is a recognized leader in the pharmacy sector.

[15] Ultimately, MC2, with the assistance of the Debtor, Mr. Dang, and BMO, conducted a sale process to identify a purchaser for the Debtor's pharmacy business. This sale process resulted in the transactions in respect of the Regency Pharmacy and the Shares.

[16] On April 17, 2024, the Regency Purchaser made an irrevocable offer to enter into the Regency APA whereby the Regency Purchaser agreed to purchase all of the Debtor's (and Receiver's) right, title and interest, if any, in, to and under certain purchased assets (as defined in the Regency APA). The conditions to closing this transaction include (a) the issuance of an order appointing GTL as the Receiver; (b) the issuance of an approval and vesting order approving the transaction and vesting the Regency Assets in the Regency Purchaser free and clear of all claims and encumbrances; and (c) the approval of an application for accreditation as a community pharmacy by the Regency Purchaser to the Ontario College of Pharmacists, which process is expected to be completed 45 days following submission.

[17] On April 4, 2024, the Manning Purchaser made an irrevocable offer to enter into the Manning SPA, pursuant to which the Manning Purchaser agreed to purchase the Shares. It is contemplated that the transaction under the Manning SPA will be completed by way of approval and a "reverse" vesting order. The Manning SPA is conditional upon, among other things (a) the issuance of an order appointing GTL as the Receiver, (b) the issuance of an approval and vesting order, among other things, approving the Manning SPA and vesting the Shares in the Manning Purchaser free and clear of all claims and encumbrances, (c) the completion of the transaction contemplated by the Regency APA, including the assignment of the lease in respect of Toronto Manning Drug Mart.

[18] Section 243 (1) of the *BIA* provides that on an application by a secured creditor, a court may, where the court considers it just or convenient to do so, appoint a receiver to take possession of the accounts, inventory and other property of an insolvent person and exercise control over that person's property and assets. Section 101 of the *Courts of Justice Act* provides that a judge may grant an interlocutory order appointing a receiver and manager where it appears to the judge to be just or convenient to do so.

[19] In considering whether it is just or convenient to appoint a receiver, the Court must have regard to all of the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto. These include the rights of a secured creditor pursuant to its security.

[20] I am satisfied that the appointment of a receiver is just and convenient in the circumstances for the following reasons:

a. the Debtor has defaulted on its obligations under the credit agreement and the security documents, and no payments have been made under the credit facilities since January 2023;

b. the security documents grant BMO the right to appoint a receiver upon default;

c. the respondents do not oppose the appointment of GTL as the Receiver; and

d. the proposed receivership will permit GTL to complete the proposed transactions which, if approved and completed, will result in a repayment of a significant portion of the indebtedness owing to BMO and a continuation of the Debtor's pharmacy business as a going concern.

[21] In *Royal Bank of Canada v. Soundair Corp*., 1991 CanLII 2727 (ON CA), the Court of Appeal for Ontario held that in reviewing a proposed sale of assets by a receiver, the Court will consider: (a) whether the receiver is made a sufficient effort to obtain the best price and has not acted improvidently; (b) whether the interests of all the parties have been considered; (c) the efficacy and integrity of the process by which offers have been obtained; and (d) whether there has been unfairness in the working out of the process.

[22] With respect to the Regency APA, I am satisfied that the principles in *Soundair* are satisfied. A robust sale process was completed by MC2 (following prior sale efforts by the Debtor). The objective of that process was to obtain the highest and best value for the assets and business of the Regency Pharmacy. Interested parties were provided with a reasonable opportunity to conduct due diligence, consider the opportunity, and make an offer. The proposed Receiver is of the view that the proposed purchase price is fair and reasonable and does not believe that further marketing efforts would yield a superior transaction. Completion of the transaction in respect of the Regency Pharmacy will allow it to continue as a going concern for the benefit of customers, suppliers, employees and other stakeholders. I am satisfied that the sale process was run with integrity and there was no unfairness.

[23] The Regency APA and the transaction contemplated thereunder should be approved.

[24] BMO also seeks approval of the Manning SPA and the transaction contemplated thereby, which is structured as a reverse vesting order ("RVO") transaction. BMO also seeks an ancillary relief that is necessary to complete the proposed transaction, including adding ResidualCo as a respondent in these receivership proceedings, and vesting all of the Excluded Assets, Excluded Contracts, and Excluded Liabilities in ResidualCo, and discharging all Encumbrances, other than the Permitted Encumbrances, against the Retained Assets (defined terms have the meanings given to them in the application materials).

[25] Pursuant to section 183(1)(c) of the *BIA*, the Court has such jurisdiction at law and in equity as will enable it to exercise original, auxiliary, and ancillary jurisdiction in bankruptcy and another proceedings authorized by the *BIA*. It has been recognized that a principal benefit of the reverse vesting structure is the preservation of non-transferable assets, such as licenses and regulatory approvals. This Court has jurisdiction to grant the requested order.

[26] In *Just Energy Group Inc. (Re)*, 2022 ONSC 6354, McEwen J. noted, at para. 33, that reverse vesting orders should not be the norm, and that a court should carefully consider whether a reverse vesting order is warranted in the circumstances.

