

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

B E T W E E N:

AMERICAN GENERAL LIFE INSURANCE COMPANY and
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

Applicants

- and -

VICTORIA AVENUE NORTH HOLDINGS INC.
and THE PARTIES LISTED ON SCHEDULE "A"

Respondents

**APPLICATION UNDER section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985,
c. B-3, as amended, and under section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43**

**FACTUM OF THE RECEIVER
(Motion for Approval of Broker Engagement, Sale Process and Ancillary Matters)
Returnable October 29, 2021**

BLAKE, CASSELS & GRAYDON LLP
Barristers and Solicitors
199 Bay Street
Suite 4000, Commerce Court West
Toronto, Ontario M5L 1A9

Pamela L.J. Huff, LSO #27344V
Tel: 416-863-2958
Email: pamela.huff@blakes.com

Aryo Shalviri, LSO #63867A
Tel: 416-863-2962
Email: aryo.shalvir@blakes.com

Chris Burr, LSO #55172H
Tel: 416-863-3261
Email: chris.burr@blakes.com

Jules Monteyne, LSO #72980C
Tel: 416-863-5256
Fax: 416-863-2653
Email: jules.monteyne@blakes.com

Lawyers for the Receiver

TO: SERVICE LIST

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SERVICE LIST
(as at October 4, 2021)

<p>BLAKE, CASSELS & GRAYDON LLP 199 Bay Street Suite 4000, Commerce Court West Toronto, Ontario M5L 1A9</p> <p>Pamela L.J. Huff, LSO #27344V Tel: 416-863-2958 Email: pamela.huff@blakes.com</p> <p>Chris Burr, LSO #55172H Tel: 416-863-3261 Email: chris.burr@blakes.com</p>	<p>KPMG INC. Bay Adelaide Centre 333 Bay Street, Suite 4600 Toronto, Ontario M5H 2S5</p> <p>Nick Brearton Tel: 416-777-3768 Email: nbrearton@kpmg.ca</p> <p>George Bourikas Tel: 416-777-8887 Email: gbourikas@kpmg.ca</p>
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<p>Aryo Shalviri, LSO #63867A Tel: 416-863-2962 Email: aryo.shalviri@blakes.com</p> <p>Jules Monteyne, LSO #72980C Tel: 416-863-5256 Fax: 416-863-2663 Email: jules.monteyne@blakes.com</p> <p><i>Lawyers for the Applicants and the Receiver</i></p>	<p>Katherine Forbes Tel: 416-777-8107 Email: katherineforbes@kpmg.ca</p> <p>Jojo Tang Email: jojotang@kpmg.ca</p> <p><i>Receiver</i></p>
<p>NORTON ROSE FULBRIGHT CANADA LLP 222 Bay Street, Suite 3000 P.O. Box 53 Toronto, Ontario M5K 1E7</p> <p>Evan Cobb Tel: 416-216-1929 Email: evan.cobb@nortonrosefulbright.com</p> <p><i>Independent Counsel for the Receiver</i></p>	<p>WEISZ FELL KOUR 200 Bay Street, Suite 2305 P.O. Box 120 Toronto, Ontario M5J 2J3</p> <p>Sharon A. Kour Tel: 416-613-8283 Email: skour@wfklaw.ca</p> <p>Caitlin Fell Tel: 416-613-8282 Email: cfell@wfklaw.ca</p> <p><i>Lawyers for the Legal Owner, Victoria Avenue North Holdings Inc.</i></p>
<p>EMILY EVANGELISTA 101 10 Director Court Woodbridge, Ontario L4L 7E8</p> <p>Tel: 905-265-2252, ext. 337 Email: emily@evangelistalaw.ca</p> <p><i>Lawyer for Tanbros Investments Ltd.</i></p>	<p>PETER I WALDMANN PROFESSIONAL CORPORATION 183 Augusta Avenue Toronto, Ontario M5T 2L4</p> <p>Peter I Waldmann Email: peter@peteriwaldmann.com; info@peteriwaldmann.com; legalservices@peteriwaldmann.com</p> <p><i>Lawyer for Yun Zuo in her personal capacity and as the trustee of The Xuezhong Family Trust, Qiu Xie as the trustee of Xie 2018 Family Trust, Jian Ming Xu (Plaintiff in related court proceedings), and Xing Wang (Plaintiff in related court proceedings)</i></p>

