

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

ENLIGHTENED FUNDING CORPORATION

Applicant

- and -

VELOCITY ASSET AND CREDIT CORPORATION AND  
926749 ONTARIO LTD. O/A CLONSILLA AUTO SALES AND LEASING

Respondents

**IN THE MATTER OF AN APPLICATION UNDER 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*, AS AMENDED**

**FACTUM OF THE RESPONDENTS**

April 20, 2024

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## **PART I: THE MOTION**

1. The Respondents Velocity Asset and Credit Corporation (“**Velocity**”) and 926749 Ontario Ltd. o/a Clonsilla Auto Sales and Leasing (“**Clonsilla**” or the “**Dealership**” or the “**Dealer**”) oppose the receiver’s motion for an order allowing it to assign the respondents into bankruptcy pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the “**BIA**”).
2. The Respondents also oppose the receiver’s motion to approve its activities and fees and request that they be deferred until completion of the administration.

## **PART II: THE FACTS**

### **The Receivership, and the Respondents’ Full Co-operation and Compliance**

3. On October 26, 2023, Justice Conway appointed Deloitte as receiver.
4. Immediately following the issuance of the Receivership Order, the receiver took possession of the property for “the purpose of preserving, protecting and safeguarding the assets in compliance with the Receivership Order.” However, that is not what occurred. Instead of desiring to keep the business operational, the receiver pursued a mission to liquidate the respondents, even though at no time was either Velocity or the Dealership insolvent or declared insolvent.<sup>1</sup>
5. Upon receiving the Receivership Order, Velocity and the Dealership complied immediately, delivering all books and records to the receiver.

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<sup>1</sup> Hugh Waddell’s Affidavit sworn April 19, 2024 (“**Mr. Waddell’s Affidavit**”), Respondents’ Motion Record (“**RMR**”), para. 8.

6. Hugh Waddell, director and officer of Clonsilla and Velocity (“**Waddell**”), instructed the Dealership’s staff to offer the receiver all the assistance that they could.<sup>2</sup>

7. The receiver made false accusations in its 1st Report and in its 3rd Report that alleged issues of duplicate funding, irregularities in lease documentation, transfer of Property following the Receivership Order, and misappropriation of lease proceeds to purchase additional vehicles, all which were not true.<sup>3</sup>

8. The receiver alleges in its 1st Report that there were a number of material financial irregularities in respect of the respondents. Despite being available and willing, however, the receiver never requested the Dealership’s assistance, but instead only reviewed the Dealership’s books and records, and making false assumptions and conclusions about a business that had operated for some 28 years.

9. The Dealership countered the receiver’s conclusions in the Waddell affidavit sworn April 19, 2024.<sup>4</sup>

- (a) Duplicate VINs and Lease Issues:
- (b) Financial Discrepancies:
- (c) Unexplained Re-Leasing Practices:
- (d) Lease Documentation Irregularities:
- (e) Transfer of Dealer Property:
- (f) Misappropriation of Dealer Property:
- (g) OMVIC concerns

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<sup>2</sup> Mr. Waddell’s Affidavit, RMR, para 3.

<sup>3</sup> Mr. Waddell’s Affidavit, RMR, para 3.

<sup>4</sup> Mr. Waddell’s Affidavit, RMR, para 3-13.

10. The receiver alleged it has made significant efforts to review the books and records of the respondents, but that its efforts have hampered an opportunity to assemble a definitive listing of leases which comprise the Dealer Property. This is solely due to the failure of the receiver, not due to any action or inaction of the respondents. The Dealership, upon the direction of Mr. Waddell, gave the receiver access to the Dealership's sole bank account at RBC, allowing the receiver to collect all payments owing. Mr. Waddell then instructed the staff to give the Receiver access to all files and programs, deposit books and all the facilities required to conduct its investigations.<sup>5</sup>

