Court File No.: CV-24-00721374-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N :

BANK OF MONTREAL

Applicant

- and -

HOHS DRUGS LIMITED and HUAN DANG

Respondents

APPLICATION UNDER 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 APPLICANT
(Returnable June 11, 2024)

June 6, 2024

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FACTUM OF THE APPLICANT

PART I - INTRODUCTION

1. This is an application by Bank of Montreal ("**BMO**") for an order, among other things, appointing Grant Thornton Limited ("**GTL**" or 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 ("**HOHS**" or the "**Debtor**"), and all of the assets, undertakings and properties of the Debtor acquired for or used in relation to the Debtor's pharmacy business.

2. Subject to the proposed appointment of GTL as the Receiver, BMO also seeks the approval of two transaction approval orders in respect of the Debtor's assets and business:

(a) An Order ("**Manning AVO**") approving a share purchase agreement dated April 4, 2024 between the 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 ("**Regency AVO**"), approving an asset purchase agreement dated April 17, 2024 between the Receiver and 1000801194 Ontario Inc. (the "**Regency**

Purchaser") and the transaction contemplated thereby, being an acquisition of a pharmacy located at 2737 Keele St, Suite 1-8, Toronto (the "**Regency Pharmacy**") through a traditional approving and vesting order transaction.

3. The respondents do not oppose the relief sought by BMO.

4. The Debtor and/or Mr. Dang, as applicable, are in default of their obligations under the terms of, among other things, a Credit Agreement and Security Documents (each as defined herein). The respondents are jointly indebted to BMO for the principal amount of over $5,363,6887.18.

5. BMO has demanded repayment of the total indebtedness and has issued notices of intention to enforce security ("**NITES**") under the *Bankruptcy and Insolvency Act* (the "**BIA**"). BMO is entitled to appoint a receiver of the assets, undertakings and properties of the Debtor under the applicable security documents, and to realize upon the Shares pursuant to the Share Security Documents (as defined herein).

6. BMO has 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.

7. If so appointed, GTL, as Receiver, will take the necessary steps to implement the transactions on the terms and conditions set out in the applicable purchase agreements.

8. If the contemplated transactions are not completed, the Debtor's business may be discontinued and its assets liquidated. The transactions, if completed, will permit the Debtor's pharmacy business to continue as a going concern. They provide stability and certainty for the Debtor's stakeholders, including customers, suppliers, and employees.

PART II - SUMMARY OF FACTS

Overview

9. The detailed facts giving rise to this application are set out in the Affidavit of Leo Chun sworn May 29, 2024 (the "**Chun Affidavit**")[1] and the pre-filing report of GTL in its capacity as the proposed receiver dated June 3, 2024 (the "**Pre-Filing Report**"). All terms capitalized but not defined herein are as defined in the Chun Affidavit.

10. The Debtor owns and operates two pharmacies in the City of Toronto: the pharmacy located at 260 Spadina Avenue, Toronto (the "**Toronto Manning Drug Mart**") and the Regency Pharmacy.[2]

11. HOHS is a "Pre-1954 Charter Company" as contemplated under section 142(4) of the *Drug and Pharmacies Regulations Act* (Ontario).[3] 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.[4]

[1] Affidavit of Leo Chun dated May 29, 2024 at para 4 (the "**Chun Affidavit**"), Tab 2 to the Application Record of Bank of Montreal dated May 31, 2024 (the "**Application Record**").
[2] Chun Affidavit, Tab 2 to the Application Record.
[3] *Drug and Pharmacies Regulation Act*, R.S.O. 1990, c. H.4.
[4] Chun Affidavit at para 5, Tab 2 to the Application Record.

12. The Debtor's assets consist primarily of pharmacy assets (inventory, accounts receivable, and service contracts), as well as the Charter.[5]

13. Mr. Dang purchased the Shares of the Debtor in 2018 for $2,600,000, plus an inventory adjustment.[6]

BMO Credit Facilities, Security and Defaults

14. HOHS and BMO entered into a letter of agreement dated December 14, 2018, as amended and restated on May 9, 2019 (the "**Credit Agreement**"). Pursuant to the Credit Agreement, BMO made available certain credit facilities to HOHS. As security for their obligations under the Credit Agreement, HOHS executed the following documents:[7]

(a) a general security agreement in favour of BMO dated December 21, 2018 (the "**HOHS GSA**"); and

(b) a Notice of Registration Under Sec. 427 of the *Bank Act* and related agreements ("**Bank Act Security**").

