

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

**BETWEEN:**

**ROYAL BANK OF CANADA**

Applicant

**- and -**

**BACK 40 PICTURES INC.**

Respondent

**SECOND REPORT OF DELOITTE RESTRUCTURING INC.**

**IN ITS CAPACITY AS RECEIVER OF**

**BACK 40 PICTURES INC.**

**DATED JUNE 3, 2022**

**TABLE OF CONTENTS**

INTRODUCTION AND PURPOSE OF THIS REPORT ..... 3

TERMS OF REFERENCE ..... 5

BACKGROUND ..... 6

ACTIVITIES OF THE RECEIVER..... 7

STATUS OF TAX CREDIT APPLICATIONS..... 8

HST AUDIT ..... 9

TELEFILM FUNDING ..... 11

RECEIVER’S BORROWINGS ..... 12

SECURED CREDITORS ..... 12

STATEMENT OF RECEIPTS AND DISBURSEMENTS..... 15

FEES AND DISBURSEMENTS OF THE RECEIVER AND ITS LEGAL COUNSEL ..... 15

RECEIVER’S RECOMMENDATION TO THE COURT ..... 16

**APPENDICES**

<b>APPENDIX “A”</b>	<b>Appointment Order dated July 9, 2020</b>
<b>APPENDIX “B”</b>	<b>First Report of the Receiver dated March 31, 2021</b>
<b>APPENDIX “C”</b>	<b>First Amending Order dated April 15, 2021</b>
<b>APPENDIX “D”</b>	<b>Second Amending Order dated March 1, 2022</b>
<b>APPENDIX “E”</b>	<b>Corporation Profile Report dated May 31, 2022</b>
<b>APPENDIX “F”</b>	<b>Notice of Assessment dated February 2, 2022</b>
<b>APPENDIX “G”</b>	<b>Proposal dated May 19, 2022</b>
<b>APPENDIX “H”</b>	<b>Proposal Response dated May 26, 2022</b>
<b>APPENDIX “I”</b>	<b>Telefilm Agreement dated May 2, 2018 and amended August 17, 2018</b>
<b>APPENDIX “J”</b>	<b>Intercreditor Agreement dated August 13, 2018</b>
<b>APPENDIX “K”</b>	<b>Aird email to ACTRA dated May 24, 2022</b>
<b>APPENDIX “L”</b>	<b>PPSA Report dated May 30, 2022</b>
<b>APPENDIX “M”</b>	<b>Interim Statement of Receipts and Disbursements dated May 30, 2022</b>
<b>APPENDIX “N”</b>	<b>Affidavit of Richard Williams sworn June 2, 2022</b>
<b>APPENDIX “O”</b>	<b>Affidavit of Tamie Dolny sworn June 2, 2022</b>

## INTRODUCTION AND PURPOSE OF THIS REPORT

1. On July 9, 2020 (the “**Date of Appointment**”), Royal Bank of Canada (“**RBC**”) made an application (the “**Application**”) to the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) for an order appointing Deloitte Restructuring Inc. (“**Deloitte**”) as receiver of the books and records (the “**Records**”) used in relation to the business carried on by Back 40 Pictures Inc. (“**Back 40**” or the “**Company**”), including but not limited to, the film production known as Rabid (the “**Production**”) and ascertaining all amounts owing to the Company by Canada Revenue Agency (“**CRA**”) and other governmental authorities (collectively, the “**Property**”).
2. Pursuant to the order of the Honourable Justice McEwen dated July 9, 2020 (the “**Appointment Order**”), Deloitte was appointed as receiver (in such capacity, the “**Receiver**”) of the Records. A copy of the Appointment Order is attached hereto as **Appendix “A”**.
3. On April 15, 2021, the Receiver made a motion for an order, *inter alia*, approving the Receiver’s activities since the Date of Appointment, approving the fees and disbursements of the Receiver and its counsel, and amending the Appointment Order to increase the Receiver’s borrowing powers. The Receiver filed its first report dated March 31, 2021 (the “**First Report**”) in connection with the Receiver’s motion. A copy of the First Report, without appendices, is attached hereto as **Appendix “B”**. The First Report contains an overview of the film tax credit application process and a discussion of the Receiver’s activities between the Date of Appointment and the date of the First Report.

