Court File No.: CV-20-00648456-00CL

B E T W E E N:

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

ALTERNA SAVINGS AND CREDIT UNION LIMITED

Applicant

– and –

1140402 ONTARIO INC. O/A EMERALD LODGE

Respondent

IN THE MATTER OF AN APPLICATION PURSUANT TO 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 26, 2021

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FACTUM OF THE RECEIVER

PART I: INTRODUCTION

1. On September 25, 2020, pursuant to an order (the "**Receivership Order**") of the Ontario Superior Court of Justice (Commercial List) (the "**Court**"), Grant Thornton Limited ("**GTL**") was appointed receiver (in such capacity, the "**Receiver**") of the assets, interests, and undertakings of 1140402 Ontario Inc. o/a Emerald Lodge (the "**Debtor**" or "**Emerald Lodge**").

2. Emerald Lodge is the registered owner of certain real property located at 83-85 Emerald Street South, Hamilton, Ontario (the "**Property**"). Prior to the commencement of these proceedings, the Debtor operated a residential care facility which offered personal care and assisted living for adults, including people with disabilities and those with limited incomes (the "**Home**"). Due to a number of health and safety issues identified by the Receiver in the weeks following its appointment, in consultation with the City of Hamilton (the "**City**"), all residents

were evacuated on October 23, 2020. Since that time, the Property has remained vacant and the Home is no longer operational.

3. On November 27, 2020 the Court issued an order (the "**Sale Process Order**"), among other things, authorizing the Receiver to conduct a broad and flexible sale process (the "**Sale Process**") for the marketing of the Property. The sale process is described in the First Report of the Receiver dated November 20, 2020 (the "**First Report**"). Since the commencement of the Sale Process, and in accordance with the Sale Process Order, the Receiver has canvassed the market for the Property, and these efforts have resulted in the agreement of purchase and sale between the Receiver, as vendor and Realty Holdings Group Ltd. ("**RHG**"), in trust for 83 Emerald Inc. as purchaser (the "**RHG APS**").

4. The RHG APS is fair and reasonable in the circumstances and presents the best option available for the sale of the Property. Should the RHG APS be approved by the Court and close in accordance with its terms, the Receiver will have fulfilled its mandate in the within proceedings, subject to completing certain administrative and statutorily required tasks, as set out in the Second Report of the Receiver dated March 22, 2021 (the "**Second Report**").

5. This factum is filed in support of a motion by the Receiver for, among other things:

   (a) an order (the "**Approval and Vesting Order**"), among other things, approving the RHG APS and, upon and conditional upon closing, vesting the Debtor's right, title and interest in and to the Property to 83 Emerald Inc. (the "**Purchaser**") free and clear of any encumbrances; and

   (b) an order (the "**Receivership Termination Order**"), among other things:

(i) abridging the time for service and filing of this notice of motion and the motion record and dispensing with service on any person other than those served;

(ii) sealing the purchase price for the RHG APS, along with the confidential appendices to the Second Report;

(iii) approving the activities of the Receiver as set out in the Second Report;

(iv) approving the professional fees incurred by the Receiver and its legal counsel as described in the affidavits of Rob Stelzer and Raj Sahni appended to the Second Report (collectively, the "**Fee Affidavits**"), and including the estimated fees and disbursements of the Receiver and its legal counsel to close the RHG APS, and otherwise complete these proceedings; and

(v) upon the filing of the Discharge Certificate (as defined in the Receivership Termination Order), discharging GTL as Receiver of the Debtor, and releasing GTL from any and all liability arising in connection with its acts or omissions in its capacity as Receiver.

PART II: FACTS

6. The facts and information relating to the Approval and Vesting Order and the Receivership Termination Order are set out in the Second Report. The First Report contains additional background on these proceedings and relevant stakeholders. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Second Report.