15. Mr. Dang and 2670120 Ontario Inc. each guaranteed payment to BMO of all of the indebtedness and liabilities owing to BMO by HOHS in connection with the Credit Agreement.[8]

16. As security for the obligations under his guarantee, Mr. Dang provided BMO with security over the Shares pursuant to a Hypothecation of Negotiable Collateral for All Loans dated May 23, 2019 and a Power of Attorney to Transfer Stock or Bonds (together, the "**Share Security**

[5] Chun Affidavit at para 6, Tab 2 to the Application Record.
[6] Chun Affidavit at para 33, Tab 2 to the Application Record.
[7] Chun Affidavit at para 21-23, Tab 2 to the Application Record.
[8] Chun Affidavit at para 26, Tab 2 to the Application Record.

Documents", and collectively with the HOHS GSA and the Bank Act Security, the "**Security Documents**").[9]

17. BMO registered financing statements against HOHS and Mr. Dang pursuant to the Ontario *Personal Property Security Act* and holds a first ranking security interest over the assets of the Debtor and the Shares, subject to any government priority payable amounts and any purchase money security interests.[10]

18. The Debtor has been in default of its obligations under the Credit Agreement since 2021. In the summer of 2022, Mr. Dang advised BMO of his intention to sell the pharmacy business and Charter.[11]

19. In the fall of 2022, it became clear that the Debtor did not have sufficient cash flow to operate its business and service the payments on its credit facilities with BMO. To assist the Debtor with its cash flow while it made efforts to sell the pharmacies, BMO reduced the monthly payments required to be made on its credit facilities.[12]

20. Despite attempts by the respondents to identify a purchaser for the Regency Pharmacy and the Toronto Manning Drug Mart, no transaction was completed. In February, 2023, BMO issued the Demand Letters and NITES.[13]

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[9] Chun Affidavit at para 27, Tab 2 to the Application Record.
[10] Chun Affidavit at para 28, Tab 2 to the Application Record.
[11] Chun Affidavit at para 40, Tab 2 to the Application Record.
[12] Chun Affidavit at para 41, Tab 2 to the Application Record.
[13] Chun Affidavit at para 45, Tab 2 to the Application Record.

Engagement of GTL, MC2 and Pre-filing Sale Process

21. In March, 2023, BMO engaged MC2 Business Advisors Inc. ("**MC2**") to develop and implement with HOHS and Mr. Dang a sale process for the assets of HOHS 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.[14]

22. 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. A summary of the sale process and the results of the sale process are set out in Confidential Appendix "1" to the Pre-Filing Report.

23. This sale process resulted in the transactions in respect of the Regency Pharmacy and the Shares. BMO seeks approval of each of these transactions.[15]

Regency Pharmacy

24. 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).[16] A redacted copy of the Regency APA is attached as Appendix "1" to the Pre-Filing Report. A summary of the key terms of the Regency APA is as follows (each term capitalized but not defined below are as defined in the Regency APA):

(a) **Purchaser**: 1000801194 Ontario Inc.

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[14] Chun Affidavit at paras 47-49, Tab 2 to the Application Record.
[15] Chun Affidavit at paras 47-49, Tab 2 to the Application Record.
[16] Chun Affidavit at paras 54-57, Tab 2 to the Application Record.

(b) **Purchased Assets**: Merchantable Inventory, Patient Records, fixed assets (machinery, equipment, fixtures, furniture, computer hardware, computer software and accessories), leasehold improvements, intellectual property, Purchased Contracts, Books and Records relating to the Purchased Assets, and all goodwill and other intangible assets.

(c) **Purchase Price:** subject to a proposed sealing order.

(d) **Assumed Liabilities**: The Regency Purchaser shall assume certain liabilities including liabilities in respect of Transferred Employees and Taxes.

(e) **Excluded Assets**: cash on hand or in any bank account, accounts receivable, prepaid expenses, interest and insurance policies or long-term investments; and any payment or entitlement to any rebate, refund or credit of Tax from a governmental authority in respect of any Tax reporting period prior to closing.

25. 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]

Toronto Manning Drug Mart

26. 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

[17] Chun Affidavit at para 56, Tab 2 to the Application Record.

contemplated that the transaction under the Manning SPA will be completed by way of approval and "reverse" vesting order.