Legal Owner / Beneficial Owners:

VICTORIA AVENUE NORTH HOLDINGS INC. 200 Ronson Drive, Suite 201 Toronto, Ontario M9W 5Z9 Attention: Mark Gross Email: mark@danimax.ca	THE BENEFICIAL OWNERS LISTED ON SCHEDULE "A"
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Ministries / Municipalities:

CANADA REVENUE AGENCY c/o Department of Justice Ontario Regional Office The Exchange Tower, Box 36 Suite 3400, 130 King Street West Toronto, Ontario M5X 1K6 Diane Winters , General Counsel Tel: 416-973-3172 Fax: 416-973-0810 Email: diane.winters@justice.gc.ca Rakhee Bhandari Tel: 416-952-8563 Email: rakhee.bhandari@justice.gc.ca	MINISTRY OF FINANCE (ONTARIO) Insolvency Unit 33 King Street West, 6th Floor Oshawa, Ontario L1H 8H5 Email: insolvency.unit@ontario.ca
CITY OF HAMILTON 71 Main Street West Hamilton, Ontario L8P 4Y5 Attention: Legal Services Email: kaush.parameswaran@hamilton.ca	

Parties with PPSA Registrations:

<p>BLUE CHIP LEASING CORPORATION 41 Scarsdale Road, Unit 5 Toronto, Ontario M3B 2R2</p>	<p>MILLER THOMSON LLP Scotia Plaza 40 King Street West, Suite 5800 Toronto, ON M5H 3S1</p> <p>Asim Iqbal, LSO #61884B Tel: 416-597-6008 Fax: 416-863-1716 Email: aiqbal@millerthomson.com</p> <p>Elsir Tawfik, LSO #79819D Tel: 416-595-2663 Fax: 416-595-8695 Email: etawfik@millerthomson.com</p> <p><i>Lawyers for De Lage Landen Financial Services Canada Inc.</i></p>
<p>MERIDIAN ONECAP CREDIT CORP. Suite 1500, 4710 Kingsway Burnaby, British Columbia V5H 4M2</p>	

Parties with Encumbrances Registered on Title:

<p>1012689 ONTARIO LIMITED 45 Lower Jarvis Street Toronto, Ontario M5E 1R8</p> <p>With a copy to:</p> <p>DALE & LESSMANN LLP 181 University Avenue, Suite 2100 Toronto, Ontario M5H 3M7</p> <p>Nedko Petkov Tel: 416-369-7821 Email: npetkov@dalelessmann.com</p>	<p>MILLER THOMSON LLP Scotia Plaza 40 King Street West, Suite 5800 Toronto, ON M5H 3S1</p> <p>Asim Iqbal, LSO #61884B Tel: 416-597-6008 Fax: 416-863-1716 Email: aiqbal@millerthomson.com</p> <p>Elsir Tawfik, LSO #79819D Tel: 416-595-2663 Fax: 416-595-8695 Email: etawfik@millerthomson.com</p> <p><i>Lawyers for De Lage Landen Financial Services Canada Inc.</i></p>
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Email Distribution List:

pamela.huff@blakes.com; chris.burr@blakes.com; aryo.shalviri@blakes.com;
jules.monteyne@blakes.com; nbrearton@kpmg.ca; gbourikas@kpmg.ca;
katherineforbes@kpmg.ca; jojotang@kpmg.ca; evan.cobb@nortonrosefulbright.com;
skour@wfkaw.ca; cfell@wfkaw.ca; emily@evangelistalaw.ca; mark@animax.ca;
peter@peteriwaldmann.com; info@peteriwaldmann.com; legalservices@peteriwaldmann.com;
diane.winters@justice.gc.ca; rakhee.bhandari@justice.gc.ca; insolvency.unit@ontario.ca;
kaush.pameswaran@hamilton.ca; npetkov@dalelessmann.com; aiqbal@millertomson.com;
etawfik@millertomson.com;

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PART I - OVERVIEW

1. This Factum is filed by KPMG Inc., in its capacity as Court-appointed receiver and manager (the “**Receiver**”), appointed pursuant to the Order of the Honourable Mr. Justice Koehnen of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) granted on August 3, 2021 (the “**Appointment Order**”), in support of the Receiver’s motion for an order:

