

**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***

SUPPLEMENTAL FACTUM OF THE RECEIVER

April 30, 2024

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PART I - NATURE OF THE REPLY

1. This Supplemental Factum of the Receiver is filed in reply to the Factum of the Respondents dated April 20, 2024, and in answer to the preliminary questions from this Court at the hearing on April 23, 2024.¹

PART II - THE FACTS

2. Waddell swore an affidavit on April 19, 2024 (the “**Waddell Affidavit**”), that makes allegations with respect to the Receiver and its Reports. The allegations against the Receiver are irrelevant to the relief sought by the Receiver and will be dealt with at the appropriate time. However, the Receiver is concerned that the allegations, which it denies have any validity, should be left unchallenged on the record. Accordingly, the Receiver has provided the Supplement to the Third Report to respond to the Waddell Affidavit.
3. The Receiver notes, however, that the following are undisputed facts with respect to the Debtors from the First and Third Report (collectively, the “**Undisputed Facts**”), which are more than sufficient to support the relief requested by it for an order permitting it to file the Debtors into bankruptcy:
 - (a) Customer payments for warranty products were not paid to Canada General Warranty (“**CGW**”). Waddell claims he had an “arrangement” with CGW and that

¹ All capitalized terms used herein but not defined shall have the definition given to those terms in the Receiver’s Factum dated April 19, 2024 (the “**Receiver’s Factum**”), the Third Report of the Receiver dated April 15, 2024 (the “**Third Report**”) and the First Report of the Receiver dated December 4, 2023 (the “**First Report**”).

the vehicles were properly insured, however, he does not dispute that he did not pay over the insurance premiums paid by customers to CGW.²

- (b) Lease 3270 and the associated lease file includes: (1) an invalid lease that the lessee denies signing, (2) a pre-authorized payment form for an account that is not for an account of the Lessee, and (3) a certificate of insurance that was not issued by the Insurer or the Broker. This lease was submitted by the Debtors for funding by Enlightened. Such funds were advanced to the Debtors.³
- (c) The Dealer transferred vehicles that were subject to Enlightened's security and the Receivership to Auto Connect, without a corresponding repayment to discharge the security.⁴
- (d) OMVIC and the Peterborough Police Department are conducting investigations into the activities of Waddell and the Dealer.⁵
- (e) The Dealer unplatd certain vehicles that it had leased to lessees because the floor plan financing had not been repaid and as such the cars were not permitted to be plated.⁶ Though the Dealer had sold one vehicle to Lessee 3269 (an active lessee),

² Waddell Affidavit at paragraph 13(g), CaseLines Master # B-1-148. Receiver's Supplement to the Third Report (the "**Supplemental Report**") at paragraph 16 and Appendix "E".

³ First Report, paragraphs 84-87 on CaseLines Master # E43.

⁴ Waddell Affidavit at paragraph 13(e) and Exhibit "C" on CaseLines Master # B-1-140 and # B-1-148.

⁵ Third Report, paragraph 37 on CaseLines Master # E757.

⁶ Third Report, paragraph 40 on CaseLines Master # E757.

her vehicle was impounded because the licence plates were no longer registered.⁷
This has also occurred with two other lessees.

- (f) Waddell and members of his family were in possession of fifteen vehicles that were subject to lease arrangements and Property pursuant to the ARRO.⁸ The Receiver demanded the return of such vehicles on January 16, 2024.⁹ To date, only three have been returned by the Waddell family.¹⁰
- (g) The Dealer owes the CRA \$883,176.47 in respect of unpaid GST and HST.¹¹
- (h) The Receiver sent correspondence to Waddell and his family members requesting certain banking information that will confirm whether transfers under value occurred, however, this information has not been provided.¹²

PART III - ISSUES

4. The Respondents have raised two issues that the Receiver replies to herein:
- (a) whether this Court has jurisdiction to grant the requested power to the Receiver;
and
 - (b) what evidence ought to be relied upon in granting the requested relief.

⁷ Third Report, paragraph 38 on CaseLines Master # E757.

⁸ Third Report, paragraph 50 on CaseLines Master # E759.

⁹ Third Report, paragraph 51 on CaseLines Master # E759.

¹⁰ Third Report, paragraph 51 and Appendix “J” on CaseLines Master # E759 and # E890.

¹¹ Third Report, paragraph 87 on CaseLines Master # E769.

¹² Third Report, paragraph 65-68 on CaseLines Master # E763.