27. A redacted copy of the Manning SPA is attached as Appendix "2" to the Pre-Filing Report. A summary of the key terms of the Manning SPA is as follows (each term capitalized but not defined below are as defined in the Manning SPA):

(a) **Purchaser**: Frank Murgic Pharmacist Professional Corporation or its assignee or nominee

(b) **Purchased Shares**: At closing, the proposed receiver will sell and transfer the Shares to the Manning Purchaser free and clear of all Encumbrances. Mr. Dang owns all of the common shares in the capital of the Debtor, which constitute all of the issued and outstanding shares.

(c) **Purchase Price:** subject to a proposed sealing order. The Purchase Price comprises of a cash payment plus the value of Merchantable Inventory as at Closing. The Purchase Price (subject to certain adjustments) shall be paid to, and held by, the Receiver for the benefit of ResidualCo.

(d) **Retained Assets**: all of the assets of the Debtor on the effective date and any assets acquired up to and including closing, except for inventory sold in the ordinary course. The Retained Assets will not include the Excluded Assets or the Excluded Contracts, which shall, prior to the sale of the Shares, be transferred to ResidualCo.

(e) **Retained Liabilities:** all Liabilities of the Debtor under any Assumed Contract and all Liabilities of Retained Employees.

(f) **Employees**: any employees not retained by the Manning Purchaser shall be terminated prior to closing, and any Liabilities owing to such Terminated Employees shall be Excluded Liabilities.

(g) **Transfer to ResidualCo**: prior to the sale of the Shares, the Excluded Assets, Excluded Contracts and Exclude Liabilities will be channeled to ResidualCo. All Claims attaching to the Excluded Liabilities shall continue to exist as against ResidualCo, the Purchase Price and the Excluded Assets.

28. The Manning SPA is conditional upon, among other things (i) the issuance of an order appointing GTL as the Receiver, (ii) 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, (iii) the completion of the transaction contemplated by the Regency APA, including the assignment of the lease in respect of Toronto Manning Drug Mart.[18]

29. A "reverse" vesting order structure is necessary to maximize and preserve the value of the Charter.[19] It will allow for the monetization of the Charter free of liabilities (as required by the Manning Purchaser) and is the only viable alternative to a wind down and liquidation of the Debtor's business.

30. In addition to seeking approval of the Manning SPA and the transaction through the Manning AVO, the Applicant is seeking the approval of other relief critical to the completion of the transaction, including (i) adding ResidualCo as a respondent in the proposed receivership proceedings, and (ii) transferring and vesting all of the Debtor's right title and interest in and to

[18] Chun Affidavit at para 59, Tab 2 to the Application Record.
[19] Chun Affidavit at para 72, Tab 2 to the Application Record.

the Excluded Assets, Excluded Contracts, and Excluded Liabilities (as defined in the Manning SPA) in and to ResidualCo.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

31. The issues to be determined before this Honourable Court are:

(a) Whether the Court should appoint a GTL as receiver and manager?

(b) Whether the transaction in respect of the Regency Pharmacy should be approved?

(c) Whether the transaction in respect of the Toronto Manning Drug Mart should be approved?

(d) Whether the confidential appendices to the Chun Affidavit and the Pre-Filing Report should be sealed?

(e) Whether the WEPPA Declaration (as defined below) should be granted?

32. It is respectfully submitted that each of the foregoing questions should be answered in the affirmative.

A. GTL should be appointed as the Receiver

33. Section 243(1) of BIA provides that on an application by a secured creditor, a court may, where the court considers it just and 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 business.

34. Section 101 of the *Courts of Justice Act*, RSO 1990, c C.43 (the "**CJA**") provides that the Ontario Superior Court of Justice may grant an interlocutory order appointing a receiver and manager where it appears to a judge to be just or convenient to do so.[20]

35. In determining 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 the secured creditor pursuant to its security.[21]

36. While the appointment of a receiver is generally considered an extraordinary equitable remedy, Courts do not regard the remedy as extraordinary where the relevant security document permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties.[22]

37. If the security held by the secured creditor seeking the appointment of a receiver provides for the appointment of a receiver, the issue is essentially whether it is preferable to have a court-appointed receiver rather than a privately appointed receiver.[23]

38. The appointment of a receiver is just and convenient in these circumstances for the following reasons:

[20] *Courts of Justice Act*, RSO 1990, c C.43, section 101.
[21] *Bank of Nova Scotia v Freure Village on Clair Creek*, 1996 CanLII 8258 (ON SC) at para 10.
[22] *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd*., 2013 ONSC 6866 (CanLII), at para 27; *Bank of Montreal v. Sherco Properties Inc*., 2013 ONSC 7023 (CanLII), at para 42.
[23] *Bank of Montreal v. Carnival National Leasing Limited*, 2011 ONSC 1007 (CanLII), at para 36.