11. At no time did the receiver ask Waddell or the Dealership staff for help regarding the list of leases, nor did the Dealership deny the receiver any information to assist in the compilation of leases. The receiver fabricated this "difficulty," as Mr. Waddell gave the receiver the office operations manager, Maryanne Jacobs' full co-operation for two months, who is the only staff member at the Dealership who knows how the software system and accounting operate between Velocity, the Dealership and the Applicant.<sup>6</sup>

12. The receiver alleges that it spent "significant time and resources attempting to reconstruct the lease portfolio." Given all the Dealership's co-operation, this indicates the receiver's inefficiency, incompetency, lack of training and over-billing. The receiver was advised not to remove documents from the lessees' files, as that would create hours and hours of time wasted trying to reconcile files that the receiver, who despite being warned by Maryanne Jacobs, continued to separate documents from their respective files.<sup>7</sup>

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<sup>5</sup> Mr. Waddell's Affidavit, RMR, para 3-14.

<sup>6</sup> Mr. Waddell's Affidavit, RMR, para 3-16.

<sup>7</sup> Mr. Waddell's Affidavit, RMR, para 3-17.

13. The receiver alleged that it was unable to estimate the actual receivable balance of the leases and that based on pre-authorized payment contracts that the receiver reviewed, it appears there are fewer than 400 lessees remitting payments to the Dealership each month. However, the receiver did not assess all the receivables, and disregarded reports that the Applicant and Velocity provided, as well as the receipt books that we gave to the receiver on the first day it arrived at the Dealership. The receiver made no mention that in addition preauthorized payments the respondents received many payments by e-transfers, cheques and cash. The receiver also failed to report that at minimum, 150 of the leases reported on the Applicant's portfolio were from a different dealer, National Auto Finance. The theoretical and unsubstantiated Receiver's guess of a difference in reported and official leases versus the amount the receiver staff were able to find, was unfounded inuendo that improperly influenced the court on December 8, 2023 to keep the Dealership, then unrepresented, in receivership. This omission, despite full cooperation of the Dealership's operations staff, access to its computers, email, and bank account, indicates the receiver's inadequacies or agenda.<sup>8</sup>

14. The receiver alleged that the Dealership and Velocity have been "evasive and have not provided any response that would explain the significant discrepancies and irregularities already uncovered by the Receiver." This is not true. No receiver staff asked Mr. Waddell to explain their perceived irregularities. Had they asked, the Dealership would have spent time investigating any possible irregularities. Instead of being forthright, a receiver staff member would inform Mr. Waddell that he was not to interrupt their closed-door meeting, and they would huddle together on a conference call, never once asking a single question about what they were investigating.<sup>9</sup>

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<sup>8</sup> Mr. Waddell's Affidavit, RMR, para 3-18.

<sup>9</sup> Mr. Waddell's Affidavit, RMR, para 3-19.

15. To that end, when the receiver’s lawyer received Mr. Waddell’s letter dated November 30, 2023 explaining the discrepancies, the response from the receiver’s lawyer was that it was “unacceptable.” No reason was given as to why the explanations provided were unacceptable. Every one of the Dealership’s staff and Mr. Waddell was willing to assist the receiver, because everyone at the Dealership wanted to ensure that their business of 28 years remained operational.<sup>10</sup>

16. The receiver made all these false innuendos to give the impression that the respondents were misleading the receiver. This created the narrative that allowed the receiver’s legal team to be successful in having the court believe the expanded receivership powers were necessary.<sup>11</sup>

17. It has been six months since the initial receivership order of October 26, 2023, and still the respondents have not had the benefit of using their own documents to defend themselves against the receiver’s false accusations.<sup>12</sup>

### **PART III: ISSUES AND LAW**

18. The respondents submit that the issues are as follows.

(a) Whether the court has the power to allow the court-appointed receiver to assign the respondents into bankruptcy

(b) Whether the receiver has established on the evidence that the respondents have committed an act of bankruptcy and a need for bankruptcy;

(c) Whether the court should exercise its discretion and dismiss or stay the receiver’s motion even though the receiver has made out a *prima facie* case for an assignment, for “other sufficient cause”; and

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<sup>10</sup> Mr. Waddell’s Affidavit, RMR, para 3-20.