¹ See Schedule “A” to the Appointment Order

- i. approving the broker engagement agreement dated as of October 20, 2021 (the “**Broker Engagement Agreement**”) with CBRE Limited (“**CBRE**” or the “**Broker**”) and the engagement of the Broker as exclusive real estate broker in accordance with the terms therein;
 - ii. approving the proposed Sale Process set out at Schedule “A” to the form of Order contained at Tab 3 of the Receiver’s Motion Record (the “**Sale Process**”) and described in the Second Report of the Receiver dated October 22, 2021 contained at Tab 2 of the Receiver’s Motion Record (the “**Second Report**”);
 - iii. sealing Confidential Appendices “A” and “B” to the Second Report (collectively, the “**Confidential Appendices**”); and
 - iv. granting certain other ancillary relief.
2. In the Receiver’s view, (i) the engagement of the Broker and approval of the Sale Process will enable the Receiver to undertake a comprehensive, transparent and efficient sale process for the Real Property Assets (as defined below), employing procedures that are optimized to maximize value for creditors and achieve closing of potential transaction(s) on an appropriate timeline, and (ii) the Confidential Appendices contain confidential, sensitive and in certain instances competitive information that if disclosed, could cause serious harm to important interests and the salutary effects of sealing them outweigh any deleterious effects. Accordingly, for the reasons set out below, the Receiver is respectfully requesting that this Court: (i) approve the engagement of the Broker and the Sale Process, and (ii) seal the Confidential Appendices.

3. Capitalized terms used but not otherwise defined in this Factum shall have the meanings given to them in the Second Report.

PART II - FACTS

Background

4. Pursuant to the Appointment Order, the Receiver was appointed as receiver of the Property (as defined in the Appointment Order).

Second Report at para 1.

5. Prior to the Receiver's appointment, Victoria Avenue North Holdings Inc. (the "**Legal Owner**") was engaged in the ownership, maintenance and operation of medical office buildings leased by the Legal Owner to primarily medical professionals and related businesses (together with the leases related thereto, the "**Real Property Assets**"). The Receiver is proposing to market the Real Property Assets as going concerns.

The Broker and Broker Engagement Agreement

6. Following its appointment, the Receiver conducted a request for proposal process ("**RFP**") inviting a number of real estate brokerage firms to submit proposals to act as a listing broker for the Real Property Assets.

Second Report at para 17.

7. The RFP engaged real estate brokers with (i) sufficient reach to broadly market the assets which are located in various municipalities across Ontario, (ii) experience with these types of assets, and (iii) expertise in the sale of real property in court-supervised proceedings.

Second Report at paras 17 and 18.

8. In response to the RFP, the Receiver obtained separate proposals from five real estate brokers, each setting out proposed economic terms, marketing plans, and relevant expertise. The Receiver met with each of these five brokers to engage with them on the terms of their submitted proposal. A summary of the proposals received in the RFP is attached as Confidential Appendix “A” to the Second Report (the “**RFP Proposals Summary**”). Following this process, the Receiver determined that CBRE is best positioned to act as listing broker and has proceeded to engage CBRE pursuant to the Broker Engagement Agreement, which is subject to this Court’s approval.

Second Report at paras 19-21; Confidential Appendix “A” to the Second Report [**“Confidential Appendix A”**].

9. The Receiver has entered into the Broker Engagement Agreement, an unredacted version of which is appended as Confidential Appendix “B” to the Second Report and a redacted version of which is appended as Appendix “C” to the Second Report.

Second Report at paras 22 and 23; Confidential Appendix “B” to the Second Report [**“Confidential Appendix B”**]; Appendix “C” to the Second Report at section 8.6.

10. The Broker has assisted the Receiver in preparing the proposed Sale Process and should this Court approve the Broker Engagement Agreement and the Sale Process, the Broker will assist the Receiver in conducting the Sale Process.