(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;[24]

(b) The Security Documents grant BMO the right to appoint a receiver upon default;[25]

(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.[26]

B. The Regency AVO should be granted

Jurisdiction to approve a transaction through RVO

39. It is well established by the Ontario Court of Appeal in *Royal Bank of Canada v Soundair Corp*.[27] that in reviewing a proposed sale of assets by a receiver, the Court will consider the following principles:

(a) whether the receiver has 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 had been obtained; and

[24] Chun Affidavit at para 41, Tab 2 to the Application Record.
[25] Chun Affidavit at para 70, Tab 2 to the Application Record.
[26] Chun Affidavit at para 11, Tab 2 to the Application Record.
[27] *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA).

(d) whether there has been unfairness in the working out of the process.

40. The Regency APA and transaction contemplated thereunder should be approved because the *Soundair* principles have been met:

(a) **Sufficient effort was made to obtain the best price**: 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.[28] 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.[29]

(b) **The interests of all parties have been considered and served**. The transaction provides for the best possible outcome in the circumstances for all parties with an economic interest in these proceedings. Completion of the transaction in respect of the Regency Pharmacy will allow the Regency Pharmacy to continue as a going concern for the benefit of customers, suppliers, employees and other stakeholders.[30]

(c) **The sale process was run with integrity and there was no unfairness**. The sale process was robust. A virtual data room was made available for potential purchasers and provided comprehensive information on the business and the opportunity. There was engagement with interested parties including on-site visitations and

[28] Pre-Filing Report at para 67.
[29] Pre-Filing Report at para 67.
[30] Chun Affidavit at para 75, Tab 2 to the Application Record.

meetings with potential purchasers.[31] Considering the number of parties that were canvassed, the duration of the sale process, and the response of the market during the sale process, the process was fair and reasonable and there was no unfairness in conducting the sale process.[32]

41. For the foregoing reasons, the Applicant requests the approval of the Regency APA and the transaction contemplated thereunder.

42. The proposed Receiver recommends the approval of the Regency APA.

C. The Manning AVO should be granted

43. The Applicant seeks approval of the Manning SPA and the transaction contemplated thereby, which is structured as a reverse vesting order ("**RVO**") transaction. The Applicant also seeks other ancillary relief that is critical to the completion of 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.

Jurisdiction and Test: RVO in Receiverships

44. This Court has jurisdiction to grant an RVO in the context of a receivership proceeding pursuant to section 183(1)(c) of the BIA, which confers on the Court "such jurisdiction at law and in equity as will enable [it] to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act".[33]

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[31] Pre-Filing Report at paras 52-63.
[32] Pre-Filing Report at para 67.
[33] Section 183(1)(c), BIA.

45. While there are a number of case authorities discussing the circumstances in which RVOs may be issued in context of proceedings under the *Companies' Creditors Arrangement Act* (the "**CCAA**"), RVOs have been accepted as available tools in other insolvency proceedings, including in proposal proceedings and receiverships.[34]

46. The purpose of a receivership under the BIA is to "enhance and facilitate the preservation and realization of [a debtor's assets] for the benefit of creditors".[35]

47. The overarching framework for considering whether to approve a RVO was established by Justice McEwen in *Just Energy Group Inc. (Re)*:[36]

(a) first, the court is to consider whether the RVO is *prima facie* appropriate for use in the case at hand; and

(b) second, if a RVO is *prima facie* appropriate, the court should then consider whether the *Soundair* factors support the sale transaction generally.