4. Pursuant to the order of the Honourable Justice Pattillo dated April 15, 2021 (the “**First Amending Order**”), the relief sought by the Receiver was granted. A copy of the First Amending Order is attached hereto as **Appendix “C”**.
5. On March 1, 2022, RBC made an application for an order amending the Appointment Order to add the following powers of the Receiver:
  - a) to complete and file outstanding Harmonized Sales Tax (“**HST**”) returns on behalf of the Company for all periods prior to May 31, 2022;
  - b) to direct Canada Revenue Agency, on behalf of the Company, to deliver any and all tax credit refund cheques to the Receiver; and
  - c) to deposit any tax credit or refund cheques in respect of the Company into the Post Receivership Accounts, as defined in the Second Amending Order (itself defined below).
6. Pursuant to the Order of the Honourable Justice Conway dated March 1, 2022 (the “**Second Amending Order**”), the relief sought by RBC was granted. A copy of the Second Amending Order is attached hereto as **Appendix “D”**.
7. The purpose of this second report of the Receiver (the “**Second Report**”) is to provide information to the Court with respect to the Receiver’s motion for orders substantially in the form attached to the motion record seeking:
  - a) Approval of the activities of the Receiver since the date of the First Report, as outlined in the Second Report;

- b) Approval of the Receiver's proposed course of action with respect to a proposed adjustment of HST tax returns to finalize the quantum of the film tax credit refund claimed by the Company;
- c) Approval of a distribution of funds on hand to RBC, after payment of professional fees and other costs as contemplated herein;
- d) Approval of the fees and disbursements of the Receiver and its legal counsel, including an accrual of fees to discharge; and
- e) The discharge of Deloitte Restructuring Inc. as receiver of Back 40 Pictures Inc.

#### **TERMS OF REFERENCE**

8. In preparing this Second Report, Deloitte has been provided with, and has relied upon, unaudited, draft and/or internal financial information, the Company's books and records, discussions with the Company's management, shareholders and employees, and information from third-party sources (collectively, the "**Information**"). Except as otherwise described in this Second Report:
- a) Deloitte has reviewed the Information for reasonableness, internal consistency and use in the context in which it was provided. However, Deloitte has not audited or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Canadian Auditing Standards ("**CAS**") pursuant to the *Chartered Professional Accountants Canada Handbook*, and accordingly the Receiver expresses no opinion or other form of assurance contemplated under CAS in respect of the Information.

- b) Deloitte has filed this Second Report solely for the purpose of providing information to this Court. Parties using the Second Report other than for the purposes outlined herein are cautioned it may not be appropriate for their purposes.
9. Unless otherwise stated, all dollar amounts contained in this Second Report are expressed in Canadian Dollars.
10. Due to restrictions imposed as a result of the COVID-19 pandemic, the Receiver has been unable to perform usual procedures to verify or test information provided by the Company.

## **BACKGROUND**

11. Back 40 was incorporated on February 22, 2016 under the *Ontario Business Corporations Act*. Back 40 is a single-purpose entity incorporated to produce and exploit the Production. The shareholders of Back 40 are Rabid Road Productions Inc. (49.5% ownership) and Somerville House Films 2018 Ltd. (50.5% ownership).
12. A corporation profile report for the Company is attached hereto as **Appendix “E”**. According to the attached reports, the directors and officers of the Company are Mary Ellen Nicholson (“**Nicholson**”) John Vidette (“**Vidette**”), Paul Allan Lalonde (“**Lalonde**”) and Michael Walker (“**Walker**” and, together with Vidette and Lalonde, the “**Producers**”).
13. Prior to its appointment as Receiver, Deloitte was engaged by RBC to conduct a review of film and video tax credits (the “**Tax Credits**”) in respect of the Production. Deloitte was advised by RBC that the Company’s applications (the “**Applications**”) for the Tax Credits had not been completed due to a shareholder dispute and a shortage of funds to pay tax credit consultants that had been engaged to finalize the Applications.

## ACTIVITIES OF THE RECEIVER

14. Since the date of the First Report, the Receiver has taken the following steps:
- a) Worked with Behind the Scenes Services Inc. (“**BTS**”) to complete the Applications, as described in greater detail below. BTS is a tax credit consultant engaged by the Receiver to assist in completing the Applications;
  - b) Worked with Kay & Warburton Chartered Professional Accountants (“**KWCA**”) to prepare financial statements and tax returns, as described in greater detail below;
  - c) Reviewed and analyzed financial and operational information provided by the Company;
  - d) Corresponded with the Company’s creditors and suppliers in respect of unpaid amounts and to obtain information required for the Applications and for this Second Report;
  - e) Corresponded with the Canadian Audio-Visual Certification Office (“**CAVCO**”) and Ontario Creates (“**OC**”), the entities responsible for issuing federal and provincial certificates of eligibility for the Tax Credits;
  - f) Corresponded with CRA in respect of an audit of the Company’s HST returns, as discussed in greater detail below;
  - g) Submitted additional documentation necessary to satisfy the requirements of a production agreement between the Company and Telefilm Canada (“**Telefilm**”) in order to secure the release of a final financing tranche by Telefilm in the approximate amount of \$210,000; and



- h) Approved the issuance of financial statements and tax returns necessary to finalize the Applications.

