

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and -

DEAN MYERS CHEVROLET LIMITED and 1125278 ONTARIO LIMITED

Respondents

**FACTUM OF THE RECEIVER
(Motion returnable March 25, 2020)**

March 23, 2020

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Deloitte Restructuring Inc.

TO: SERVICE LIST

PART I - NATURE OF MOTION

1. This is a motion by Deloitte Restructuring Inc. ("**Deloitte**"), in its capacity as court-appointed receiver and manager (the "**Receiver**"), appointed pursuant to order of the Court dated February 12, 2020 (the "**Appointment Order**") of the Property (as defined in the Appointment Order) of Dean Myers Chevrolet Limited ("**DMCL**") and 1125278 Ontario Limited ("**112 Ontario**") (collectively, the "**Debtor**") for the relief detailed below.

Summary

2. As detailed below, DMCL was a GM (defined below) vehicle dealer, that carried on business in Toronto. DMCL ceased operating on the Receiver being appointed. 112 Ontario was a vehicle leasing company, that is no longer taking on new leases beyond 11 existing customer leases.
3. The Receiver has negotiated the sale of forty-nine (49) new 2020 model year vehicles with GM, and seeks the Court's approval of this transaction and a Vesting Order.
4. Following the completion of the sale to GM, if approved, the Receiver will be left with vehicle and parts inventory, as well fixed assets and equipment, to sell, and requests that the Court grant the Omnibus Order, to permit an efficient sales process to be completed without further Court attendance.
5. The Debtor's senior secured lender RBC (defined below), supports the sale to GM, the Omnibus Order and the relief sought in the Receiver's motion. RBC is owed approximately \$9,500,000, and the Receiver anticipates RBC suffering a significant shortfall following the Receiver's realization of the Debtor's assets.
6. The Receiver seeks an Order authorizing a distribution to RBC, and the remaining relief sought in the Ancillary Order, including increasing the borrowing limit under the Appointment Order from \$250,000 to \$750,000. RBC is agreeable to this increase.

Relief Sought

Approval and Vesting Order (defined terms specific to this Order)

- a. An Approval and Vesting Order, substantially in the form attached hereto to the Approval and Vesting Order at Schedule "A", *inter alia*, approving the transaction contemplated by an agreement of purchase and sale (the "**GM Sale Agreement**") between the Receiver and General Motors of Canada Company ("**GM**" or the "**Purchaser**") dated March 17, 2020 and appended to the Confidential Report of the Receiver dated March 19, 2020, for the sale of the assets described in the GM Sale Agreement (the "**Purchased Assets**"), and vesting all of the right, title and interest of DMCL in and to the Purchased Assets in the Purchaser free and clear of and from any Claims and Encumbrances (as defined in the Approval and Vesting Order).

Omnibus Order (defined terms specific to this Order)

- a. An Order prospectively authorizing the Receiver to accept an offer or offers to purchase, either by private sale or auction, of any or all of the unsold vehicles, parts inventory, fixed assets and equipment of the Debtor (the "**Unsold Units**" and individually, an "**Unsold Unit**") provided that the sale price for each Unsold Unit to which such offer(s) relates is acceptable to the Receiver having regard to the value for such Unsold Unit(s) and prior sales of similar units and with consideration to the current market conditions and all other terms of the offer(s) are, in the Receiver's sole opinion, in the best interest of the stakeholders of the Debtor;
- b. An Order prospectively authorizing the execution of an agreement of purchase and sale or bill of sale in respect of each Unsold Unit by the Receiver, as vendor, and the purchaser of each Unsold Unit (each purchaser hereinafter referred to as the "**Purchaser**") substantially in the form as attached at Schedule "A1" and "A2" to the Omnibus Order, together with any amendments or modifications thereto deemed necessary by the Receiver (each agreement hereinafter referred to as a "**Bill of Sale**");

- c. An Order prospectively approving the sale transactions in respect of the Unsold Units;
- d. An Order that, upon delivery by the Receiver to the Purchaser of a Receiver's Certificate substantially in the form attached as Schedule "B" to the Omnibus Order, all of the Debtor's right, title and interest in and to the Unsold Unit(s) described in each applicable Bill of Sale will vest in and to the applicable Purchaser, free and clear of and from all Claims and Encumbrances (as defined in the Omnibus Order).