48. While decided before *Just Energy*, the Court in *Harte Gold (Re)*[37] considered the question of when a RVO can be appropriate, and the decision is therefore a useful precedent for the first stage of the *Just Energy* analysis. In *Harte Gold*, Justice Penny articulated four non-exhaustive factors to provide guidance on the circumstances when a reverse vesting order can be appropriate:[38]

(a) why the reverse vesting order is necessary;

[34] See, for example, *Port Capital Development (EV) Inc. (Re)*, 2022 BCSC 1464, and *Peakhill Capital Inc. v Southview Gardens Limited Partnership*, 2023 BCSC 1476 (CanLII).
[35] *Hamilton Wentworth Credit Union Ltd. (Liquidator of) v Courtcliffe Park Ltd*, 1995 CanLII 7059 (ONSC) at para 18.
[36] *Re Just Energy Group Inc.*, et al., 2022 ONSC 6354 at paras 29-31.
[37] *Harte Gold Corp. (Re)*, 2022 ONSC 653 (CanLII).
[38] *Harte Gold Corp. (Re)*, 2022 ONSC 653 (CanLII) at para 38.

(b) whether the structure produces an economic result at least as favourable as any other viable alternative;

(c) whether any stakeholder is worse off under the reverse vesting order structure than under a viable alternative; and

(d) whether the consideration provided by the acquirer reflects the importance and value of the assets being preserved under the reverse vesting order structure.

It is prima facie appropriate to use an RVO in this case

49. This Court has previously approved the use of RVOs to facilitate transactions in the context of receivership proceedings. Recently, in *Royal Bank of Canada v Canwest Aerospace Inc.*[39] the Court held that an RVO was justified in circumstances where there were intangible business assets that were crucial to the sale, including in that case aviation certificates and contracts with foreign counterparties which could not be easily conveyed in an asset sale.[40]

50. It has been recognized that a principal benefit of the reverse vesting structure is the preservation of non-transferrable assets, such as licenses and regulatory approvals.[41]

51. A transaction involving a Pre-1954 charter pharmacy was recently approved by this Court in the receivership proceedings of *Pulse RX Inc. and Family Pharmacy Clinic Inc.*[42] In that case, the receiver sought and obtained approval of a transaction by way of RVO in respect of a Pre-1954 Charter pharmacy in circumstances similar to the instant case, where, among other things: the

[39] *Royal Bank of Canada v Canwest Aerospace Inc.*, 2024 BCSC 585 (CanLII).
[40] *Royal Bank of Canada v Canwest Aerospace Inc.*, 2024 BCSC 585 (CanLII) at paras 31-35.
[41] *Harte Gold Corp (Re)*, 2022 ONSC 653 at paras 70-72; *Quest University Canada (Re)*, 2020 BCSC 1883 at para 138; *Beleave Inc.*, *Re*, Endorsement dated September 18, 2020, Court File No. CV-20-00642097-00CL (ONSC [Commercial List]).
[42] *Pulse RX Inc. and Family Pharmacy Clinic Inc*, CV-21-00661434-00CL; Order of Justice Gilmore dated May 24, 2022.

Charter had significant value if commercialized, the Charter was not transferrable but highly marketable, and where the sale arose out of a robust sale process.[43]

52. The Harte Gold analysis illustrates that this particular case fits within the pattern of circumstances where a RVO is appropriate. A detailed description of the benefits of the proposed RVO transaction and why the RVO structure is appropriate is set out in the Pre-Filing Report at paragraphs 74 through 87. In summary:

(a) The reverse vesting structure will preserve the key non-transferrable asset of the Debtor's business, being the Charter;

(b) Without the Charter, the value of the Toronto Manning Drug Mart in the market place would be significantly lower;

(c) No stakeholder is worse off under the RVO structure than under a viable alternative; rather, the RVO transaction in this case will permit the completion of a value-maximizing, going concern sale that preserves supply, customer and employee relationships; and

(d) The purchase price was generated following a comprehensive pre-filing sale process, and represents the highest possible consideration that a potential acquirer was willing to pay. The consideration being paid reflects the importance and value of the Charter which is being preserved under the RVO structure.

53. It is also submitted that the transaction in respect of the Toronto Manning Drug Mart satisfies the test set out in *Soundair*, and ought to be approved for the following reasons:

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[43] *Pulse RX Inc. and Family Pharmacy Clinic Inc*, CV-21-00661434-00CL; Second Report of MNP Ltd. as court-appointed Receiver of Pulse RX Inc. and Family Pharmacy Clinic Inc dated May 17, 2022 at para 30 and Factum of MNP Ltd. dated May 21, 2022 at paras 24-26.