A. Background on the Receivership Proceedings

7. Alterna Savings and Credit Union Limited ("**Alterna**"), the applicant in these proceedings and senior secured creditor of the Debtor, holds a mortgage on the Property (the "**Alterna Mortgage**").[1] As of the date of the Second Report, the Debtor is indebted to Alterna in the amount of $2,658,368.91.[2] KLN Holdings Inc. ("**KLN**") holds a second mortgage on the Property (the "**KLN Mortgage**") and is owed $468,602.74 by the Debtor as at October 9, 2020.[3] A charge in favour of the Alterna Mortgage was registered on title to the Property on October 15, 2019 as Instrument No. WE1387262, and a charge in favour of the KLN Mortgage was registered on title to the Property on February 27, 2020 as Instrument No. WE1416590.[4]

8. The majority of the Debtor's revenue was generated pursuant to a subsidy agreement (the "**Subsidy Agreement**") with the City in respect of the Home.[5] Following its appointment, the Receiver asked Stefanie Martino ("**Martino**"), the former president and sole officer and director of the Debtor, to continue day to day operational control of the Home.[6]

9. Due to a number of health and safety issues identified by the Receiver in the weeks following its appointment, in consultation with the City, all residents were evacuated from the Home on October 23, 2020. Since that time, the Home has remained vacant and the Home is no longer operational.[7]

[1] First Report of the Receiver Grant Thornton Limited dated November 20, 2020, at para 9 [First Report].
[2] Second Report of the Receiver Grant Thornton Limited dated March 22, 2021, at para 2 [Second Report].
[3] First Report, *supra* note 1 at para 11.
[4] Second Report, *supra* note 2 at para 29.
[5] First Report, *supra* note 1 at para 7.
[6] *Ibid*, at para 13.
[7] *Ibid*, at para 23.

B. The Sale Process

10. In order to maximize the value of the Property, the Receiver proposed a broad and flexible Sale Process, which was approved by the Court pursuant to the Sale Process Order.[8] Recognizing that there is a wide variety of potential end uses for the Property, the Sale Process was developed to afford the Receiver with broad discretion to pursue a value maximizing transaction for the sale of the Property.[9] The Sale Process did not impose any timeline on the Receiver to achieve this objective, and did not obligate the Receiver to undertake any specific marketing initiatives, provided that the Receiver's efforts were focused on maximizing the value for the Property.

11. As set out in the First Report, even prior to the issuance of the Sale Process Order, the Receiver had been contacted by several parties who had expressed an interest in the Property, and engaged in discussions with experienced operators of facilities similar to the Home. The Receiver was also provided with an appraisal from Colliers International Realty Advisors Inc. (the "**Colliers Appraisal**") which had been prepared for Alterna and is included at Confidential Appendix 2 to the Second Report.[10] Further, the Receiver received proposals from commercial real estate brokers for the listing of the Property in order to understand the potential benefits and costs of such marketing efforts.[11]

12. Following the approval of the Sale Process, the Receiver continued to engage in discussions with the interested parties described in the First Report. In total, the Receiver engaged in discussions with 12 parties about purchasing the Property.[12] Ultimately, it was determined that none of these expressions of interest were viable or value maximizing. The Receiver reached this

[8] *Ibid*, at paras 25-34.
[9] *Ibid*, at paras 25-34.
[10] Second Report, *supra* note 2 at para 16.
[11] *Ibid* at para 13.
[12] *Ibid* at para 14.

determination primarily because the proposed purchase prices were either too low, or the potential transactions were conditional upon entering into a new subsidy arrangement with the City, which the City had indicated was not possible.[13]

13. In late November 2020, the Receiver was contacted by RHG, a property developer that is active in Hamilton and has experience in developing properties similar to the Property.[14] Through preliminary discussions with RHG, the Receiver learned that RHG had no interest in pursuing a new subsidy arrangement with the City.[15] It also learned that RHG was willing to offer a purchase price that was significantly higher than the Property value set out in the Colliers Appraisal.[16] The Receiver notes that the purchase price is also significantly higher than the estimates of value provided by the two brokers which it had asked to provide listing proposals, Cushman & Wakefield ("**Cushman**") and CBRE Limited ("**CBRE**").[17] For these reasons, the Receiver believes that RHG presented the best opportunity to maximize the value of the Property.