11. The Receiver is seeking an order sealing and treating as confidential the RFP Proposals Summary and the unredacted Broker Engagement Agreement. The Receiver is of the view that the disclosure of the commercial terms and competitive information contained in the RFP Proposals Summary would have a detrimental impact on the participants in the RFP, and that the disclosure of the economic terms of both the RFP Proposals Summary and the unredacted Broker Engagement Agreement could negatively impact the Sale Process (in the case of the RFP Proposals

Summary) and the Receiver's ability to negotiate future listing agreements should it become necessary to engage a different broker in the future (in the case of both the RFP Proposals Summary and the Broker Engagement Agreement). Further, it is an explicit term of the Broker Engagement Agreement that the Receiver seek a sealing order in respect of the unredacted Broker Engagement Agreement.

Second Report at para 41; Appendix "C" to the Second Report.

The Sale Process

12. The Sale Process has been prepared by the Receiver in consultation with the Broker, with the objective of obtaining offers for the Real Property Assets through a comprehensive, transparent and efficient process that is designed to provide the greatest value to the Legal Owner, and in turn, its creditors and other stakeholders. The Sale Process provides for a robust marketing process which will thoroughly test the market.

Second Report at para 26.

13. The Sale Process is comprised of two marketing phases, whereby the marketing will be initially focused on potential purchasers of the full portfolio in the first marketing phase, and thereafter focused on sub-portfolio (one or more properties, but fewer than the full-portfolio) purchasers in the second marketing phase. The full-portfolio phase will market the Real Property Assets alongside the entire portfolio of similar real property assets subject to a proposed court-supervised sale process in the Southmount Proceedings (as defined in paragraph 6 of the Second Report). The two-phase marketing approach is designed to recognize that potential portfolio purchasers may require more time to consider and diligence the opportunity and to focus marketing efforts on them first. However, notwithstanding that there are two active marketing phases, all

interested parties (whether portfolio or sub-portfolio buyers) shall be entitled to participate in the process from day one, and all interested parties will have the same bid deadline.

Second Report at paras 6, 25 and 27.

14. From start to finish, the proposed Sale Process is anticipated to run for approximately 6 months, which period of time takes into account approximately 3-4 weeks around the December holiday period where a significantly lower level of market activity is anticipated. However, by the terms of the Sale Process, certain deadlines and timelines may be revised by the Receiver, in consultation with the Broker and on notice to interested parties.

Second Report at para 27; Appendix "A" to the Second Report.

15. The Receiver will make a motion to this Court to obtain approval of any successful bid(s) and one or more vesting orders with respect to the asset purchase agreement(s) with any ultimate successful bidder(s).

Second Report at para 27.

PART III - ISSUES

16. The following issues are before the Court on this Motion:

- (a) Should the engagement of CBRE as Broker be approved in accordance with the terms set out in the Broker Engagement Agreement?
- (b) Should the proposed Sale Process be approved?
- (c) Should a sealing order be granted in respect of the Confidential Appendices?

17. In the Receiver's respectful submission, the answer to all three questions is yes.

PART IV - THE LAW AND DISCUSSION

A. The Engagement of CBRE as Broker Should be Approved

18. The Receiver requires real estate advisory services to run the Sale Process in order to maximize realizations from the Real Property Assets. The engagement of a real estate broker in insolvency proceedings involving real property is not uncommon, and the Receiver already has the authority to retain a broker pursuant to subparagraph 3(d) of the Appointment Order.

[Appointment Order](#) of this Court dated August 3, 2021, at subpara 3(d).

19. Notwithstanding the existing authority to retain a broker, given the importance of the selection of CBRE to monetization efforts and the fact that any commissions earned as a result of any successful transaction(s) would be paid from gross proceeds of sale, the Receiver has determined that it is advisable and appropriate to seek approval of the Broker Engagement Agreement.

20. While there are no explicit statutory provisions respecting a receiver's engagement of a consultant or an advisory party such as a real estate broker, section 243(1)(c) of the *Bankruptcy and Insolvency Act* (Canada) (the "BIA") provides the statutory basis for the Court to exercise its discretion to approve the appointment of such a broker where it sees fit to do so. Courts have also recognized that industry experience and familiarity with the debtor company or assets subject to a sale process are important factors to consider when approving the engagement of an advisor such as a broker.

BIA, section 243(1)(c); [Colossus Minerals Inc. Re, 2014 ONSC 514](#) at paras 28-36, Tab A of the Book of Authorities of the Receiver ["Receiver's BOA"].