Ancillary Order (defined terms only applicable in this section)

- a. An Order approving the Receiver's First Report to the Court dated March 19, 2020 (the "**First Report**") and the Confidential Supplement to the First Report dated March 19, 2020 (the "**Confidential Supplement**") and the activities and conduct of the Receiver as detailed therein;
- b. An Order sealing the Confidential Supplement;
- c. An Order that the Statement of Receipts and Disbursements as detailed in the First Report be approved;
- d. An Order that the Receiver be authorized to make a distribution payment to the applicant, Royal Bank of Canada ("**RBC**"), as detailed in the First Report, and such further distributions to RBC at the discretion of the Receiver up to the amount owed to RBC by the Debtor, including all interest and costs;
- e. An Order approving an increase in the Receiver's borrowing limit in paragraph 22 of the Appointment Order from \$125,000 to \$750,000.

PART II - THE FACTS

Introduction and Appointment

1. On Application by the Debtor's senior secured lender RBC, Deloitte was appointed Receiver of the Property of the Debtor pursuant to the Appointment Order.

Paragraphs 1-3 of the First Report of the Receiver dated March 23, 2020 (the “First Report”)

2. DMCL is an Ontario corporation which operated as an automotive dealership and service centre located at 3180 Dufferin Street, Toronto (the “**Premises**”). DMCL was an authorized reseller of new Chevrolet, Buick and GMC branded vehicles pursuant to a dealership agreement (the “**Dealership Agreement**”) with GM.

Paragraph 4 of the First Report

3. 112 Ontario is an Ontario corporation and primarily operated as a vehicle leasing company, which also operated out of the Premises.

Paragraph 5 of the First Report

Receiver’s Activities

4. The Receiver has undertaken the activities in accordance with the terms of the Appointment Order, including;
 - a. dealings with the DMCL employees and Canada Revenue Agency;
 - b. dealing with the vehicle inventory, and the return of certain vehicles to the Premises;
 - c. commenced a formal marketing of all 2020 model vehicle inventory to GM dealers and negotiations with GM in respect of applicable repurchases;
 - d. conducted a detailed reconciliation of customer deposits in respect of future vehicle purchases, consulted with the director of DMCL, the Ontario Motor Vehicle Industry Council, and GM in this regard, and arranged for the issuance of letters by its counsel, Harrison Pensa LLP to all 58 affected customers;
 - e. entered into the GM Sale Agreement, as detailed in the First Report;
 - f. reached a settlement with the Former Landlord and the payment of monies, as detailed in the First Report; and,

- g. issued demand letters to related parties for payment of outstanding receivables.

Paragraph 22 of the First Report

The RBC Security

5. RBC is the first registered secured creditor of DMCL and 112 Ontario. As at January 27, 2020, DMCL was indebted to RBC in the amount of \$9,224,188 before accrued interest and costs (the “**DMCL Indebtedness**”). 112 Ontario is indebted to the Bank as at January 31, 2020 in the amount of \$300,359 and a guarantor of the DMCL Indebtedness to the Bank.

Paragraph 32 of the First Report

6. Deloitte retained Harrison Pensa LLP, independent legal counsel who has reviewed the security held by RBC and concludes that the RBC holds a valid security interest in all property, assets and undertakings of the property of DMCL and 112 Ontario.

Paragraph 40 of the First Report

7. Other than RBC, the only other parties who have made a registration under the *Personal Property Security Act* are CWB National Leasing Inc. (“**CWB**”) and Pattison Sign Group (“**Pattison**”). The CWB and Pattison’s registrations relate to specific assets and the Receiver is working with CWB and Pattison for the return of such assets.