PART IV - LAW & ARGUMENT

(a) THE COURT HAS JURISDICTION TO GRANT THE RECEIVER THE POWER TO ASSIGN THE DEBTORS INTO BANKRUPTCY

5. The Court in this proceeding has already determined that it was just and convenient to appoint the Receiver over the Debtors on application by the secured creditor pursuant to section 243 of the BIA. In doing so, the Court made the following findings with respect to the circumstances in this case:

[7] In determining whether it is just and convenient to appoint a receiver, the court is required to have regard to “all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto”: see *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), at para. 10.

[8] In this case, I have considered all of the circumstances including the nature of the security held by Enlightened that entitles it to appoint a receiver on default, the history of defaults and forbearance over the last five months, the presentation of two highly conditional term sheets by the Debtors, and the uncertainty regarding any prospect of payment of the arrears and the overall indebtedness. There are other secured creditors that will benefit from the stability of a receivership. Enlightened has entered into the Support Agreement to fund the receivership and preserve the value of the Property pending a court approved sales process.

[9] I consider it just and convenient to appoint a receiver and have signed the order accordingly.¹³

6. Further, when the Receiver sought to expand its Receivership under the *Courts of Justice Act* to all of the property of the Dealer and seek investigative powers, the Court made the following findings in connection with the granting this further relief:

[6] I am satisfied that it is just and convenient to grant the ARRO in this case. As noted above, the record raises issues of duplicate funding, irregularities in lease documentation, transfer of Dealer Property following

¹³ Endorsement of Justice Conway dated October 26, 2023 on CaseLines Master # E776; Book of Authorities Tab 1, paragraphs 7-9.

the Receivership Order, and misappropriation of lease proceeds to purchase additional vehicles. The appointment of the Receiver is necessary at this stage to preserve, protect, and ultimately realize on the Property subject to the security of secured creditors. Also as noted above, OMVIC has serious concerns about the harm to consumers from unremitted payments to Canada General Warranty.

[7] I make no factual findings at this point. However, the record satisfies me that the appointment of the Receiver is just and convenient and warranted under the circumstances.¹⁴

7. This motion is not an opportunity, as argued by the Debtors, to relitigate the appointment of the Receiver and whether it was just and convenient make the appointment. The issue on this motion is whether the Court has the jurisdiction to expand the powers of the Receiver to include the authorization to assign the Debtors into bankruptcy.
8. The jurisdiction for this Court to grant an order authorizing a receiver to assign a debtor into bankruptcy is found in section 243(c) of the BIA, which authorizes the Court to appoint a receiver to “take any other action the court considers advisable.” This includes the requested power. Section 243(c) of the BIA provides:

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

...

(c) take any other action that the court considers advisable.¹⁵

¹⁴ Endorsement of Justice Conway dated December 8, 2023 on CaseLines Master # E794; Book of Authorities Tab 2.

¹⁵ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s. 243(1). [BIA]

9. Further, section 101(2) of the CJA authorizes the Court to grant a receivership order on “such terms as are considered just” by the Court. This also includes the requested power.

Section 101 of the CJA provides:

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.¹⁶

10. The Court’s decision to exercise its jurisdiction under the BIA and the CJA and grant the requested relief is a discretionary decision based on the circumstances of the particular case.
11. As set out in the Receiver’s Factum, courts have routinely granted their court appointed receivers the authorization to assign the Debtors into bankruptcy and to act as the trustee in bankruptcy. This occurred in *RBC v. Gustin, Bank of Montreal v Owen Sound Golf and Country Club* and in *Royal Bank v Sun Squeeze Juices Inc.*,¹⁷ among other cases.

¹⁶ *Courts of Justice Act*, RSO 1990, c. C.43 at s. 101. [CJA]

¹⁷ *RBC v Gustin*, [2019 ONSC 5370](#); *Bank of Montreal v Owen Sound Golf and Country Club*, [2012 ONSC 557](#); *Royal Bank v Sun Squeeze Juices Inc.*, 1994 CarswellOnt 266, [1994] O.J. No. 567 (Gen. Div. [Commercial List]), aff’d 1994 CarswellOnt 310, 28 C.B.R. (3d) 201 (CA) [*Sun Squeeze*] on CaseLines Master # E1594, Book of Authorities, Tab 3.

12. In *Bank of Montreal v Owen Sound Golf and Country Club*, Justice Brown (as he then was) stated as follows:

It is well settled that a court possesses the power to authorize a receiver to file an assignment in bankruptcy or consent to a bankruptcy order.¹⁸

13. The Respondents assert that the cases do not outline when this power should be granted. That is incorrect. In *Sun Squeeze*, there were two questions before the Court:

- (a) whether the Court has the jurisdiction to authorize a court-appointed receiver either to assign a debtor company into bankruptcy or to consent to a receiving order being issued against the debtor company; and
- (b) if so, whether this Court should so authorize the receiver in the circumstances.