14. In reaching this determination, the Receiver also considered the costs of continuing to hold and maintain the Property and related incremental commission costs that would result from the formal engagement of a commercial real estate broker, all of which would have the effect of eroding the net benefit to the Debtor's stakeholders.[18]

15. In summary, the RHG APS:

[13] *Ibid*, at para 14.
[14] *Ibid*, at para 15.
[15] *Ibid*, at para 15.
[16] *Ibid*, at para 16.
[17] *Ibid*, at para 16.
[18] *Ibid*, at para 16.

(a) is conditional upon the approval of the Court pursuant to the form of approval and vesting order included in the Receiver's motion record, but is otherwise a firm and binding purchase and sale agreement;

(b) provides for full satisfaction of the purchase price upon closing, and no deposit has been provided;

(c) contemplates the purchase and sale of the Property on an "as-is, where-is" basis, with no representations;

(d) contains additional provisions typical to the sale of real property by a court-appointed receiver, including provisions negating the Receiver's liability in respect of the sale of the Property; and

(e) is supported by Alterna.[19]

Should the Court approve the RHG APS, it is anticipated that the transaction will close expeditiously.[20]

16. The Receiver understands that financing for the RHG APS transaction will be provided by Alterna, and that as a result, no cash payment is anticipated at closing.[21] The purchase price provided by the RHG APS is not sufficient to satisfy Alterna's senior secured debt, and, accordingly, will not result in a distribution to the Debtor's subordinated secured creditor, KLN, nor any other of the Debtor's creditors.[22]

[19] *Ibid*, at paras 18-20.
[20] *Ibid*, at para 18.
[21] *Ibid*, at para 19.
[22] *Ibid*, at para 22.

C. The Canada Revenue Agency Subordinated Claims

17. As was noted in the First Report, the Receiver understands that source deductions totalling totaling $91,279.10 relating to the period from February 2020 to September 2020 (the "**Source Deduction Accrual Period**"), which were deducted but not remitted by the Debtor (the "**Source Deductions**"), are owing to the Canada Revenue Agency ("**CRA**").[23] As discussed above, the Alterna Mortgage was registered prior to the Debtor's failure to remit the source deductions.

18. The Receiver has taken several steps to ascertain exactly how much is owing to the CRA. First, it requested the CRA perform a payroll audit in person, however, due to the COVID-19 pandemic, the CRA was unable to accommodate this request.[24] The Receiver attempted to upload the payroll documents pertaining to the audit period on the Debtor's online business account, but was been unable to complete this as it has been unable to obtain necessary the business account credentials from Martino.[25] After the Receiver followed up several times, the CRA eventually agreed that the Receiver could provide paper payroll records to the CRA.[26] The Receiver faxed the payroll records to the CRA on March 9, 2021 and followed up again on March 12, 2021.[27] The CRA has not yet reviewed the records provided by the Receiver and, therefore, has not provided its assessment of the payroll amounts owing by Emerald Lodge.[28]

19. In any event, and as discussed further below, the CRA's claims in respect of Source Deductions are subordinate to Alterna's mortgage interest, and, accordingly, there will be no recovery in respect of the Source Deduction claims.

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[23] First Report, *supra* note 1 at paras 46-47, Second Report, *ibid* at para 25.
[24] Second Report, *ibid* at para 26.
[25] *Ibid*, at para 26.
[26] *Ibid*, at para 27.
[27] *Ibid*, at para 27.
[28] *Ibid*, at para 27.

D. The Approval and Vesting Order

20. As discussed, the RHG APS represents the best offer obtained through the Sale Process conducted by the Receiver.

21. Subject to the Court's approval, the proposed Approval and Vesting Order will approve the RHG APS, and, upon closing, vest title to the Property to the Purchaser free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise.

E. The Receivership Termination Order

22. The Second Report describes the activities of the Receiver since the First Report. These activities have included, among other things, undertaking the Sale Process, negotiating and executing the RHG APS, visiting the Property regularly to ensure its security, and conducting various administrative duties relating to the Home and its employees, including assisting with administration of employee WEPP claims, finalizing the Debtor's 2020 tax documents, and administering the ongoing receipts and disbursements of the Debtor in respect of the Property, all as set out in more detail in the Second Report.[29]

23. The anticipated remaining activities that need to be completed prior to the finalization of the Receivership (collectively, the "**Remaining Duties**") are as follows:

[29] *Ibid*, at para 12.