<sup>11</sup> Mr. Waddell’s Affidavit, RMR, para 3-21.

<sup>12</sup> Mr. Waddell’s Affidavit, RMR, para 4.

(d) Whether the court has the jurisdiction to make an order under section 243 of the *Bankruptcy and Insolvency Act* when there has been no declaration that the respondents were insolvent and that Part XI of the Act applies.

**(a) Whether the court has the power to allow the court-appointed receiver to assign the respondents into bankruptcy**

19. There are several cases in which courts have given the court-appointed receiver authority to assign the debtors into bankruptcy, and in one case, the court authorized the receiver to consent to a receiving order. These cases are all distinguishable on their facts:

*2403177 Ontario Inc. v. Bending Lake* 2016 ONSC 199 at paras. 113 to 123

*Bank of Montreal v Owen Sound Golf and Country Club*, 2012 ONSC 557

*Bargain Harold's Discount Ltd.* 1992 CanLII 7611 (ONSC) – 3rd last paragraph

*First Treasury Financial Inc. v. Cango Petroleum Inc.*, 1991 CanLII 8338 (ON SC) para 43.

*PriceWaterhouseCoopers v. Bank of Montreal* 2017 CanLii 11229 (NLSC) at para. 66

*RBC v. Gustin* 2019 ONSC 5370 at para. 15

*Royal Bank v. Sun Squeeze Juices Inc.* 1994 CanLii 8771 (ONCA)

20. In none of these cases is there any discussion or reasoning as to the power of the court to make such an order.

21. In none of these cases did the debtor oppose the court's granting the receiver power to assign.

22. In none of these cases is there any reference to a statutory authority giving a court-appointed receiver to act on behalf of the respondents.



23. Section 49 of the BIA provides that an insolvent person may make an assignment. An “insolvent person” under the BIA does not include a court-appointed receiver.

24. A court-appointed receiver is an officer of the court; it is not a liquidator that steps into the shoes of the company.

- a. the court-appointed receiver is not a creditor of the respondents;
- b. the court-appointed receiver is not a director or an officer of the respondents;
- c. the court-appointed receiver is not a shareholder of the companies.

25. So how does the court give the receiver the right to stand in the shoes of the shareholders? Only in [\*Bank of Montreal v Owen Sound Golf and Country Club\*, 2012 ONSC 557 at paras. 5 and 7](#) does the court give the receiver the rights of a shareholder and as a shareholder, the shareholder can assign the company into bankruptcy.

26. In assigning the respondents into bankruptcy, the court-appointed receiver is usurping the residual power of the directors and officers to challenge the receiver’s administration and realization:

[\*Peterborough \(City\) v. Kawartha Native Housing Society Incorporated\*, 2010 ONCA 705. at paras. 30 and 31;](#)

[\*Royal Bank of Canada v. Casselman PHBC Ltd.\*, 2017 ONSC 4107 at para. 34:](#)

[34] Unlike a bankruptcy, however, the receiver does not step into the shoes of the debtor corporation. The debtor continues its corporate existence along with all of its residual rights. Those residual rights may be minimal but they include the right to challenge the work of the receiver, to oppose confirmation of any reports and to otherwise be heard in the current litigation. Those rights are now vested in the trustee since I am validating the bankruptcy. I also understand that the trustee is in possession of all of the books and records of the debtor.

**(b) Whether the receiver has established on the evidence that the respondents have committed an act of bankruptcy and a need for bankruptcy**

27. Paragraph 80 of the receiver's 3rd report states that "the Receiver has discovered numerous financial irregularities and concerning conduct of the Debtors. This includes evidence of misappropriation, transfers of property at undervalue and potentially fraudulent activity." The receiver repeats these financial irregularities from its 1st report. The receiver has failed to set out any of these alleged numerous financial irregularities with sufficient particulars.