## STATUS OF TAX CREDIT APPLICATIONS

- 15. Prior to the Receiver's appointment, the Records were held by BTS as it had previously been engaged by the Company to assist it in filing the Applications. The Receiver has also corresponded with suppliers and other third parties to obtain additional Records necessary to support the Applications.
- 16. BTS has submitted all required information for the federal application to CAVCO and has obtained the final, "Part B" certificate, which has been submitted to CRA. This certificate is required in order for CRA to begin its review of the Applications.
- 17. BTS has submitted all required information for the provincial application to OC and has obtained an interim certificate, which has been submitted to CRA. BTS continues to respond to requests from OC for clarification and additional information in support of the final certificate. The final certificate is expected in the next few weeks, and any delay in obtaining it will not delay the issuance of the tax credit refunds as discussed below.
- 18. In addition to tax returns for the Company's tax years ending November 30, 2017 through 2019, the Receiver directed KWCA to complete and file tax returns for the Company's tax year ended November 30, 2020.
- 19. On February 2, 2022 CRA issued a notice of assessment (the "NOA") in respect of the Applications in the amount of \$1,615,328.37 (the "Refund"), composed of the \$1,613,736.00 claimed in the Applications and \$1,592.37 in refund interest. A copy of the NOA is attached hereto as **Appendix "F"**. The Refund is being held by CRA pending the

completion of the HST audit discussed below. The amount of the Refund is agreeable to the Receiver based on the information available to it.

## **HST AUDIT**

20. On March 17, 2021 the Receiver received a letter from CRA advising that the HST returns of the Company had been selected for audit and requesting the delivery of an extensive list of information.
21. Over the following months, the Receiver worked with BTS, KWCA and other parties to first update the financial records of the Company and then to arrange for the delivery of the requested items to CRA.
22. On May 19, 2022 the Receiver received a letter from CRA enclosing a schedule of proposed adjustments to the HST returns (the “**Proposal**”), a copy of which is attached hereto as **Appendix “G”**. The Proposal includes the following adjustments:
  - a) The reversal of input tax credits (“**ITCs**”) on accounts payable outstanding as at the Date of Appointment, resulting in an additional HST obligation of \$46,514.02; and
  - b) The inclusion of unreported income in the amount of \$315,000.00, resulting in an additional HST obligation of \$40,950.00.
23. Amounts owed by the Company to CRA for GST/HST will be set off by CRA against the Refund. On May 26, 2022 the Receiver sent a letter to CRA in response to the Proposal (the “**Proposal Response**”), a copy of which is attached hereto as **Appendix “H”**. The Proposal Response takes issue with the Proposal in the following areas:

- a) With respect to the reversal of ITCs on unpaid accounts payable, the Receiver notes that Back 40 has not ceased operations, and is party to contracts with several distributors that entitle Back 40 to future royalty revenues. The fact that the accounts payable have not yet been settled does not preclude their eventual settlement. As such, the Receiver is of the view that the ITCs should not be reversed.
  - b) With respect to the inclusion of unreported revenue, the Receiver notes that the amount of \$105,000 due from Telefilm (the “**Telefilm Amount**”), which is included in the \$315,000 noted above, is unlikely to be received. As discussed in greater detail below, the release of the Telefilm Amount is conditional on, among other things, the delivery of sales and exploitation reports from the Company’s distributors. While the Producers and the Receiver have made efforts to obtain the required reports, these have been unsuccessful. As the income is unlikely to be received, its inclusion should be reversed. The reversal of the Telefilm Amount would reduce the Company’s HST obligation by \$13,650.
24. The only party that would be impacted by an adjustment of the GST/HST liability is RBC, as detailed more fully in this Second Report. The Receiver will review the response from CRA (the “**HST Assessment**”) with RBC and determine whether the cost of taking further actions outweighs any benefit. The Receiver will not take further steps to challenge the HST Assessment, regardless of whether or not such assessment incorporates the Receiver’s proposed changes, unless so directed by RBC (collectively, the “**Course of Action on the CRA Proposal**”). The Receiver has canvassed its proposed course of action with RBC, which supports the Receiver’s proposed course of action.