(a) completing the RHG APS transaction;

(b) preparing and submitting the final statement of account and report of the Receiver, pursuant to subsection 246(3) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("**BIA**");

(c) paying the Final Fees to the professionals entitled to them, subject to approval of the Court;

(d) paying any residual balance to Alterna provided that the total payable is less than or equal to the total amount of Alterna's indebtedness; and

(e) upon the completion of the Remaining Duties, the Receiver will file the Discharge Certificate in the form attached to the draft Receivership Termination Order.[30]

24. Once the Receiver has completed the Remaining Duties and filed the Discharge Certificate, the Receiver will have fulfilled its mandate as contemplated by the Receivership Order and these proceedings will be completed.[31]

25. The Receivership Termination Order provides for, among other things: (i) the approval of the Receiver's activities as set out in the Second Report, (ii) the sealing of the purchase price for the RHG APS and the confidential appendices to the Second Report, and (iii) the approval of the professional fees incurred by the Receiver and its legal counsel as described in Fee Affidavits. Further, upon the filing of Discharge Certificate, the Receivership Termination Order would discharge GTL as Receiver of the Debtor, and, subject to gross negligence or wilful misconduct

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[30] *Ibid*, at para 45.
[31] *Ibid*, at para 46.

on the part of the Receiver, release and discharge GTL from any and liability relating to matters that were raised, or could have been raised, throughout the Receivership Proceedings.

PART III: ISSUES

26. The issues to be determined on this motion are:

(a) Should this Court grant the Approval and Vesting Order?

(b) Should this Court grant the Receivership Termination Order?

(c) Should this Court approve the sealing of the purchase price to the RHG APS and the confidential appendices to the Second Report?

PART IV: LAW & ARGUMENT

A. The Approval and Vesting Order

1. The RHG APS Should be Approved

27. Section 100 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended, authorizes this Court to grant an order vesting "in any person an interest in real or personal property that the Court has authority to order be conveyed".[32] Similarly, subsection 243(1) of the BIA vests this Court with jurisdiction to "grant a vesting order vesting property in a purchaser".[33]

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[32] *Courts of Justice Act*, RSO 1990, c. C.43 s 100 [*CJA*]; *Elleway Acquisitions Limited v 4358376 Canada Inc*, 2013 ONSC 7009 at para 30 [*Elleway*].
[33] *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc*, 2019 ONCA 508 at para 87 [*Third Eye*]; *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 s 243(1).

28. The principles to be applied when determining whether to approve a sale transaction are well known to this Court and were articulated by the Ontario Court of Appeal in *Royal Bank of Canada v Soundair Corp*. ("***Soundair***"):

(a) whether a sufficient effort was made to obtain the best price and to not act improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which the party obtained offers; and

(d) whether the working out of the process was unfair.[34]

29. In this decision, the Ontario Court of Appeal also emphasized that the court "should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process".[35]

30. In assessing these principles, courts have recognized that the duty of the Receiver is not to obtain the best price, but to do everything reasonably possible in the circumstances to obtain the best price.[36] A Receiver must balance the need to move quickly in a sale process with ensuring that the best value for the subject assets is obtained, and to this end, this Court has recognized that a quick sale process may be required in order to optimize the prospects of securing the best price for the assets.[37]

[34] *Royal Bank of Canada v Soundair Corp*, [1991] 46 OAC 321 at para 16 [*Soundair*]; *Elleway*, *supra* note 32 at para 31; *Home Trust Co v 2122775 Ontario Inc*, 2014 ONSC 1039 at para 11; *Romspen Investment Corp v 6176666 Canada Ltée*, 2012 ONSC 1727 at para 18 [*Romspen*].
[35] *Soundair*, *ibid* at para 15.
[36] *Skyepharma PLC v Hyal Pharmaceutical Corp*, 12 CBR (4th) 87 at para 4.
[37] *CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750 at para 14.

