

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

BETWEEN:

CANADIAN WESTERN BANK

Applicant

- and -

1000179473 ONTARIO INC. and 2724393 ONTARIO INC.

Respondents

**FACTUM OF THE RECEIVER
(Motion returnable June 24, 2024)**

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Court-Appointed Receiver**

TO: THE SERVICE LIST

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FACTUM OF THE RECEIVER

PART I – OVERVIEW

1. This Factum is submitted by MNP Ltd. (“**MNP**”), in its capacity as court-appointed receiver (the “**Receiver**”) without security, of the assets, undertakings and property of 1000179473 Ontario Inc. (“**1000 Corp**”) and 2724393 Ontario Inc. (“**272 Corp**”, together with 1000 Corp, the “**Companies**” and collectively the property of 272 Corp and 1000 Corp, the “**Properties**”), for orders:

- (a) approving the sale transaction (the “**1000 Transaction**”) contemplated by an agreement of purchase and sale (the “**1000 APS**”) between the Receiver and Dynamic Investment Corp. (the “**Purchaser**”) dated May 22, 2024 and authorizing the Receiver to take all necessary steps to complete the 1000 Transaction;
- (b) vesting in the Purchaser all of 1000 Corp’s right, title and interest in and to the Purchased Assets (as defined in the 1000 APS), free and clear of claims and

encumbrances, other than claims and encumbrances specifically provided for in the 1000 APS, upon closing of the 1000 Transaction and the delivery of a Receiver's certificate to the Purchaser certifying that the purchase price and all closing conditions have been satisfied or waived and the 1000 Transaction has been completed to the satisfaction of the Receiver;

- (c) authorizing and directing the Receiver to distribute an amount to CWB net of a holdback in the amount of \$250,000 in respect of potential statutory priorities and the Receiver and its counsel's outstanding fees from the sale proceeds of the 1000 Transaction;
 - (d) expanding the Receiver's powers to permit MNP to file an assignment in bankruptcy on behalf of 1000 Corp and appointing MNP Ltd. as Trustee in Bankruptcy over 1000 Corp;
 - (e) approving the Third Report of the Receiver dated June 19, 2024 (the "**Third Report**") and the activities of the Receiver described in the Third Report;
 - (f) approving the fees and disbursements of the Receiver and of the Receiver's independent counsel, Chaitons LLP ("**Chaitons**");
 - (g) approving the interim statement of receipts and disbursements for the period ending June 7, 2024 (the "**Interim R&D**"); and
 - (h) sealing the confidential appendices to the Third Report, pending completion of the 1000 Transaction or further order of the Court.
2. Capitalized terms not defined herein have the meaning defined in the Third Report.

PART II – FACTS

Background

3. The circumstances leading to the appointment of the Receiver are set out in the affidavit of Rod Randall of the Canadian Western Bank (“**CWB**”) sworn July 13, 2023, and filed in support of the Appointment Order (the “**Randall Affidavit**”).¹

4. 1000 Corp owns land municipally known as 269 Erie Street East, Stratford, Ontario and operated a gas station and convenience store on the property under the “Inver” banner (the “**1000 Station**”) at the relevant time. All of this location’s fuel was supplied by BCP IV Service Station LP o/a Greenenergy (“**Greenenergy**”).²

5. 272 Corp. owns lands municipally known as 181 Brant Road, St. George, Ontario and operated a gas station and convenience store on the property under the “Ultramar” banner (the “**272 Station**”, together with the 1000 Station, the “**Stations**”). All of this location’s fuel and related items were supplied by Parkland Fuel Corporation (“**Parkland**”) pursuant to supply and brand agreements between 272 Corp. and Parkland.³

6. As set out in the Randall Affidavit, both the St. George and Stratford Stations were shut down by the Companies since late June 2023. There were no active employees of the Companies at the Stations at the date of the Receiver’s appointment.⁴

¹ Third Report at para. 2, Motion Record of the Receiver dated June 19, 2024 (“**MR**”) Tab 2.

² Third Report at para. 3, MR Tab 2.

³ Third Report at para. 4, MR Tab 2.

⁴ Third Report at para. 5, MR Tab 2.

Receivership Proceeding

7. Pursuant to an order (the “**Appointment Order**”) of the Ontario Superior Court of Justice (the “**Court**”) dated July 21, 2023 (the “**Receivership Date**”) upon application by CWB, MNP was appointed Receiver over the Properties.⁵

Security Review

8. The Receiver obtained an independent legal opinion from Jaffe Peritz LLP (“**Jaffe**”), confirming that the general security agreements granted to CWB by each of the Companies and the charges registered against title to the Properties (the “**Charges**”) are valid and enforceable, subject to certain assumptions and qualifications typically included in opinions provided to trustees and receivers in insolvency proceedings.⁶

Sale Process

9. On November 14, 2023, the Receiver obtained an Order approving a marketing and sale process for the Stations.⁷

10. To assist in marketing the Property for sale, the Receiver engaged Avison Young Commercial Real Estate Services LP (“**Avison Young**”) for the development and implementation of the real property sale process (the “**Sale Process**”).