21. The Broker, if appointed, will be paid its fees and commissions from the gross proceeds of sale of the Real Property Assets. Accordingly, the factors that a Court will take into account when considering whether to approve a charge for advisor's fees are also relevant in considering approval of the Broker Engagement Agreement in the present case. These factors are:

- (a) the size and complexity of the business being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the receiver.

[Re Canwest Publishing Inc., 2010 ONSC 222](#) at para 54 [*"Canwest"*], Tab B of Receiver's BOA.

22. In the present case, the Receiver undertook the RFP, a comprehensive process for the selection of a broker. After carefully considering the responses received, the Receiver entered into the Broker Engagement Agreement with the Broker and is recommending approval thereof because:

- (a) the Broker is well known in the industry for its market-leading expertise and experience with commercial real estate assets;
- (b) the Broker has significant market reach, particularly with institutional purchasers and a clearly articulated marketing strategy which can be deployed in respect of the of the two medical office buildings comprising the Real Property Assets;

- (c) the Broker also has familiarity with the geographic regions where the Real Property Assets are situated and has a commission fee structure that permits it to partner with local cooperating brokers;
- (d) the Broker has previously acted as a broker of distressed assets, including in the insolvency context and can assist in implementing the proposed Sale Process in a transparent and fair manner;
- (e) the Broker has commissions which are within a narrow competitive margin of the proposals received from other prospective brokers and the quantum of commissions payable under the Broker Engagement Agreement reflects an appropriate incentive to secure the highest and best bids for the Real Property Assets; and
- (f) the Receiver has consulted with the Applicants, being the senior secured creditors in these proceedings which are supportive of the engagement of CBRE, as well as the other registered mortgagee.

Second Report, at paras 19, 20 and 22; Confidential Appendix “B”, *supra*; Confidential Appendix “C”, *supra*.

23. For all the foregoing reasons, it is appropriate for this Court to exercise the discretion provided to it under section 243(1)(c) of the BIA and approve the Broker Engagement Agreement and the engagement of the Broker as contemplated therein.

B. The Proposed Sale Process Should be Approved

24. The Receiver has, in consultation with the Broker, prepared the Sale Process with a view to maximizing value for creditors in a fair, transparent and efficient manner. The Receiver notes in particular that:

- (a) any interested party that executes a non-disclosure agreement will be afforded an opportunity to participate in the proposed Sale Process;
- (b) the proposed Sale Process is contemplated to run for a total period of approximately 6 months and is sufficiently robust to provide the Real Property Assets with adequate exposure to the market and maximize value for stakeholders; and
- (c) any “Successful Bid” that is selected pursuant to the proposed Sale Process will require this Court’s approval.

Second Report at para 27.

25. As with the engagement of the Broker, this Court has the jurisdiction to approve the proposed Sale Process pursuant to section 243(1)(c) of the BIA.

BIA, section 243(1)(c).

26. Although the decision to approve a particular form of sale process is distinct from the approval of a proposed sale transaction, courts have held that the factors which a court is to consider on such motions are intertwined with and drawn from the oft-cited principles set out in *Royal Bank v Soundair Corp.*, being : (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by

which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties.

[CCM Master Qualified Fund Ltd. v blutip Power Technologies Ltd., 2012 ONSC 1750](#) at para 6 [“*blutip*”], at para 6, Tab C of Receiver’s BOA; *Royal Bank of Canada v Soundair Corp.*, 1991 CarswellOnt 205, 91 CBR (5th) 285 (Ont CA) at para 16 [“*Soundair*”], Tab D of Receiver’s BOA; [Choice Properties Limited Partnership v Penady \(Barrie\) Ltd., 2020 ONSC 3517](#) at para 16, Tab E of Receiver’s BOA; [Yukon \(Government of\) v Yukon Zinc Corporation, 2020 YKSC 17](#) at para 62, Tab F of Receiver’s BOA.

27. Accordingly, when reviewing a sales process proposed by a receiver a court should assess:
- i. the fairness, transparency and integrity of the proposed process;
 - ii. the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
 - iii. whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

blutip, supra, at para 6, Tab C of Receiver’s BOA.

28. The proposed sale process need not be perfect, only reasonable and a court should also give significant weight to the recommendation of its receiver, a court-appointed officer with significant expertise in insolvency proceedings.