(a) The process leading up to the transaction was reasonable and included an extended period of marketing by both the Debtor and thereafter by MC2;

(b) The transaction is the best available option for the business of the Toronto Manning Drug Mart because it preserves the valuable Charter and will result in a going concern transaction that preserves relationships with suppliers, customers and employees;[44]

(c) The transaction will result in the repayment of a significant portion of the indebtedness owing to BMO and is far more beneficial to creditors than a bankruptcy and liquidation of the assets;[45]

(d) There is no suggestion that any creditor was ignored or overlooked; to the contrary, BMO has engaged with various stakeholders including landlords and other secured creditors prior to the commencement of this application;

(e) The purchase price under the Manning SPA is fair and reasonable and the proposed Receiver is of the view that it represents the best available consideration for the assets and business of the Toronto Manning Drug Mart; and

(f) A condition of the Manning SPA is that the assets be transferred to the Manning Purchaser through a receivership and pursuant to an RVO.

ResidualCo Should be Added as a Debtor

54. In order to consummate the proposed transaction, ResidualCo must become a debtor in these receivership proceedings. Doing so will allow the Manning Purchaser to acquire the Shares

[44] Chun Affidavit at para 75, Tab 2 to the Application Record.
[45] Chun Affidavit at para 33, Tab 2 to the Application Record; Pre-Filing Report at para 80.

free and clear of all Encumbrances (except for Permitted Encumbrances), while allowing the claims of the Debtor's creditors to continue against ResidualCo.

D. The Confidential Appendices should be Sealed

55. The Applicant is seeking an Order from the Court sealing Confidential Exhibits "1", "2", "3", "4" and "5" to the Chun Affidavit which consist 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. The Applicant is also seeking an Order from the Court sealing Confidential Appendices "1", "2" and "3" to the Pre-Filing Report (the "**Confidential Appendices**"), which, respectively consist of: the summary of the results of the sale process, the unredacted Regency APA, and the unredacted Manning SPA.

56. Redacted versions of the Confidential Appendices (with the exception of the sale process summary) are attached to the Pre-Filing Report and the only the redactions contained therein relate to the purchase price, the deposit and other key commercial terms under each transaction.

57. Pursuant to the *CJA*, the Court has the discretion to order that any document filed in a civil proceeding be treated as "confidential", sealed and not form part of the public record.

58. The Supreme Court of Canada ("**SCC**") in *Sherman Estate* recently refined the common law test for the granting of sealing orders in civil matters.[46] In its decision, the SCC reiterated that it is a fundamental element of Canadian democracy that court proceedings are open to the public.

59. The SCC established three core prerequisites in order for a Court to grant a sealing order:

(a) court openness poses a serious risk to an important public interest;

[46] *Sherman Estate v. Donovan*, 2021 SCC 25 at para 30

(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.[47]

60. It is respectfully submitted that the prerequisites in *Sherman Estate* have been satisfied. The release of purchase price information and other critical commercial terms prior to closing of each respective transaction may prejudice any future sale process that might have to be undertaken if the proposed transactions fail to close. Redacting such sensitive information is therefore in the public interest.

61. The proposed sealing order is temporally limited to the closing of the proposed transactions. Accordingly, the sealing order is proportional in the circumstances and the benefits of preserving the confidential information pending closing of each transaction outweigh any negative effects.

E. The WEPPA Declaration should be granted

62. GTL intends to administer an employee claims process under the *Wage Earner Protection Program Act*, SC 2005, c 47 ("**WEPPA**") for individuals currently employed by HOHS whose employment will be terminated prior to the closing of the transaction in respect of Toronto Manning Drug Mart (the "**Terminated Employees**").

[47] *Sherman Estate v. Donovan*, 2021 SCC 25 at para 38.

63. The Applicant is therefore seeking approval of a declaration (the "**WEPPA Declaration**") authorizing the Receiver to take all steps as may be necessary to uphold any and all obligations arising from the WEPPA including:

(a) working with the management of the Debtor and/or the Manning Purchaser to identify the Terminated Employees and to determine the amounts owed to Terminated Employees;

(b) providing Service Canada and Terminated Employees with information necessary to establish eligibility for payment pursuant to WEPPA; and

(c) administering the WEPPA claims process generally.