[27] In *Harte Gold (Re)*, 2022 ONSC 653, Penny J. identified four non-exclusive inquiries which should be made when a reverse vesting order is sought: (a) why is the RVO necessary in this case? (b) does the RVO structure produces an economic result at least as favourable as any other viable alternative? (c) is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and (d) does the consideration being paid for the debtor's business reflect the importance and value of the intangible assets being preserved under the RVO structure?

[28] A transaction involving a pre-1954 charter pharmacy was approved by this Court in receivership proceedings in *Pulse RX Inc. and Family Pharmacy Clinic Inc.*, CV-21-00661434-00CL (Order of Gilmore J. dated May 24, 2022). In that case, like the case before me, the Charter had significant value if commercialized, it was not transferrable, and the sale arose out of a robust sale process.

[29] The Manning Purchaser is not prepared to acquire the Shares under any alternative structure. I am satisfied that a reverse vesting structure is necessary and appropriate in the circumstances. This structure (i) allows for the monetization of the Charter (which cannot be transferred or conveyed under a traditional asset sale and vesting order structure) because the Manning Purchaser is able to acquire it within the existing corporate structure, while also facilitating the retention of material contracts and the vesting out of certain excluded assets and excluded liabilities which will be transferred to ResidualCo; (ii) preserves the Debtor's historical tax attributes; and (iii) is critical to the viability of the Manning transaction and necessary to avoid the consequences resulting from the Debtor's bankruptcy. A liquidation of the Debtor's assets and business will result in a materially worse outcome for all stakeholders in comparison with the Manning transaction.

[30] The proceeds of the Manning transaction are not sufficient to repay the debt owing to BMO in full. No other subordinate creditors would receive a return under any other viable alternative. In addition, the reverse vesting order structure will be beneficial to, among other stakeholders, the Debtor's current employees. The proposed Receiver reports that without this structure, and the preservation of the Manning Business, the employment of all of the Debtor's employees would be terminated. I am satisfied that no unfairness arises from the reverse vesting structure and that no stakeholders will be worse off under the structure than they would be under any other viable alternative.

[31] I am satisfied that the Manning transaction, implemented through a reverse vesting order structure, will produce an economic result at least as favourable as any other alternative. The reverse vesting order structure will contribute to significantly improve the offer from the Manning Purchaser, thereby maximizing creditor recoveries. This will result in substantial recoveries for BMO, the primary secured creditor. The proposed Receiver reports that based on its analysis of

the Debtor's assets and business, and experience in similar mandates, it does not expect any alternative structure to provide an economic result for the Debtor's creditors that is at least as or more favourable than the Manning transaction.

[32] I am satisfied based on the proposed Receiver's Pre-filing Report that the consideration being paid for the Shares is fair and reasonable in the circumstances. The consideration is greater than the Debtor's assets would be under a bankruptcy, and reflects the importance and value to the Manning Purchaser of the assets being preserved under the reverse vesting order structure, including the Charter and the Debtor's tax attributes. The principles in *Soundair* are satisfied.

[33] BMO seeks an order sealing Confidential Exhibits "1", "2", "3", "4", and "5" to the Chun affidavit which consisted of Letters of Intent signed by the Debtor, an email from Mr. Dang to BMO regarding his sale efforts, and the Letters of Intent signed by BMO for the proposed transactions. BMO also seeks an order sealing Confidential Appendices "1", "2", and "3", to the Pre-Filing Report which, respectively, consist of the summary of the results of the sale process, the unredacted Regency APA, and the unredacted Manning SPA. Redacted versions of the Confidential Appendices (the exception of a sale process summary) are attached the Pre-Filing Report and the only redactions relate to the purchase price, the deposit and other key commercial terms under each transaction.

[34] I am satisfied that the test for a sealing order as set out in *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 30, is satisfied.

[35] GTL intends to administer an employee claims process under the *Wage Earner Protection Program Act* ("WEPPA") for individuals currently employed by the Debtor whose employment will be terminated prior to the close of the transaction in respect of Toronto Manning Drug Mart. BMO therefore seeks approval of a declaration authorizing the Receiver to take all steps as may be necessary to uphold any and all obligations arising from the WEPPA. The *Wage Earner Protection Plan* is a federal government program that provides for payments to individuals in respect of wages owed to them by employers who are bankrupt or subject to a receivership. A declaration in the circumstances is necessary because, subject to the appointment of GTL as Receiver of the Debtor and approval of the Manning SPA, WEPPA will be administered following closing of the transaction, at which time liabilities owing to employees whose employment was terminated will have vested in ResidualCo. They requested declaration permits the Receiver to assist with the administration of WEPPA notwithstanding the removal of the Debtor as a respondent in the proposed receivership proceedings. I am satisfied that this relief should be granted.

[36] For these reasons, I grant the application. The closing of the transactions will not take place until at least ten days after the approval orders are issued. As I have noted, McKesson may not have received the application materials at its address for service shown on its *PPSA* registrations, and it would not accept the package of application materials sent to its head office. I direct the Receiver to serve the orders made on this application on McKesson forthwith. This will give McKesson time to seek to vary the orders, if so advised, before the transactions are completed.

[37] Orders to issue in forms of Orders signed by me today.

Mr. Justice
Cavanagh