## TELEFILM FUNDING

25. The Company and Telefilm are party to a production agreement dated May 2, 2018 and amended on August 17, 2018 (together, the “**Telefilm Agreement**”). A copy of the Telefilm Agreement is attached hereto as **Appendix “I”**.
26. Pursuant to the Telefilm Agreement, a final drawdown in the amount of \$210,000.00 plus HST is payable on the satisfaction of certain conditions, including among other things:
  - a) the delivery of final cost documentation;
  - b) provision of an insurance certificate;
  - c) evidence of delivery of Production materials to the Library and Archives of Canada;  
and
  - d) confirmation of acceptance of delivery of materials related to the Production from various distributors and third parties.
27. In January, 2021 Walker requested the Receiver’s assistance in obtaining and submitting information related to the requirements above. The Receiver worked with BTS, Walker and several third parties to arrange for the delivery of most of the required items, with the exception of certain third-party agreements that had not been executed.
28. Following submission of the available items, Telefilm agreed in March, 2021 to release 50% of the final drawdown, or \$105,000 plus HST. This amount was paid directly to RBC by Telefilm on or about April 5, 2021.
29. Following the release of the amount above, Telefilm advised that the balance of the Telefilm Amount would only be released once the Company had complied with its sales

and exploitation reporting requirements. The information required to complete these reports can only be obtained from the Company's third-party distributors. The Receiver and Walker have requested the required reports on multiple occasions, but have yet to receive complete reporting from any of the distributors.

30. On May 26, 2022 Aird & Berlis LLP ("**Aird**") wrote to each of the distributors again requesting delivery of the required reports. Only one of the three distributors had provided additional reports as at the date of this Second Report.

### **RECEIVER'S BORROWINGS**

31. Paragraph 14 of the Appointment Order authorizes the Receiver to borrow funds pursuant to Receiver's Certificates in a principal amount not exceeding \$100,000. Pursuant to the First Amending Order, the Appointment Order was amended to increase the Receiver's borrowing powers to a principal amount not exceeding \$200,000. As at the date of this Second Report, the Receiver has borrowed funds in the principal amount of \$169,178.89 (the "**Receiver's Borrowings**").

### **SECURED CREDITORS**

32. Media Finance Capital Limited ("**MFC**") holds certain security over the Company, including a General Security Agreement dated June 15, 2018 and a Copyright Mortgage dated June 15, 2018 (together, the "**MFC Security**").
33. RBC holds certain security over the Company, including a General Security Agreement dated July 6, 2018, a Film Production Security Agreement dated July 6, 2018, and a Copyright Mortgage dated July 6, 2018 (together, the "**RBC Security**").

34. Film Finances Canada Ltd. (“**FFC**”) holds certain security over the Company, including a Completion Agreement and Copyright and Mortgage Assignment, both dated July 23, 2018 (together, the “**FFC Security**”).
35. RBC, MFC and FFC entered into an intercreditor agreement dated August 13, 2018 (the “**Intercreditor Agreement**”), a copy of which is attached hereto as **Appendix “J”**. Pursuant to the terms of the Intercreditor Agreement, RBC enjoys a first-ranking charge over the Refund, the Telefilm Amount and any amounts payable by the OMDC Film Fund.
36. The Alliance of Canadian Cinema, Television and Radio Artists (“**ACTRA**”) also purports to hold certain security over the Company, including a Security Agreement dated October 29, 2018 (the “**ACTRA Security**”).
37. On May 24, 2022 ACTRA provided the Receiver with a copy of the ACTRA Security and advised that it was not aware of the security interests of RBC, MFC and FFC at the time it had entered into the Security Agreement.
38. After receiving correspondence from ACTRA on May 24, 2022, Aird wrote to ACTRA to request additional information, including the Independent Production Agreement referenced in the ACTRA Security and a breakdown of ACTRA’s claim. Aird also asked that ACTRA set out the legal basis for its purported priority over MFC, RBC and FFC. A copy of Aird’s email is attached hereto as **Appendix “K”**. As at the date of this Second Report, ACTRA has not provided any additional information and has not provided a basis to support ACTRA having a priority claim over any of the other secured creditors.
39. The Receiver obtained the attached report (the “**PPSA Report**”) from the Personal Property Security Act (“**PPSA**”) registration system on May 30, 2022. A copy of the PPSA

Report is attached hereto as **Appendix “L”**. As set out in the PPSA report, each of RBC, MFC and FFC registered their security prior to the registration by ACTRA on November 1, 2018.