64. The Wage Earner Protection Plan ("**WEPP**") 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".[48]

65. In order for an individual to be eligible to receive a payment under WEPPA, section 5 of the WEPPA requires the following conditions to be satisfied:

(a) The individual's employment ended for a reason prescribed by regulation;

(b) the former employer is bankrupt or subject to a receivership; and

(c) the individual is owed eligible wages by the former employer.[49]

66. With respect to subsection 5(a) of the WEPPA, the *Wage Earner Protection Program Regulations* (the "**WEPP Regulations**") stipulate that the following reasons for termination of

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[48] WEPPA, section 4.
[49] WEPPA, section 5.

employment satisfy the condition in 5(a) of the WEPPA: (i) the individual resigned or retired; (ii) the individual's employment has terminated; or (iii) the term of the individual's employment has expired.[50]

67. For the purpose of section 5(b) of the WEPPA, an employer is subject to a receivership when any property of the employer is under possession or control of a receiver within the meaning of section 243(2) of the BIA.[51]

68. Finally, for the purpose of section 5(c) of the WEPPA, an individual must be owed "eligible wages" which include: (a) wages other than severance pay and termination that were earned during the prescribed time periods and (b)severance pay and termination pay that relate to employment during the prescribed time periods.[52]

69. A declaration in these 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 Terminated Employees will have vested in ResidualCo. The WEPPA declaration permits the proposed Receiver to assist with the administration of WEPPA notwithstanding the removal of HOHS as a respondent in the proposed receivership proceedings.

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[50] WEPP Regulations, section 3.
[51] BIA, section 243(1) and (2).
[52] WEPPA, section 2(1).

PART IV - ORDER REQUESTED

70. The Applicant respectfully seeks the orders at Tabs "3", "4" and "5" to the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of June, 2024.

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SCHEDULE “A”

LIST OF AUTHORITIES

1. *Bank of Nova Scotia v Freure Village on Clair Creek*, 1996 CanLII 8258 (ON SC)
2. *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd*., 2013 ONSC 6866 (CanLII)
3. *Bank of Montreal v. Sherco Properties Inc*., 2013 ONSC 7023 (CanLII)
4. *Bank of Montreal v. Carnival National Leasing Limited*, 2011 ONSC 1007 (CanLII)
5. *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727
6. *Port Capital Development (EV) Inc. (Re)*, 2022 BCSC 1464
7. *Peakhill Capital Inc. v Southview Gardens Limited Partnership*, 2023 BCSC 1476 (CanLII)
8. *Hamilton Wentworth Credit Union Ltd. (Liquidator of) v Courtcliffe Park Ltd*, 1995 CanLII 7059 (ONSC)
9. *Re Just Energy Group Inc.*, et al., 2022 ONSC 6354
10. *Harte Gold Corp. (Re)*, 2022 ONSC 653 (CanLII)
11. *Royal Bank of Canada v Canwest Aerospace Inc.*, 2024 BCSC 585 (CanLII)
12. *Quest University Canada (Re)*, 2020 BCSC 1883
13. *Beleave Inc.*, *Re*, Endorsement dated September 18, 2020, Court File No. CV-20-00642097-00CL (ONSC [Commercial List])
14. *Pulse RX Inc. and Family Pharmacy Clinic Inc*, CV-21-00661434-00CL; Order of Justice Gilmore dated May 24, 2022
15. *Sherman Estate v. Donovan*, 2021 SCC 25

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

Courts vested with jurisdiction

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;

(b) [Repealed, 2001, c. 4, s. 33]

(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

(d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;

(e) in the Province of Prince Edward Island, the Supreme Court of the Province;

(f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;

(g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and

(h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

Superior Court jurisdiction in the Province of Quebec

(1.1) In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.

Courts of appeal — common law provinces

(2) Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

Court of Appeal of the Province of Quebec

(2.1) In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with power and jurisdiction, according to its ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the Superior Court.

Supreme Court of Canada

(3) The Supreme Court of Canada has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.

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.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

Definition of *receiver*

(2) Subject to subsections (3) and (4), in this Part, ***receiver*** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — 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 — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of *receiver* — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition ***receiver*** in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of *disbursements*

(7) In subsection (6), ***disbursements*** does not include payments made in the operation of a business of the insolvent person or bankrupt.

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).