14. In *Sun Squeeze* Farley J. found that the jurisdiction to grant the requested relief was settled law.¹⁹

As to the first question, I do not see that there is any dispute that this Court has the power to authorize the Court-appointed R/M to either file an assignment in bankruptcy or consent to the Petition. ...²⁰

15. As to the second question, Farley J. continued as follows:

Thus this matter boils down to whether in the circumstances I should authorize the R/M to consent to the receiving order. Each case of course must be determined on its own facts. It seems to me that where there is an

¹⁸ *Bank of Montreal v Owen Sound Golf and Country Club*, 2012 ONSC 557 at [para 7](#).

¹⁹ *Sun Squeeze*, at para 6 on CaseLines Master # E1596; Book of Authorities, Tab 3.

²⁰ *Sun Squeeze*, at para 6 on CaseLines Master # E1596; Book of Authorities, Tab 3.

obvious insolvency then the Court should examine whether there is a "need" for a bankruptcy and if this need overcomes any contras. ...²¹

16. As previously submitted, bankruptcy of the Debtors is appropriate in the circumstances of this case. Allowing the Receiver to assign the Debtors into bankruptcy would:
- (a) be for the general benefit and efficiency of the estate, including by avoiding an application for bankruptcy brought by Peoples, thereby keeping with the single proceeding model outlined for the commercial list;
 - (b) render the statutory deemed trusts for GST/HST inapplicable, which will increase the assets of the estate that are available to the Debtors' creditors;
 - (c) grant the trustee investigative powers and, if appropriate, the power to commence proceedings under ss. 95 and 96 of the BIA to recover Reviewable Transactions, thereby avoiding the litigation relating to the motion to vary the Amended and Restated Receivership Order; and
 - (d) cause the lookback period for the calculation of the Reviewable Transactions to be calculated from October 6, 2023.
17. Reviewable transactions have occurred and these transfers require investigation. The existence of these non-arms length transfers supports the extended look back period to encompass as many of these transactions as possible for the benefit of the creditors of the Debtors.

²¹ *Sun Squeeze*, at para 11 on CaseLines Master # E1597; Book of Authorities, Tab 3.

18. As stated above, the Debtors have failed to cooperate with the Receiver. The Receiver's requests for financial disclosure from non-arms length parties remain unanswered.²²

(b) THE EVIDENCE SUPPORTS THE GRANTING OF THE RELIEF

19. The Undisputed Facts as set out above in paragraph 3 provide sufficient circumstances to support the Court granting the Receiver the power to bankrupt the Debtors.

20. There is no need to cross examine Waddell on his Affidavit on allegations that are irrelevant to the relief sought by the Receiver.

21. The bankruptcy of the Debtors is inevitable. The requested relief ought to be granted to maintain court efficiencies and end Waddell's interference in this Receivership.

PART V - RELIEF REQUESTED

22. For all of the foregoing reasons, and those in the Receiver's Factum, the Receiver requests that this Court grant orders substantially in the forms included at Tabs 3-5 of the Receiver's Motion Record.

²² Third Report, paragraph 65-68 on CaseLines Master # E763.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of April, 2024.

A handwritten signature in black ink, appearing to be 'R. Kennedy', written over a horizontal line.

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**SCHEDULE “A”
LIST OF AUTHORITIES**

1. Endorsement from October 26, 2023.
2. Endorsement from December 8, 2023.
3. [*RBC v Gustin*, 2019 ONSC 5370](#)
4. [*Bank of Montreal v Owen Sound Golf and Country Club*, 2012 ONSC 557](#)
5. [*Royal Bank v Sun Squeeze Juices Inc.*, 1994 CarswellOnt 266, \[1994\] O.J. No. 567 \(Gen. Div. \[Commercial List\]\), aff’d 1994 CarswellOnt 310, 28 C.B.R. \(3d\) 201 \(CA\)](#)

**SCHEDULE “B”
RELEVANT STATUTES**

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

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
- (c) take any other action that the court considers advisable.

Courts of Justice Act, RSO 1990, c. C.43

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

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*

ENLIGHTENED FUNDING CORPORATION and **VELOCITY ASSET AND CREDIT CORPORATION AND 926749 ONTARIO LTD.**

Applicant

Respondents

Court File No.: CV-23-00707330-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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