Paragraph 41 of the First Report

The Proposed GM Transaction

8. Due to the depreciating nature of vehicles and the inherent significant security and occupancy costs of continued possession of the vehicle inventory, the Receiver took steps to immediately compile New Inventory listings with a view to negotiating a repurchase by GM of new vehicles and parts inventory pursuant to the terms of the Dealership Agreement.

Paragraphs 99-107 of the First Report

9. Following negotiations, the Receiver and GM entered into the GM Sale Agreement for forty nine (49) model 2020 new vehicles.
10. The Receiver believes the transaction contemplated by the GM Sale Agreement represents the most commercially reasonable value for these vehicles in the circumstance

Marketing of the Remaining Vehicles and Assets

Inventory and Assets

11. On February 28, 2020, the Receiver issued a detailed listing of all New Inventory to GM dealers in Ontario and select GM dealers in Quebec.

Paragraphs 115-117 of the First Report

12. The Receiver intends to market the vehicle inventory remaining following the closing of the transaction contemplated by the GM Sale Agreement and certain fixed assets to the same population of GM dealers plus dealers in the immediate vicinity and other interested parties who have contacted the Receiver to date.
13. Parts inventory will also be primarily marketed to GM dealers due to the nature of those products.

Proposed Disposition Plan

14. The Receiver is seeking the Omnibus Order, which prospectively authorizes the Receiver to accept offers on unsold vehicles, parts inventory, fixed assets and equipment, enter sales agreements and vest title with respect to same.

Paragraphs 115-117 of the First Report

15. The Receiver is of the view that the Omnibus Order is appropriate due to the nature and value of the remaining assets including the potential for numerous

individual transactions. The Omnibus Order will expedite the sale of the remaining assets while minimizing overhead and occupancy costs.

Distribution

16. As detailed above, the Receiver has obtained an independent legal opinion confirming the validity and enforceability of RBC's security.

Paragraphs 123-128 of the First Report

17. It is the Receiver's opinion that the estimated recovery from the assets and undertakings of DMCL and 112 Ontario will not be sufficient to retire the estimated amount of the RBC Indebtedness and potential priority claims with the result that there will be no recovery available to the unsecured creditors of the receivership estates of DMCL and 112 Ontario.
18. The Receiver is aware of certain potential priority claims as detailed in the First Report.
19. The Receiver is seeking Court approval of an initial and future distribution of funds to RBC as the senior secured creditor.
20. GM system restrictions prevent the direct payment of any repurchase directly to the Receiver, and can only flow through the existing floor plan account. The Receiver has been advised by RBC that the floor plan account system has similar limitations and cannot redirect the funds out of the floor plan account. However, RBC has advised the Receiver that it will support the increase of the Receiver's borrowings to allow the Receiver to fulfil receivership obligations and potential priority claims which may have priority to RBC.
21. Section 22 of the Appointment Order authorizes the Receiver to borrow up to \$125,000. RBC has confirmed that it supports the increase of this limit to \$750,000 and will fund this amount as necessary to settle known priority payables, plus accrued and future receivership liabilities.

Sealing Order

22. Until such time as the transaction contemplated by the GM Sale Agreement is completed and funds are received by the Receiver, the Receiver is of the view that the information and documentation contained in the Confidential Report should be sealed in order to avoid the negative impact that the dissemination of the confidential information contained therein would have if the recommended sale of the Purchased Assets failed to close for any reason. Publication of the purchase price would undermine the fairness of any future sales efforts.

PART III - ISSUES, LAW AND ARGUMENT

A. The Receiver's Activities

23. The Receiver's activities in these proceedings have been undertaken in furtherance of the Receiver's duties and are consistent with the Receiver's powers, as set out in the Appointment Order. The Receiver has acted reasonably and in the best interests of the Respondent's stakeholders. It is respectfully submitted that the Receiver's activities should therefore be approved by this Court.
24. This Court has the jurisdiction to approve such activities. The "court has the inherent jurisdiction to review and either approve or disapprove of the activities of a court appointed receiver" and "it would be unusual and illogical [if] the receiver could come to court for prior approval but not post approval."