Drug and Pharmacies Regulation Act, R.S.O. 1990, c. H.4

Operation of pharmacies by corporation

142 (1) No corporation shall own or operate a pharmacy unless the majority of the directors of the corporation are pharmacists. R.S.O. 1990, c. H.4, s. 142 (1).

Same

(2) No corporation shall own or operate a pharmacy unless a majority of each class of shares of the corporation is owned by and registered in the name of pharmacists or in the name of health profession corporations each of which holds a valid certificate of authorization issued by the College. 2000, c. 42, Sched., s. 13; 2007, c. 10, Sched. L, s. 7.

Application of subs. (2)

(3) For the purposes of subsection (2), shares registered in the name of the personal representative of a deceased pharmacist shall, for a period not exceeding four years, be considered to be registered in the name of a pharmacist. R.S.O. 1990, c. H.4, s. 142 (3).

Idem

(4) Subsection (2) does not apply to any corporation operating a pharmacy on the 14th day of May, 1954. R.S.O. 1990, c. H.4, s. 142 (4).

Application of section

(5) This section does not apply to the operation of a pharmacy by a non-profit corporation having as its objects and providing health services by members of more than one health discipline. R.S.O. 1990, c. H.4, s. 142 (5).

***Wage Earner Protection Program Act*, SC 2005, c 47, s 1**

Interpretation
Definitions

2 (1) The following definitions apply in this Act.

eligible wages means

(a) wages other than termination pay and severance pay that were earned during the longer of the following periods:

(i) the six-month period ending on the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer,

(ii) the period beginning on the day that is six months before one of the following days and ending on the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer:

(A) the day on which a proposal is filed by or in respect of the employer under Division I of Part III of the *Bankruptcy and Insolvency Act* or, if a notice of intention to make a proposal is filed by or in respect of the employer under that Division, the day on which the notice of intention is filed,

(B) the day on which the most recent proceedings under the *Companies' Creditors Arrangement Act* are commenced, and

(iii) the period beginning on the day that is six months before one of the following days and ending on the day on which a court makes a determination under subsection 5(5):

(A) the day on which a proposal is filed by or in respect of the employer under Division I of Part III of the *Bankruptcy and Insolvency Act* or, if a notice of intention to make a proposal is filed by or in respect of the employer under that Division, the day on which the notice of intention is filed,

(B) the day on which the most recent proceedings under the *Companies' Creditors Arrangement Act* are commenced; and

(b) termination pay and severance pay that relate to employment that ended

(i) during the period referred to in paragraph (a), or

(ii) during the period beginning on the day after the day on which the period referred to in paragraph (a) ends and ending on the day on which the trustee is discharged or the receiver completes their duties, as the case may be. (*salaire admissible*)

Program Established

4 The Wage Earner Protection Program is established to provide for payments to individuals in respect of wages owed to them by employers who are insolvent.

Eligibility for Payments

Conditions of eligibility

5 (1) An individual is eligible to receive a payment if

(a) the individual's employment ended for a reason prescribed by regulation;

(b) one of the following applies:

(i) the former employer is bankrupt,

(ii) the former employer is subject to a receivership,

(iii) the former employer is the subject of a foreign proceeding that is recognized by a court under subsection 270(1) of the *Bankruptcy and Insolvency Act* and

(A) the court determines under subsection (2) that the foreign proceeding meets the criteria prescribed by regulation, and

(B) a trustee is appointed, or

(iv) the former employer is the subject of proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act* and a court determines under subsection (5) that the criteria prescribed by regulation are met; and

(c) the individual is owed eligible wages by the former employer.

(d) [Repealed, 2009, c. 2, s. 343]

Prescribed criteria — other proceedings

5(5) On application by any person, a court may, in proceedings under Division I of Part III of the Bankruptcy and Insolvency Act or under the Companies' Creditors Arrangement Act, determine that the former employer meets the criteria prescribed by regulation.

Wage Earner Protection Program Regulations, SOR/2008-222

Termination of Employment

3 An individual's employment has ended for the purposes of paragraph 5(a) of the Act if it has ended for any of the following reasons:

- (a) the individual resigned or retired;
- (b) the individual's employment has terminated; or
- (c) the term of the individual's employment has expired.

BANK OF MONTREAL and **HOHS DRUGS LIMITED et al.** Court File No. CV-24-00721374-00CL

Applicant Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding Commenced at
Toronto

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(**Returnable June 11, 2024**)

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