11. On October 30, 2023, the 1000 Station was listed for sale on the Toronto Real Estate Board MLS by Avison Young for an initial 90 day period for \$2.5 million. On October 31, 2023, the 1000

⁵ Third Report at para. 1, MR Tab 2; Appendix “A” to the Third Report.

⁶ Third Report at paras. 33-34, MR Tab 2.

⁷ Third Report at para. 7, MR Tab 2.

Station was listed for sale on the Waterloo Association for Realtors Interboard at the listing price set out above (the “**Listing**”).⁸

12. Avison Young provided the Receiver with on-going reports regarding its activities to market the 1000 Station, the response to the Listing and expressions of interest in the 1000 Station generally. Below is a summary of the marketing activities as set out in the Avison Report:⁹

- (a) preparation of a teaser (the “**Teaser**”) that was sent on October 19, 2023, November 2, 2023 and November 29, 2023 by way of email. The third email reached 2,113 realtors and prospective purchasers in the Greater Toronto Area and the local region of the 1000 Station;
- (b) in relation to the email delivered November 29, 2023, a total of 443 parties opened Avison Young’s email blast and 44 clicked through the content;
- (c) subsequently, the email blast was resent on March 7, April 8, April 22 and May 6, 2024 to solicit interest from prospective purchasers;
- (d) preparation of a secure online data room, with the Receiver’s assistance, to facilitate potential purchasers’ due diligence. The data room contained, among other things, available information regarding sales, operating costs, equipment and supply agreements with fuel suppliers;
- (e) 23 realtors and interested parties responded to the Teaser and executed Non-disclosure Agreements that were prepared by the Receiver;

⁸ Third Report at para. 16; MR, Tab 2; Appendix “D” to the Third Report.

⁹ Third Report at para. 18, MR, Tab 2; Appendix “E” to the Third Report.

- (f) 11 prospective purchasers that executed NDAs viewed the data room of which 3 made on-site inspections of the 1000 Station; and
- (g) 3 offers for the 1000 Station were received and are summarized in **Confidential Appendix “1”** attached to the Confidential Appendix Brief. This includes the offer from the Purchaser.

Dynamic Investment Corp.’s Offer

13. Following consultations with CWB and Avison Young, the 1000 APS was negotiated with the Purchaser.¹⁰

14. Key Aspects of the 1000 APS are summarized in the following table (capitalized terms have the meanings ascribed to them in the 1000 APS):¹¹

Purchase Price	Sealed pending completion of the Transaction.
Deposit	One hundred and Forty-Five Thousand Dollars (\$145,000) (delivered to the Receiver).
Purchased Assets	The property and all assets and equipment currently located on site.
Conditions	None.
Closing Date	The 30th day following the date of Court approval and issuance of the approval and vesting order.

15. The Receiver is of the opinion that the 1000 APS represents the best and highest offer for the 1000 Station and that the Sale Process completed was fair and reasonable for the following reasons:¹²

¹⁰ Third Report at para. 19, MR Tab 2.

¹¹ Third Report at para. 19, MR Tab 2; Appendix “F” to the Third Report. A copy of the unredacted 1000 APS is attached as Confidential Appendix “2” to the Confidential Appendix Brief.

¹² Third Report at para. 20, MR Tab 2.

- (a) the Receiver along with Avison Young made sufficient effort to expose the 1000 Station to a wide variety of potential purchasers;
- (b) the current market for gas stations is saturated with more than 30 stations for sale in southern Ontario, many of which are in insolvency proceedings;
- (c) the purchase price reflects the best price available in the circumstances; and
- (d) CWB who will suffer a shortfall on its security, supports the completion of the 1000 Transaction.

Proposed Distributions

16. The Receiver proposes to distribute the net proceeds of the 1000 Transaction to CWB subject to maintaining a holdback of \$250,000 in respect of potential statutory priorities and the Receiver and its counsel's outstanding fees.¹³

Pre-Receivership Bulk Fuel Sales

17. Parkland, the exclusive fuel supplier to the 272 Station had evidence that approximately 100,000 litres of fuel was removed from the 272 Station and sold to a third party in the Orillia Region, prior to the Receiver's appointment. The Receiver was contacted by the Ontario Provincial Police who confirmed the removal of the missing fuel based on their investigation.¹⁴

18. In mid March 2024, the Receiver was contacted by Greenenergy, the exclusive fuel supplier to the 1000 Station. At that time, Greenenergy advised the Receiver that they believe that prior to the

¹³ Third Report at para. 36, MR, Tab 2.