28. On the contrary, Hugh Waddell has served an affidavit sworn on April 19, 2024 countering each of these allegations.

29. The receiver has not cross-examined him on these replies.

30. The receiver's investigations are ostensibly to determine whether the Waddell family have received fraudulent preferences or transfers at undervalue.

31. Paragraph 81 of the receiver's 3<sup>rd</sup> report states that the receiver discovered transfers from the respondents to the Waddell family that appeared to be out of ordinary course of business. It is submitted that the receiver does not have to see personal bank records to determine whether a transfer to a related party is a transfer at undervalue or that a payment is a fraudulent preference. The receiver need only to look to the books and records of the respondents to make decision.

32. By analogy to an application for a bankruptcy order, the receiver has not established both \$1,000 owing and acts of bankruptcy –

- Where is the evidence of fraudulent preferences, transfers at undervalue and misappropriation of funds?

33. The receiver has been in possession of the books and records of the respondents for over 6 months and has yet to produce a statement of assets and liabilities.

34. It is questionable whether the receiver's information should be considered by the court and used in support of a creditor's application for a bankruptcy order. The application creditor which initiated this receivership is no longer involved.

*Argus Steel Construction Ltd (Re)*, [1965] OJ No 675, 7 CBR (NS) 304, [1965] OJ No 675

**(c) Whether the court should exercise its discretion and dismiss or stay the receiver's motion even though the receiver has made out a *prima facie* case for an assignment, for "other sufficient cause"**

35. The court may dismiss an application for a bankruptcy order under subsection 43(7) of the *Bankruptcy and Insolvency Act* for "other sufficient cause". It is submitted that that is the case here; that the receiver has not acted in good faith under section 4.2 of the Act.

36. While the court usually gives deference to the receiver's report, it is assumed that the receiver has acted within "the broad bounds of reasonableness" and has proceed fairly: *Ontario Securities Commission v. Bridging Finance Inc.*, 2023 ONSC 2847 at para. 42.

37. There are several examples of "other sufficient cause". First, Paragraph 85 of the receiver's 3<sup>rd</sup> report states "The Waddell Affidavit contains numerous misstatements and inaccuracies. While the Receiver disagrees with these material misstatements, they are not relevant for the purposes of the Receiver's motion." Respectfully, they are relevant.

38. The Waddell affidavit contradicts the statements made by the receiver in the First Report, and again, the receiver has not cross-examined the deponent.

39. Second, Paragraph 86 of the receiver's 3<sup>rd</sup> report states: "The Receiver has discovered numerous transactions that in its view constitute transfers at undervalue or preferences under the BIA. The evidence relating to these transactions is described herein and in the First Report." The Waddell affidavit refutes those allegations. Mere suspicion of improper transactions should not be the test. There must be solid evidence of transfers at under value and preferences. There are none.

40. There have been no cross examinations.

41. Third, the receiver's first report to the court and the receiver's factum of December 8, 2023, para. 5 refer to the facts that "lack of cooperation and the evidence of misappropriation, transfers of property and potentially fraudulent activity" led the court to believe that there was a need for a fuller receivership.

42. The respondents have never had the opportunity to refute those statements until they brought the motion to vary paragraphs 9 and 10 of the December 8 order. The affidavit of Hugh Waddell clearly contradicts these statements and refers to his and the respondents' employees cooperation.

43. Fourth, the receiver has withheld books and records since October 26, 2023 in contravention of paragraphs 6 and 7 of the December 8, 2023 order despite several demands and a motion – the respondents have been prejudiced in not being able to defend themselves without their own documents.

44. Fifth, the receiver's counsel and the receiver has again reiterated in paragraph 64 of its 3<sup>rd</sup> report that the purpose of the investigatory powers is to investigate into fraudulent preferences, transfers at undervalue and to reconcile accounts.- emails Feb 21 to Feb 29. Respectfully, the receiver has over-stepped its power as those rights belong exclusively to a trustee in bankruptcy.