31. The proposed RHG APS satisfies the *Soundair* principles given that:

(a) the broad and flexible Sale Process was approved by the Court and was conducted by the Receiver in accordance with the Sale Process Order. The Sale Process was just, and provided for a fair and transparent canvassing of the market for the Property over a reasonable amount of time;

(b) the purchase price contemplated by the RHG APS is significantly higher than the appraised value of the Property per the Colliers Appraisal, and the estimates provided by CBRE and Cushman;

(c) notwithstanding the Receiver's discussions with 12 parties, all expressions of interest for the Property were for a price that the Receiver deemed to be insufficient, were lower than the consideration provided by the RHG APS, and/or were conditional upon entering into a new subsidy arrangement with the City, which was not an option;

(d) extending the Sale Process and retaining a Potential Broker would result in additional costs with no certainty that a better offer could ultimately be obtained;

(e) the Debtor's senior secured lender, Alterna is supportive of the RHG APS, and its secondary secured lender, KLN has been kept apprised of the Sale Process, including the RHG APS and has not objected as of the date of the Second Report; and

(f) the Receiver believes that the approval of the RHG APS is the best interests of Emerald Lodge and all of its stakeholders.[38]

2. The Court has Jurisdiction to Grant the Approval and Vesting Order

32. In *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.* ("***Third Eye***"), the Ontario Court of Appeal confirmed that a court's jurisdiction under subsection 243(1) of the BIA to authorize a receiver to "take any other action that the court considers advisable" includes the authority to grant a vesting order vesting property in a purchaser free and clear of encumbrances and extinguishing liabilities.[39]

33. In granting approval and vesting orders, courts have made clear that the recommendation of the Court-appointed receiver in respect of the proposed sale transaction should only be ignored in exceptional circumstances.[40]

3. The CRA's Claims are Subordinate to the Alterna Mortgage

34. The CRA's priority claim in respect of the Source Deductions arises pursuant to section 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (the "**ITA**"), which grants the CRA a deemed trust ranking in priority to any "security interest" in respect of employee source deductions and other specified amounts.[41]

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[38] Second Report, *supra* note 2 at para 20.
[39] *Third Eye*, *supra* note 33 at para 87.
[40] *Soundair*, *supra* note 34 at para 58; *Romspen*, *supra* note 34 at para 18.
[41] *Income Tax Act*, RSC 1985, c 1 (5th Supp) s 227(4) [*ITA*].

35. However, Section 227(4.2) of the ITA states a "security interest" for the purposes of this section does not include a "prescribed security interest", as defined under Section 2201 of the *Income Tax Regulations,* C.R.C., c. 945, as amended (the "**ITR**"), which provides:

> For the purposes of subsection 227(4) of the [ITA], prescribed security interest, in relation to an amount deemed by subsection 227(4) of the [ITA] to be held in trust by a person, means that part of a mortgage securing the performance of an obligation of the person, that encumbers land or a building, where the mortgage is registered pursuant to the appropriate land registration system before the time the amount is deemed to be held in trust by the person.[42]

36. In other words, a prior-registered mortgage is a "prescribed security interest" that ranks in priority to the CRA's deemed trust under section 227(4). While this interpretation is readily discerned from the plain language of the ITA and ITR, the analysis has recently been confirmed by the Federal Court of Appeal, in assessing competing priorities between a mortgage interest and the CRA's deemed trust claim arising under section 222 of the *Excise Tax Act*, RSC 1985, c E-15 (which is statutorily analogous to a claim under ITA s.227(4)): "Generally a mortgage will be a "prescribed security interest" in situations where a lender registers a mortgage on a debtor's real property before a deemed trust arises".[43]

37. As indicated, Alterna's mortgage was registered on or about October 15, 2019, prior to the Source Deduction Accrual Period. Accordingly, Alterna's mortgage is a "prescribed security interest" for the purposes of ITA section 227(4) ranking in priority to the CRA's source deduction claim.

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[42] *ITA* s. 227(4.2), *Income Tax Regulations,* CRC, c 945 s. 2201.
[43] *Toronto-Dominion Bank v Canada*, 2020 FCA 80 at para 47.