40. Aird has provided an opinion as to the RBC Security (the “**Security Opinion**”). According to the RBC Opinion, the RBC Security is valid and enforceable against the Company in accordance with the terms thereof and the security interests provided therein were perfected by registration pursuant to the provisions of the PPSA.
41. Based on information available to the Receiver, including the Intercreditor Agreement, the Security Opinion and the PPSA Report, RBC holds a properly perfected security interest in the Refund in priority to MFC, FFC and ACTRA. On May 30, 2022 RBC provided details of the amounts due by the Company to RBC, being the total amount of \$2,300,824.93 through May 27, 2022. The Receiver is satisfied that, at a minimum, the sum of \$2,300,824.93 is owed to RBC by the Company, that RBC is a secured creditor of the Company for that amount, and that RBC enjoys priority over other secured creditors in respect of that amount.
42. The Receiver seeks the Court’s approval of a distribution to RBC of any funds remaining in the estate after payment of the fees and disbursements of the Receiver and those of its counsel, including amounts owing to BTS for services rendered to the Receiver, in an amount not to exceed \$2,300,824.93.

## STATEMENT OF RECEIPTS AND DISBURSEMENTS

43. Attached as **Appendix “M”** is an interim Statement of Receipts and Disbursements (“**SRD**”) for the period July 9, 2020 to May 30, 2022. As at May 30, 2022 the Receiver had realized receipts of \$169,179.42 and had made disbursements of \$157,878.89.
44. The Receiver estimates funds available for distribution to RBC after collection of the Refund and payment of the Receiver’s fees and disbursements, and those of its counsel, to be approximately \$1.6 million.

## FEES AND DISBURSEMENTS OF THE RECEIVER AND ITS LEGAL COUNSEL

45. The Appointment Order provides in paragraph 12 that the Receiver and its legal counsel shall pass their accounts from time to time. The Receiver and its independent legal counsel, Aird, have each prepared regular accounts, including detailed time records of the amount of time spent.
46. Professional fees and disbursements charged by Deloitte in its capacity as Receiver total \$45,110.18 (exclusive of HST) for the period from January 30, 2021 to March 31, 2022 and accruals thereof in the amount of \$20,000, exclusive of HST and disbursements (the “**Receiver’s Fees**”), as referenced in the affidavit of Richard Williams sworn June 2<sup>nd</sup>, 2022, which is attached hereto as **Appendix “N”**.
47. Professional fees and disbursements of Aird in relation to the administration of the receivership total \$16,568.29 (inclusive of HST and disbursements) for the period February 1, 2021 to June 2, 2022 and accruals thereof in the amount of \$12,500, exclusive of HST and disbursements (the “**Aird Fees**”), as set out in the affidavit of Tamie Dolny sworn June 2, 2022, which is attached hereto as **Appendix “O”**.



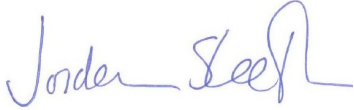
48. The Receiver has reviewed the accounts of Aird and finds the work performed and charges to be appropriate and reasonable. The Receiver is of the view that all of the time spent by each of Deloitte and Aird was necessary, reasonable and appropriate.
49. Invoices representing substantially all of the fees of the Receiver and Aird have been provided to RBC. As of the date of this Second Report, RBC has not raised any concerns with respect to the invoices provided to RBC.
50. The Receiver is of the view that the quantum of fees and the billing rates charged by each of Deloitte and Aird are reasonable, given the complexity of the matters in the receivership.
51. The Receiver is seeking this Court's approval of the Receiver's Fees and the Aird Fees.


#### **RECEIVER'S RECOMMENDATION TO THE COURT**

52. The Receiver therefore recommends that the Court:
  - a) approve the Receiver's actions and activities as set out and described in this Second Report;
  - b) approve the Receiver's Interim Statement of Receipts and Disbursements;
  - c) approve a distribution to RBC of all funds remaining in the estate after payment of the fees and disbursements of the Receiver, including amounts owing to BTS for services provided to the Receiver, in an amount not to exceed \$2,300,824.93;
  - d) approve the Receiver's Fees and the Aird Fees as set out and described in the fee affidavits of Richard Williams and Tamie Dolny; and
  - e) approve the discharge of the Receiver upon the filing of a certificate as set out in the notice of motion.

All of which is respectfully submitted at Toronto, Ontario this 3<sup>rd</sup> day of June, 2022.

**DELOITTE RESTRUCTURING INC.,**  
Solely in its capacity as Court-Appointed  
Receiver of the Books and Records of  
Back 40 Pictures Inc., and without  
personal or corporate liability

Per:   
\_\_\_\_\_  
Jordan Sleeth, CPA, CA, CIRP, LIT  
*Senior Vice-President*

Per:   
\_\_\_\_\_  
Richard Williams, CPA, CIRP, LIT  
*Senior Vice-President*