[Bank of America Canada v. Willann Investments Ltd. \(1993\) 20 C.B.R. \(3d\) 223 \(ONSC\), at paras. 3 and 4](#)

25. All of the Receiver's activities were conducted within the ambit of its powers granted by the Appointment Order and each of the activities were necessary to ensure that the proceedings were as orderly, effective and fair to all stakeholders as possible.
26. The Receiver therefore respectfully submits that its activities to date should be approved by this Court.

B. Approval of the Transaction and the Approval and Vesting Order

27. Receivers are clothed with the powers set out in the order appointing them. Receivers are consistently granted the power to market and sell property belonging to a debtor. Absent evidence that a sale is improvident or that there was an abuse of process, it is respectfully submitted that a Court is to grant deference to the recommendation of the Receiver to sell the Purchased Assets.

Appointment Order, sub-paragraphs 3(j) and 3(k)

[*Integrated Building Corp. v. Bank of Nova Scotia \(1989\), 75 C.B.R. \(N.S.\) 158 \(Alta. C.A.\)*](#)

[*Battery Plus Inc. \(Re.\), \[2002\] O.J. No. 731, at para. 2-3, 19, 22-23, 34-5*](#)

28. Under Section 100 of the Courts of Justice Act (Ontario), this Honourable Court has the power to vest in any person an interest in real or personal property that the court has the authority to order be disposed of, encumbered or conveyed.

[*Courts of Justice Act \(Ontario\), R.S.O. 1990, c. C-43, s. 100*](#)

29. Where a Court is asked to approve a transaction in a receivership context, the Court is to consider:
- i. whether the party made a sufficient effort to obtain the best price and to not act improvidently;
 - ii. the interests of all parties;
 - iii. the efficacy and integrity of the process by which the party obtained offers; and
 - iv. whether the working out of the process was unfair.

[*Royal Bank of Canada v. Soundair Corp. \(1991\), 4 O.R. \(3d\) 1 \(ONCA\), at para. 16*](#)

[*Skyepharm PLC v. Hyal Pharmaceutical Corp. \(1999\), 12 C.B.R. \(4th\) 87 \(ONSC., appeal quashed, \(2000\), 47 O.R. \(3d\) 234 \(C.A.\)\), at para. 3*](#)

30. Only in exceptional circumstances where there is clear evidence that a sale is improvident or involved an abuse of process will a Court intervene and proceed contrary to the recommendation of its officer, the Receiver.

[Royal Bank of Canada v. Soundair, supra at para. 21](#)

[Skyepharma PLC, supra at para. 3](#)

31. The Appointment Order, among other things, authorized the Receiver to market any or all of the Property and section 3(k)(i) of the Appointment Order authorized the Receiver to sell, convey, transfer, lease or assign the Property or parts of the Property out of the ordinary course of business, without the approval of this Court in respect of any repurchase of vehicles or parts inventory by General Motors of Canada Company or any of its affiliates, without any per transaction aggregate limit.

32. Based on the foregoing, it is respectfully submitted that this Honourable Court should approve the transaction subject to the GM Sale Agreement (the “**Transaction**”) and grant the Approval and Vesting Order, in accordance with the recommendation of the Receiver. It is the Receiver’s position that the Transaction be approved by the Court for the following reasons:
 - (i) the Receiver considered the benefits of an *en bloc* offer for substantially all of the model 2020 year vehicles at full GM dealer invoice value;

 - (ii) GM’s undertaking to remove the vehicles at its own expense is commercially advantageous to the receivership estate and reduces administration;

 - (iii) significant security and occupancy costs can be mitigated by the timely realization of a commercially reasonable transaction, which can be completed without delay;

 - (iv) the Receiver has appropriately consulted with and sought input from the stakeholders in connection with the Transaction, including RBC and the director of the Debtor;

 - (v) no party is objecting to the conclusion of the Transaction;

- (vi) GM represents a purchaser with a strong financial covenant with the ability to promptly deliver the purchase proceeds and execute the expedited removal of the purchased assets from the Premises; and
- (vii) the Receiver believes the Transaction represents commercially reasonable value; and
- (viii) the GM Sale Agreement represents an advantageous offer and maximizes recoveries for all stakeholders.

