

Court File No. CV-23-00698539-00CL

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

B E T W E E N:

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

- and -

**1340182 ONTARIO LIMITED and KAZEMBE & ASSOCIATES
PROFESSIONAL CORPORATION**

Respondents

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*, R.S.O. 1990, c. C-43, as amended

FACTUM OF THE RECEIVER, MNP LTD.

(Returnable November 22, 2023)

November 15, 2023

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FACTUM OF THE RECEIVER, MNP LTD.

PART I – OVERVIEW

1. This factum is filed in support of the Receiver's motion for two orders seeking, in substance:
 - a. Approval of the Wilson APA and granting of the AVO; and,
 - b. Sealing the Confidential Appendices.

2. The same defined terms will be used in this factum as in the First Report of the Receiver, unless otherwise defined.

PART II - FACTS

3. On May 11, 2023, MNP was appointed as Receiver of K&A OpCo by order of the court.
4. On June 22, 2023, MNP was appointed as Receiver of Realty Co by order of the court.¹
5. K&A OpCo operated a legal practice from the Wilson Property. The Wilson Property is owned by Realty Co.²
6. Following its appointment, the Receiver obtained an appraisal of the Wilson Property.³ The Receiver then obtained listing proposals from well-established commercial realtors.⁴

¹ The Report of the Receiver (*The Report*), dated November 10, 2023, Tab 2 of the Receiver's Motion Record, paras. 1 and 3.

² The Report, paras. 2 and 4.

³ The Report, para. 29.

⁴ The Report, paras. 30-31.

7. Kelos was selected as the broker because of, among other things, its experience in smaller commercial properties, the commission rate payable to Kelos, and its knowledge of the market.⁵
8. The Wilson Property was marketed for sale. Multiple offers were received, including one from the Purchaser. The Receiver and Kelos renegotiated the Purchaser's initial offer and entered into the Wilson APA.
9. The key terms of the Wilson APA are, in part, as follows:
 - a. The purchase price is in the range expected based on the Colliers Appraisal and the Listing Proposals;
 - b. A deposit of \$100,000.00;
 - c. Subject to Court approval and the granting of an AVO.⁶
10. The Receiver recommends that the court approve the Wilson APA and grant the AVO for the following reasons:
 - a. the Wilson Property was listed for sale and advertised to a wide group of prospective purchasers;
 - b. by listing the Wilson Property, multiple offers were received and compared inherently maximizing the sale value;

⁵ The Report, para. 31.

⁶ The Report, para. 34.

- c. the ultimate purchase price compares favorably to the appraised current market value;
- d. the secured debt of 923 Corp will be repaid in full and 923 Corp supports completion of the Transaction; and
- e. CIBC will likely suffer a shortfall on its security and CIBC supports the relief being sought by the Receiver.⁷

11. Attached to the First Report as Confidential Appendices are:

- a. The summary of the appraisal;
- b. The summary of the listing proposals;
- c. The conditional offers for the Wilson Property; and,
- d. The Wilson APA.⁸

PART III - LAW AND ISSUES

12. The substantive issues on the Receiver's motion are:

- a. approval of the Wilson APA and granting of the AVO; and,

⁷ The Report, para. 35.

⁸ The Report, paras. 5, 29, 30, and 33.

- b. sealing the Confidential Appendices.

The Wilson APA and the AVO

13. In determining whether to approve a proposed sale of assets by a receiver, Ontario courts have consistently applied the principles set out by the Court of Appeal for Ontario in *Royal Bank v. Soundair*.⁹

14. The *Soundair* principles are:

- a. *Whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;*
- b. *Whether the interests of all parties have been considered;*
- c. *The efficacy and integrity of the process by which offers are obtained; and,*
- d. *Whether there has been unfairness in the process.*¹⁰

15. The *Soundair* principles have been satisfied in respect of the proposed sale of the Wilson Property. Without limiting the generality of the foregoing, the Receiver:

- a. Obtained an appraisal of the Wilson Property;
- b. Obtained listing proposals for the Wilson Property;

⁹ [Royal Bank of Canada v. Soundair Corp.](#), (1991), 4 O.R. (3d) 1.

¹⁰ [Royal Bank of Canada v. Soundair Corp.](#), (1991), 4 O.R. (3d) 1, para. 16

- c. Retained a listing broker.
 - d. The Wilson Property was listed for sale and advertised to a wide group of prospective purchasers;
 - e. Obtained multiple offers for the Wilson Property;
 - f. The Receiver and Kelos renegotiated the Purchaser's initial offer;
 - g. The purchase price pursuant to the Wilson APA is in the range expected based on the appraisal and listing proposals; and,
 - h. 923 Corp. and CIBC support the Transaction.
16. The Receiver recommends the completion of the sale of the Wilson Property. The Receiver is satisfied that the Wilson APA resulted from an efficient process which allowed for sufficient time for the Wilson Property to be exposed to the market in order to maximize the value of the Wilson Property.¹¹
17. In *Morganite Canada Corp. v. Wolfhollow Properties Inc.*, the court set out the following general principle: The court will be loathe to interfere with the business judgment of a receiver and refuse to approve a transaction recommended by the receiver acting properly in the fulfillment of its

¹¹ The Report, paras. 34-36.

obligations as an officer of the court.¹² The Receiver marketed the Wilson Property in a reasonable and efficacious manner. The Receiver's rationale for its acceptance of the Wilson APA in light of the foregoing reflects sound business judgment.

Sealing the Confidential Appendices

18. Section 137(2) of the *Courts of Justice Act* provides the court with discretion to order any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.¹³
19. The Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)* adopted the following test to determine when a sealing order should be made:

“(a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternate 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 the 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.”¹⁴

¹² [Morganite Canada Corp. v. Wolfhollow Properties Inc., 2003 CanLII 7759 \(ON SC\), para. 7](#)

¹³ [Courts of Justice Act, R.S.O. 1990, c. C.43, Section 137\(2\)](#)

¹⁴ [Sierra Club of Canada v. Canada \(Minister of Finance\), \[2002\] 2 S.C.R. 522, para. 53.](#)

20. The Confidential Appendices are limited to the commercially-sensitive documents which the Receiver recommends be sealed until the closing of the Transaction. If disclosed now, it would likely have a detrimental impact of the sale efforts for the Wilson Property, particularly if the contemplated Transaction does not close.

PART IV - ORDER REQUESTED

21. For the reasons set out above, MNP, as Receiver, respectfully requests the granting of the Orders substantially in the form contained in the Receiver's motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of November, 2023.

Sepideh Nassabi

Sepideh Nassabi

SCHEDULE “A”

LIST OF AUTHORITIES

1. [*Royal Bank of Canada v. Soundair Corp.*, \(1991\), 4 O.R. \(3d\) 1](#)
2. [*Morganite Canada Corp. v. Wolfhollow Properties Inc.*, 2003 CanLII 7759
\(ON SC\)](#)
3. [*Sierra Club of Canada v. Canada \(Minister of Finance\)*, \[2002\] 2 S.C.R. 522](#)

SCHEDULE “B”

TEXTS OF STATUTES, REGULATIONS & BY-LAWS

Courts of Justice Act, R.S.O. 1990, c. C.43

Sealing documents

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

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Proceeding commenced at Toronto

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