45. Sixth, Enlightened Lending Corporation, the creditor that initiated these proceedings based the respondents' default on:

- a. The loan had matured;
- b. The respondents had not supplied unaudited financial statements; and
- c. The respondents earnings were out of line.

Respectfully, the initiating creditor's motion record and the receiver's 1<sup>st</sup> report do not show that the respondents were hopelessly insolvent.

46. The receiver on being appointed proceeded to liquidate the business of 28 years without canvassing new financing, making a proposal or applying for an order under the *Companies' Creditors Arrangement Act*. Respectfully, the receiver's reports show no attempt to save the business.

**(d) Whether the court has the jurisdiction to make an order under section 243 of the *Bankruptcy and Insolvency Act* when there has been no declaration that the respondents were insolvent.**

47. The court does not have the jurisdiction to make an order assigning the respondents into bankruptcy under section 243 of the BIA. The respondents were not insolvent at the time of the Initial Receivership Order was made on October 26, 2023. As there was no declaration that the BIA applied to the receivership, section 243 of the BIA can not apply to give the receiver powers to assign the respondents into bankruptcy. In other words, a receiver cannot apply to the court for powers of a trustee in bankruptcy under the BIA when the debtor is not insolvent and the BIA does not apply.

48. It is submitted that the receiver's evidence, countered above by the respondents, is insufficient to warrant the court to give the receiver power to assign the respondents into

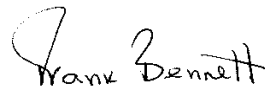
bankruptcy.

**PART V: RELIEF SOUGHT**

49. The respondents respectfully request:

- a. that the receiver's motion to obtain power to assign the respondents into bankruptcy be dismissed;
- b. costs of this motion on a full indemnity scale, or alternatively, on a scale that is just.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**



Dated: April 20, 2024

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**Frank Bennett (LSO# 11829F)**

Lawyers for the Respondents

## SCHEDULE A: JURISPRUDENCE

1. [2403177 Ontario Inc. v. Bending Lake](#) 2016 ONSC 199 at paras. 113 to 123
2. [Bank of Montreal v Owen Sound Golf and Country Club](#), 2012 ONSC 557
3. [Bargain Harold's Discount Ltd.](#) 1992 CanLII 7611 (ONSC) – 3rd last paragraph
4. [First Treasury Financial Inc. v. Cango Petroleum Inc.](#), 1991 CanLII 8338 (ON SC) para 43.
5. [PriceWaterhouseCoopers v. Bank of Montreal](#) 2017 CanLII 11229 (NLSC) at para. 66
6. [RBC v. Gustin](#) 2019 ONSC 5370 at para. 15
7. [Royal Bank v. Sun Squeeze Juices Inc.](#) 1994 CanLII 8771 (ONCA)
8. [Bank of Montreal v Owen Sound Golf and Country Club](#), 2012 ONSC 557 at paras. 5 and 7
9. [Peterborough \(City\) v. Kawartha Native Housing Society Incorporated](#), 2010 ONCA 705. at paras. 30 and 31;
10. [Royal Bank of Canada v. Casselman PHBC Ltd.](#), 2017 ONSC 4107 at para. 34:
11. [Argus Steel Construction, Re](#) 7 CBR (N.S.) 309
12. [Ontario Securities Commission v. Bridging Finance Inc.](#), 2023 ONSC 2847 at para. 42.

## **SCHEDULE B: STATUTORY AUTHORITIES**

*Bankruptcy and Insolvency Act*, RSC 1985, c B-3, <<https://canlii.ca/t/5610x>>

[Section 2](#) – insolvent person

[Section 4.2](#) – good faith

[Section 49](#) – assignment by an insolvent person

[Section 243](#) – court may appoint receiver



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Proceeding commenced at Toronto

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