C. The Omnibus Order

- 33. The Receiver is of the view that the nature and value of the remaining assets following the closing of the Transaction, including the potential for numerous individual transactions, can be administered in a standardized manner and without requiring additional Court attendances. The Receiver is also seeking to expedite, to the extent possible in the circumstances, the sale of remaining assets to minimize significant overhead and occupancy costs with respect to the Premises.
- 34. Section 3(k)(ii) of the Appointment Order also permitted the Receiver to sell, convey, transfer, lease or assign the Property or parts of the Property out of the ordinary course of business without the approval of this Court in respect of any transaction not exceeding \$250,000, provided that the aggregate consideration for all such transactions does not exceed \$500,000.

D. The Sealing Order

- 35. It is just, appropriate and necessary to the integrity of these receivership proceedings and the Sale Process for the Purchased Assets that the Confidential Supplement be sealed by this Court until the Transaction has closed.

Jurisdiction

- 36. The Court's jurisdiction to seal documents filed with it is found in s. 137(2) of the Courts of Justice Act (Ontario):

137(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form a part of the public record.

[Courts of Justice Act \(Ontario\), s. 137\(2\).](#)

37. In addition to statutory jurisdiction, the Court also has inherent jurisdiction to issue sealing orders: “there is no doubt that the court has inherent jurisdiction, and jurisdiction under s. 137(2) of the Courts of Justice Act, to seal a portion of the court file.”

[Fairview Donut Inc. v. TDL Group Corp. \(2010\), 100 O.R. \(3d\) 510 \(ONSC\), at para. 34.](#)

Discretion

38. The leading case on sealing orders is the Supreme Court of Canada’s decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, which was decided under the federal rules of court but has been widely applied to provincial cases. Sierra Club holds that a sealing order is discretionary and should only be granted when (*emphasis added*):
- a. such an order is necessary in order to prevent a serious risk to an important interest, *including a commercial interest*, in the context of litigation because reasonably alternative measures will not prevent the risk; and
 - b. the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[Sierra Club of Canada v. Canada \(Minister of Finance\) \[2002\] 2 S.C.R. 522 \(SCC\) \(“Sierra Club”\), at para. 53.](#)

39. Three elements are subsumed under the first branch of the test:
- a. the risk in question must be real and substantial, in that the risk is well grounded in evidence, and poses a serious threat to the commercial interest in question;

- b. in order to qualify as an “important commercial interest”, the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in maintaining confidentiality; and
- c. the Court must consider not only whether reasonable alternatives to a confidentiality order are available, but must also restrict the order as much as is reasonably possible while preserving the commercial interest in question.

[Sierra Club, supra, at paras 54-57.](#)

- 40. Judges sitting on the Commercial List have recognized the usual and customary practice of seeking a sealing order in the context of a sale approval motion. In *Ron Handelman Investments Ltd, v. Mass Properties Inc.*, Madam Justice Pepall (as she then was) stated:

[a]s is customary in sale approval motions, the Receiver seeks an order sealing the appraisal until the transaction is completed. This ensures the integrity of the process and avoids any prejudice to stakeholders in the event that the transaction does not close and a new purchaser must be sought.

[*Ron Handelman Investments Ltd. v Mass Properties Inc. \(2009\), 55 CBR \(5th\) 271, 2009 CarswellOnt 4257 \(ONSC \[Commercial List\]\), at para 26.*](#)

- 41. Sealing orders are routinely granted in receiverships where the Sierra Club test is met. For example, appendices to a receivers report were sealed where they contained sensitive commercial information, the release of which could be prejudicial to stakeholders, a copy of an executed sale agreement was sealed when submitted to the court as part of a sale approval motion, and bids made in a sales process have been sealed.