B. The Receivership Termination Order

1. The sealing order should be granted

38. The Receiver is requesting the sealing of the purchase price of the RHG APS, as well as the confidential appendices to the Second Report.

39. In *Sierra Club of Canada v Canada (Minister of Finance),* the Supreme Court of Canada clarified that courts should exercise their discretion to grant sealing orders where the order is necessary to prevent a serious risk to an important interest, including a commercial interest; and the salutary effects of the order outweigh its deleterious effects.[44]

40. Sealing orders are regularly granted in receivership proceedings, and courts have recognized that the disclosure of highly sensitive commercial information, including purchase prices, can be "harmful to stakeholders by undermining the integrity of the sale process".[45] The proposed sealing order has been narrowly tailored to redact the purchase price and confidential appendices in order to protect the integrity of the Sale Process in the event that the RHG APS does not close, and a redacted agreement of purchase and sale has been made publicly available. This court has previously held that such narrowly tailored sealing orders greatly outweigh any deleterious effects.[46] Therefore, the salutary effects of sealing order requested outweigh the deleterious effects, and the sealing order should be granted.

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[44] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53.
[45] *Elleway*, *supra* note 32 at para 48.
[46] *Ibid* at para 48.

2. The Receiver's activities should be approved

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

3. The fees and disbursements of the Receiver and its counsel are fair and reasonable

42. The Receiver is seeking approval of the professional fees incurred by it and its legal counsel as described in the Fee Affidavits, including the estimated fees of the Receiver and its legal counsel in connection with the completion of these proceedings. The standard to be applied is whether the compensation sought is "fair and reasonable", with an emphasis on the value provided and what was accomplished.[47] Given the complexity of this insolvency matter, the fees of the Receiver and the fees of its counsel are within an appropriate range for insolvency services of this nature rendered by other firms in the City of Toronto.

4. The Receiver should be discharged once the Remaining Duties are completed

43. Once the Receiver has completed the Remaining Duties, it will have completed its mandate. The Receiver therefore respectfully submits that the Receivership Proceedings should be terminated and the Receiver should be discharged and released following the filing of the Discharge Certificate with the Court, certifying that it has completed the Remaining Duties.

[47] *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 at paras 44-45.

Obtaining this relief at this time promotes the efficiency of these proceedings and will avoid the need for a further attendance on this matter, barring unforeseen circumstances.

44. The proposed Receivership Termination Order provides that GTL and its counsel will be released and discharged from any and all liability they have, or will have later, by reason of, or in any way arising out of, the acts or omissions of GTL acting as the Receiver, save and except for any gross negligence or willful misconduct upon the filing of the Discharge Certificate. Additionally, the proposed Receivership Termination Order contemplates that, following the filing of the Discharge Certificate, GTL shall have no further duties, obligations or responsibilities other than the authority to complete or address any matters that may be ancillary or incidental to the receivership following the termination of the Receivership Proceedings.

45. The Receiver has diligently engaged in its duties throughout the Receivership Proceedings. Absent any evidence of improper or negligent conduct on the part of the Receiver, the release sought by a Receiver should be issued by the court.[48]

PART V: RELIEF REQUESTED

46. The Receiver requests that this Court grant the proposed form of the Approval and Vesting Order and the Receivership Termination Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

BENNETT JONES LLP

March 26, 2021

[48] *Pinnacle v Kraus*, 2012 ONSC 6376 at para 47.

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. *Bank of Nova Scotia v Diemer*, 2014 ONCA 851
2. *CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750
3. *Elleway Acquisitions Limited v 4358376 Canada Inc*, 2013 ONSC 7009
4. *Home Trust Co v 2122775 Ontario Inc*, 2014 ONSC 1039
5. *Pinnacle v Kraus*, 2012 ONSC 6376
6. *Romspen Investment Corp v 6176666 Canada Ltée*, 2012 ONSC 1727
7. *Royal Bank of Canada v Soundair Corp*, [1991] 46 OAC 321
8. *Sierra Club of Canada v Canada (Minister of Finance)* [2002] 2 S.C.R. 522 (SCC)
9. *Skyepharma PLC v Hyal Pharmaceutical Corp*, 12 CBR (4th) 87
10. *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc*, 2019 ONCA 508
11. *Toronto-Dominion Bank v Canada*, 2020 FCA 80

SCHEDULE B – STATUTES RELIED ON

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

Section 243

Court may appoint receiver
(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.