¹⁴ Third Report at para. 22, MR, Tab 2.

Receiver's appointment, approximately 70,000 litres of fuel was removed from the 1000 Station and sold to that same third party in the Orillia Region.¹⁵

19. The Receiver seeks the power to file an assignment in bankruptcy on behalf of 1000 Corp with MNP acting as trustee in bankruptcy this will arm MNP with the powers available under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "BIA") to recover the value of the missing fuel. This will also allow MNP as trustee in bankruptcy to examine anyone with knowledge or information regarding the missing fuel pursuant to s. 163 of the BIA.¹⁶

Interim Statement of Receipts and Disbursements

20. The Receiver's Interim Statement of Receipts and Disbursements for the period ending June 7, 2024, reports net interim receipts over disbursements totalling \$273,930.25.¹⁷

Statutory Liabilities

21. The Receiver was advised by the sole officer and director for the Companies, Eftikhar Malik, that when the Stations ceased operations all employee wages and vacation pay were paid as well as employee source deductions were remitted to Canada Revenue Agency ("CRA").¹⁸

22. CRA has not assigned an auditor to this proceeding nor has CRA filed any trust claims from CRA for unremitted HST or employee source deductions. Accordingly, the Receiver is unable to determine the extent of any pre-receivership arrears of source deductions and HST.¹⁹

¹⁵ Third Report at para. 23, MR, Tab 2.

¹⁶ Third Report at para. 24, MR, Tab 2.

¹⁷ Third Report at para. 25, MR Tab 2; Appendix "G" to the Third Report.

¹⁸ Third Report at para. 26, MR Tab 2.

¹⁹ Third Report at para. 27, MR Tab 2.

Activities of the Receiver to Date

23. Paragraph 14 of the Third Report includes a detailed summary of the Receiver's activities since the date of the Receiver's Second Report.²⁰

Fees of the Receiver and its Legal Counsel

24. The Receiver has provided services and incurred disbursements during the period of February 21, 2024, to May 30, 2024 as set out in the Affidavit of Sheldon Title sworn on June 17, 2024 (the "**Title Affidavit**").²¹

25. During the period from March 1, 2024 to April 30, 2024, Chaitons expended a total of 48.50 hours in connection with this matter, giving rise to fees and disbursements totaling \$19,515.71 (comprised of fees of \$16,048, of disbursements of \$1,237, and \$1,237 of HST), as more particularly set out in the Affidavit of Veronica Cesario sworn June 19, 2024 (the "**Cesario Affidavit**").²²

PART III – ISSUES

26. The Receiver's motion raises the following main legal issues:

- (a) Should the Court approve the 1000 Transaction?
- (b) Is it appropriate for the Court to seal the Confidential Appendices pending closing of the 1000 Transaction?
- (c) Does the Court have authority to authorize the Receiver to file an assignment in bankruptcy on behalf of 1000 Corp?

²⁰ Third Report at para. 14, MR Tab 2.

²¹ Third Report at para. 28, MR Tab 2; Appendix "H" to the Third Report.

²² Third Report at para. 30, MR Tab 2; Appendix "I" to the Third Report.

PART IV – LAW AND ARGUMENT**The Transaction should be approved**

27. The following criteria are to be considered by the Court when asked to approve a sale of assets in a receivership context:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) the interests of the parties;
- (c) the efficacy and integrity of the process by which offers are obtained; and
- (d) whether there has been unfairness in the working out of the process.²³

28. The *Soundair* test is readily met on the facts of this case.

29. The steps taken to market and sell the property, as detailed above, included direct contact with a broad range of prospective buyers, advertising the 1000 Station for sale, distributing a Teaser, providing access to a confidential data room, and negotiating with offerors.²⁴

30. It is respectfully submitted that the Court should approve the 1000 APS for the following reasons:²⁵

- (a) the Sale Process appropriately exposed the 1000 Station to the market on a broad basis to obtain the best transaction;

²³ [*Royal Bank of Canada v. Soundair Corp.* \(1991\), 4 OR \(3d\) 1 \(ONCA\)](#) at para. 16 [*“Soundair”*].

²⁴ Third Report at para. 18, MR Tab 2.

²⁵ Third Report at para. 20, MR Tab 2.

- (b) the Purchaser has provided a deposit and the Receiver is satisfied that the Purchaser has arranged for financing to close the transaction by the Closing Date (as defined in the 1000 APS);
- (c) the Purchase Price represents the highest bid received during the Sale Process; and
- (d) the only substantial remaining condition to closing is receipt of the Approval and Vesting Order.