[*Maxtech Manufacturing Inc., Re \(2010\), 64 C.B.R. \(5th\) 239 \(ONSC \[Commercial List\]\), at paras. 29 & 30.*](#)

- 42. The Confidential Supplement contains an un-redacted version of the GM Sale Agreement and includes the purchase price of the Purchased Assets. Should the Transaction fail to close for any reason, the information contained within the Confidential Supplement could cause a reduction in any future sale of the

Purchased Assets, and harm the creditors of the Respondent if made available to the public. Protecting the information contained within the Confidential Supplement is an important commercial interest that should be protected. There is no other reasonable alternative to sealing that will prevent the Confidential Supplement from becoming public. The Receiver respectfully submits that the principles in *Sierra Club* have been satisfied.

E. The Proposed Distribution Should Be Approved

43. Orders granting distributions with a reserve for undetermined priority claims are routinely granted by Canadian courts in insolvency proceedings and receiverships.

[*Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 \(ONSC\) at para. 8;](#)

[*Re Abitibiwater Inc.*, 2009 QCCS 6461, 2009 CarswellQue 14224 \(QC. Sup. Ct.\) \(“Abitibi”\) at paras. 70-75.](#)

44. While *Abitibi* dealt with an interim distribution pursuant to a proceeding under the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36, Justice Hascon considered a number of factors in considering whether to approve an interim distribution that are equally applicable to a receivership proceeding, including whether:

- a. The payee's security is valid and enforceable;
- b. The amounts owed to the payee exceed the distribution; and,
- c. The distribution would result in significant interest savings.

[*Abitibi, supra, at para. 75.*](#)

45. The Receiver has received opinions from its counsel that the security held by RBC is valid and enforceable.

PART IV - ORDER REQUESTED

46. The Receiver requests the following Orders:

- a. That the Transaction be approved as recommended by the Receiver and that an Approval and Vesting Order be granted;
- b. That the relief sought in the Omnibus Order be granted; and,
- c. That the relief sought in the Ancillary Order be granted, including the distribution to RBC, the sealing order, the approval of the First Report and the increase in the borrowing limit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of March, 2020.



Timothy C. Hogan

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Bank of America Canada v. Willann Investments Ltd.* (1993) 20 C.B.R. (3d) 223 (ONSC)
2. *Integrated Building Corp. v. Bank of Nova Scotia* (1989), 75 C.B.R. (N.S.) 158 (Alta. C.A.)
3. *Battery Plus Inc. (Re.)*, [2002] O.J. No. 731
4. *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (ONCA)
5. *Skyepharma PLC v. Hyal Pharmaceutical Corporation*, 1999 CanLII 15007 (ONSC)
6. *Re Fairview Donut Inc. v. TDL Group Corp.* (2010), 100 O.R. (3d) 510 (ONSC)
7. *Re Sierra Club of Canada v. Canada (Minister of Finance)* [2002] 2 S.C.R. 522 (SCC)
8. *Ron Handelman Investments Ltd. v Mass Properties Inc.* (2009), 55 CBR (5th) 271 (ONSC -[Commercial List])
9. *Re Maxtech Manufacturing Inc., RE* (2010), 64 B.C.R. (5th) 239 (ONSC - [Commercial List])
10. *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (ONSC)
11. *Re Abitibiwater Inc.*, 2009 QCCS 6461, 2009 CarswellQue 14224 (QC. Sup. Ct.)
12. *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851
13. *Pinnacle Capital Resources Ltd. v. Kraus Inc.*, 2012 CarswellOnt. 14138 (ONSC)

SCHEDULE "B"
RELEVANT STATUTES

1. *Courts of Justice Act (Ontario)*, R.S.O. 1990, c. C-43, s. 100
2. *Courts of Justice Act (Ontario)*, s. 137(2)

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