Section 246

Receiver's statement
246 (1) A receiver shall, forthwith after taking possession or control, whichever occurs first, of property of an insolvent person or a bankrupt, prepare a statement containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Receiver's interim reports
(2) A receiver shall, in accordance with the General Rules, prepare further interim reports relating to the receivership, and shall provide copies thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Receiver's final report and statement of accounts
(3) A receiver shall, forthwith after completion of duties as receiver, prepare a final report and a statement of accounts, in the prescribed form and containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

***Courts of Justice Act*, R.S.O. 1990, c. C-43**

Vesting orders
100 A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed. R.S.O. 1990, c. C.43, s. 100.

***Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)**

Section 227(4)

Trust for moneys deducted
(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

Extension of trust
(4.1) Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

Meaning of security interest
(4.2) For the purposes of subsections 227(4) and 227(4.1), a security interest does not include a prescribed security interest.

Income Tax Regulations, **C.R.C., c. 945**

Section 2201

2201(1) For the purpose of subsection 227(4.2) of the Act, prescribed security interest, in relation to an amount deemed by subsection 227(4) of the Act to be held in trust by a person, means that part of a mortgage securing the performance of an obligation of the person, that encumbers land or a building, where the mortgage is registered pursuant to the appropriate land registration system before the time the amount is deemed to be held in trust by the person.

(2) For the purpose of subsection (1), where, at any time after 1999, the person referred to in subsection (1) fails to pay an amount deemed by subsection 227(4) of the Act to be held in trust by the person, as required under the Act, the amount of the prescribed security interest referred to in subsection (1) is deemed not to exceed the amount by which the amount, at that time, of the obligation outstanding secured by the mortgage exceeds the total of

> (a) all amounts each of which is the value determined at the time of the failure, having regard to all the circumstances including the existence of any deemed trust for the benefit of Her Majesty pursuant to subsection 227(4) of the Act, of all the rights of the secured creditor securing the obligation, whether granted by the person or not, including guarantees or rights of set-off but not including the mortgage referred to in subsection (1), and
>
> (b) all amounts applied after the time of the failure on account of the obligation,

so long as any amount deemed under any enactment administered by the Minister, other than the Excise Tax Act, to be held in trust by the person, remains unpaid.

(3) For greater certainty, a prescribed security interest includes the amount of insurance or expropriation proceeds relating to land or a building that is the subject of a registered mortgage interest, adjusted after 1999 in accordance with subsection (2), but does not include a lien, a priority or any other security interest created by statute, an assignment or hypothec of rents or leases, or a mortgage interest in any equipment or fixtures that a mortgagee or any other person has the right absolutely or conditionally to remove or dispose of separately from the land or building.

***Excise Tax Act*, RSC 1985, c E-15**

Trust for amounts collected
222(1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

Amounts collected before bankruptcy
(1.1) Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the Bankruptcy and Insolvency Act), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

Withdrawal from trust
(2) A person who holds tax or amounts in trust by reason of subsection (1) may withdraw from the aggregate of the moneys so held in trust

> (a) the amount of any input tax credit claimed by the person in a return under this Division filed by the person in respect of a reporting period of the person, and
>
> (b) any amount that may be deducted by the person in determining the net tax of the person for a reporting period of the person,

as and when the return under this Division for the reporting period in which the input tax credit is claimed or the deduction is made is filed with the Minister.

Extension of trust
(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the Bankruptcy and Insolvency Act), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

> (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Meaning of security interest

(4) For the purposes of subsections (1) and (3), a security interest does not include a prescribed security interest.

IN THE MATTER OF AN APPLICATION PURSUANT TO 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
ALTERNA SAVINGS AND CREDIT UNION LIMITED - and **- 1140402 ONTARIO INC. O/A EMERALD LODGE**

Court File No.: CV-20-00648456-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced in Toronto

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