The sealing order should be granted

31. The Receiver seeks an order sealing the Confidential Appendices.

32. The Supreme Court of Canada has held that a sealing order may be granted:

- (a) where it is necessary 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) where the salutary effects of the confidentiality outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.²⁶

33. This Court has applied the *Sierra* test in court-supervised sale proceedings to ensure that competitors or potential bidders do not gain an advantage if the sale transaction does not close. In *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, this Court held that

²⁶ [Sierra Club of Canada v. Canada \(Minister of Finance\), 2002 SCC 41](#) at para. 45 [“*Sierra*”].

the “integrity of the sales process necessitates keeping all bids confidential until a final sale of the assets has taken place.”²⁷

34. In *Sherman Estate v. Donovan*, the Supreme Court of Canada held that a person asking a court to exercise discretion in limiting the ‘open court’ presumption must establish that:²⁸

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

35. The Confidential Appendices to the Third Report contain confidential and commercially sensitive information related to the Sale Process, the 1000 Transaction and supply agreements, including information regarding the bids received through the Sale Process, which if disclosed would be harmful and materially prejudicial to the receivership estate and stakeholders of the 1000 Station in the event the 1000 Transaction does not close as anticipated.

36. Sealing the information in the Confidential Appendices pending completion of the 1000 Transaction is necessary and appropriate to protect the integrity of the Sale Process.

²⁷ [GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.](#), 2014 ONSC 1173 at para. 34 [“*GE Canada*”].

²⁸ [Sherman Estate v. Donovan](#), 2021 SCC 25 at para. 38.

The Receiver should be permitted to file an assignment

37. The Court has authority and has previously empowered and authorized a receiver to file an assignment in bankruptcy on behalf of debtor corporations to provide the receiver enhanced powers available to a trustee in bankruptcy.²⁹

38. Here, the Receiver seeks to recover the value of the missing fuel and conduct examinations of persons having knowledge or information regarding the missing fuel.

The activities of the Receiver should be approved

39. The activities of the Receiver described in the Third Report were all necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Appointment Order.

40. The Receiver therefore respectfully submits that the Third Report and the activities described therein should be approved.

The fees of the Receiver and its legal counsel should be approved

41. The Receiver is seeking approval of the professional fees and disbursements incurred by it and its legal counsel as described in the fee affidavits attached to the Third Report.

42. The Appointment Order at paragraphs 19 and 20 provide that the Receiver and its counsel shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts.

²⁹ [RBC v. Gustin, 2019 ONSC 5370](#), at [para. 15](#).

43. The fees and disbursements are fair and reasonable and have been properly incurred. The hourly rates charged by the Receiver and its counsel are consistent with comparable firms practicing in the area of insolvency in the Toronto market.

44. The Receiver respectfully submits that it is appropriate to approve the fees and disbursements of the Receiver and its counsel in the circumstances.

PART V – RELIEF SOUGHT

45. For the reasons set out above, the Receiver respectfully recommends and requests that the Court grant the orders sought on this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of June, 2024.



CHAITONS LLP

Lawyers for the Receiver, MNP Ltd.

SCHEDULE “A”

LIST OF AUTHORITIES

1. [*Royal Bank of Canada v. Soundair Corp.* \(1991\), 4 OR \(3d\) 1 \(ONCA\)](#)
2. [*Sierra Club of Canada v. Canada \(Minister of Finance\)*, 2002 SCC 41](#)
3. [*GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, 2014 ONSC 1173](#)
4. [*Sherman Estate v. Donovan*, 2021 SCC 25](#)
5. [*RBC v. Gustin*, 2019 ONSC 5370](#)

SCHEDULE “B”

RELEVANT STATUTES

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

Examination of bankrupt and others by trustee

163 (1) The trustee, on ordinary resolution passed by the creditors or on the written request or resolution of a majority of the inspectors, may, without an order, examine under oath before the registrar of the court or other authorized person, the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt or any person who is or has been an agent or a mandatary, or a clerk, a servant, an officer, a director or an employee of the bankrupt, respecting the bankrupt or the bankrupt's dealings or property and may order any person liable to be so examined to produce any books, documents, correspondence or papers in that person's possession or power relating in all or in part to the bankrupt or the bankrupt's dealings or property.

Examination of bankrupt, trustee and others by a creditor

(2) On the application to the court by the Superintendent, any creditor or other interested person and on sufficient cause being shown, an order may be made for the examination under oath, before the registrar or other authorized person, of the trustee, the bankrupt, an inspector or a creditor, or any other person named in the order, for the purpose of investigating the administration of the estate of any bankrupt, and the court may further order any person liable to be so examined to produce any books, documents, correspondence or papers in the person's possession or power relating in all or in part to the bankrupt, the trustee or any creditor, the costs of the examination and investigation to be in the discretion of the court.

Examination to be filed

(3) The evidence of any person examined under this section shall, if transcribed, be filed in the court and may be read in any proceedings before the court under this Act to which the person examined is a party.

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