[Marchant Realty Partners Inc. v 2407553 Ontario Inc., 2021 ONCA 375](#) at paras 10, 15 and 19, Tab G of Receiver’s BOA; [Re Sanjel Corporation, 2016 ABQB 257](#) at para 80, Tab H of Receiver’s BOA.

29. The proposed Sale Process is consistent with similar sales processes approved in other Canadian insolvency proceedings.

[First Source Financial Management Inc. and Kingsett Mortgage Corporation v Ideal \(BC\) Developments Inc. et al](#), (CV-19-00622054-00CL), Sale Process Order dated August 19, 2019 at paras 2–4, Tab I of Receiver’s BOA; [Laurentian Bank of Canada v 2145744 Ontario Limited](#), (CV-19-00631895-00CL), Order dated February 19, 2020 at paras 3—5, Tab J of Receiver’s BOA; [Cortland Credit Lending Corporation v Mohawk Trail Properties Inc. et al](#), (CV-21-00666311-00CL), Sale Process Order dated August 3, 2021 at para 1, Tab K of Receiver’s BOA.

30. The Receiver submits that for all of the foregoing reasons it is commercially reasonable and appropriate to approve the Sale Process.

D. It is Appropriate to Grant a Sealing Order Respecting the Confidential Appendices

31. In *Sierra Club of Canada v Canada (Minister of Finance)* (“*Sierra Club*”), the Supreme Court of Canada (“SCC”) held that courts should exercise their discretion to grant sealing orders where:

- i. the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and
- ii. the salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

[Sierra Club of Canada v Canada \(Minister of Finance\), 2002 SCC 41](#) at para 53, Tab L of Receiver’s BOA.

32. In *Sherman Estate v Donovan*, the SCC recast the test from *Sierra Club*, without altering its essence. According to *Sherman Estate*, a person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

- i. court openness poses a serious risk to an important public interest;
- ii. the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
- iii. as a matter of proportionality, the benefits of the order outweigh its negative effects.

[*Sherman Estate v Donovan*, 2021 SCC 25](#) at para 38 [*“Sherman Estate”*], Tab M of Receiver’s BOA.

33. Although the SCC was considering issues of personal privacy in *Sherman Estate*, it notes in citing *Sierra Club* that the term “important interest” can capture a broad array of public objectives including commercial interests.

Sherman Estate, supra, at para 41, Tab M of Receiver’s BOA.

34. In the insolvency context, courts have commonly applied the *Sierra Club* test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders.

[*Elleway Acquisitions Ltd v 4358376 Canada Inc.*, 2013 ONSC 7009](#) at paras 47 and 48, Tab N of Receiver’s BOA; [*GE Canada Real Estate Financing Business Property Company v 1262354 Ontario Inc.*, 2014 ONSC 1173](#) at para 32, Tab O of Receiver’s BOA; *Stelco Inc. (Re)*, 2006 CarswellOnt 394 at paras 2-5, [2006] OJ No. 275 (Ont SCJ), Tab P of Receiver’s BOA; *Canwest, supra*, at paras 63-65, Tab B of Receiver’s BOA.

35. The test for a sealing order as recast in *Sherman Estate* has similarly been recently employed in the insolvency context to authorize sealing orders over confidential or commercially sensitive documents.

[Ontario Securities Commission v Bridging Finance Inc., 2021 ONSC 4347](#) at paras 23-27, Tab Q of Receiver's BOA; [Laurentian University of Sudbury, 2021 ONSC 4769](#) at paras 12-14, Tab R of Receiver's BOA.

36. Confidential Appendix A contains confidential, commercially sensitive and competitive information regarding (i) fee structures, (ii) marketing strategy, and (iii) indications of value which, if disclosed, could adversely affect (i) the participants in the RFP process, (ii) the proposed Sale Process (and therefore recoveries for stakeholders), and (iii) any future efforts to engage a new broker, should the need arise.

Second Report at para 20.

37. Confidential Appendix B contains the unredacted fee structure in the Broker Engagement Agreement. As in the case of the RFP Proposals Summary, this is competitive and commercially sensitive information and its disclosure could cause harm to the Broker and any future efforts to engage a new broker, should the need arise.

Second Report at paras 23 and 24.

38. In the circumstances, the sealing order sought is the least restrictive means to maintain the confidentiality of this commercially sensitive, competitive and confidential information. Accordingly, the Receiver submits that the salutary effects of the sealing order outweigh the deleterious effects of restricting access to the Confidential Appendices, and that the sealing order is therefore appropriate.

PART V - CONCLUSION

39. For the reasons set out above, the Receiver respectfully requests that this Court:
- i. approve the Broker Engagement Agreement and authorize the Receiver to engage the Broker;
 - ii. approve the proposed Sale Process; and
 - iii. seal the Confidential Appendices.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of October, 2021.



Pamela L.J. Huff/Aryo Shalviri/Chris Burr/Jules Monteyne
Lawyers for the Receiver

SCHEDULE “A”

LIST OF AUTHORITIES

<u>Case</u>	<u>Tab</u>
1. <u>Colossus Minerals Inc, Re, 2014 ONSC 514</u>	A
2. <u>Re Canwest Publishing Inc., 2010 ONSC 222</u>	B
3. <u>CCM Master Qualified Fund Ltd. v blutip Power Technologies Ltd., 2012 ONSC 1750</u>	C
4. <i>Royal Bank of Canada v Soundair Corp.</i> , 1991 CarswellOnt 205, 91 CBR (5th) 285 (Ont CA)	D
5. <u>Choice Properties Limited Partnership v Penady (Barrie) Ltd., 2020 ONSC 3517</u>	E
6. <u>Yukon (Government of) v Yukon Zinc Corporation, 2020 YKSC 17</u>	F
7. <u>Marchant Realty Partners Inc. v 2407553 Ontario Inc., 2021 ONCA 375</u>	G
8. <u>Re Sanjel Corporation, 2016 ABQB 257</u>	H
9. <u>First Source Financial Management Inc. and Kingsett Mortgage Corporation v Ideal (BC) Developments Inc. et al</u> , (CV-19-00622054-00CL), Sale Process Order dated August 19, 2019	I
10. <u>Laurentian Bank of Canada v 2145744 Ontario Limited</u> , (CV-19-00631895-00CL), Order dated February 19, 2020	J
11. <u>Cortland Credit Lending Corporation v Mohawk Trail Properties Inc. et al</u> , (CV-21-00666311-00CL), Sale Process Order dated August 3, 2021	K
12. <u>Sierra Club of Canada v Canada (Minister of Finance), 2002 SCC 41</u>	L
13. <u>Sherman Estate v Donovan, 2021 SCC 25</u>	M
14. <u>Elleway Acquisitions Ltd v 4358376 Canada Inc., 2013 ONSC 7009</u>	N
15. <u>GE Canada Real Estate Financing Business Property Company v 1262354 Ontario Inc., 2014 ONSC 1173</u>	O
16. <i>Stelco Inc. (Re)</i> , 2006 CarswellOnt 394, [2006] OJ No. 275 (Ont SCJ)	P
17. <u>Ontario Securities Commission v Bridging Finance Inc., 2021 ONSC 4347</u>	Q
18. <u>Laurentian University of Sudbury, 2021 ONSC 4769</u>	R

SCHEDULE "B"

RELEVANT STATUTES

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3: Section 243

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.

AMERICAN GENERAL LIFE INSURANCE COMPANY, *et al.* - and -
Applicants

VICTORIA AVENUE NORTH HOLDINGS INC., *et al.*
Respondents

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

Proceeding Commenced at Toronto

**FACTUM OF THE RECEIVER
(Motion to Approve the Broker Engagement, Sale
Process, and Ancillary Matters)
Returnable October 29, 2021**

BLAKE, CASSELS & GRAYDON LLP

Barristers and Solicitors

199 Bay Street

Suite 4000, Commerce Court West

Toronto, Ontario M5L 1A9

Pamela L.J. Huff, LSO #27344V

Tel: 416-863-2958

Email: pamela.huff@blakes.com

Aryo Shalviri, LSO #63867A

Tel: 416-863-2962

Email: aryo.shalviri@blakes.com

Chris Burr, LSO #55172H

Tel: 416-863-3261

Email: chris.burr@blakes.com

Jules Monteyne, LSO #72980C

Tel: 416-863-5256

Fax: 416-863-2653

Email: jules.monteyne@blakes.com

Lawyers for the Receiver