

District of Ontario Division No.: 09 – Toronto
Court File No.: 31-3051650
Estate File No.: 31-3051650

**ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT,
R.S.C. 1985, C. B-3, AS AMENDED**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
ORGANIC GARAGE (CANADA) LTD., 2412383 ONTARIO INC., 2347018 ONTARIO
INC., 2507158 ONTARIO INC., AND 2581751 ONTARIO INC.**

FACTUM OF THE PROPOSAL TRUSTEE

Date: April 29, 2024

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Proposal Trustee*

TO: SERVICE LIST

PART I – OVERVIEW

1. On March 5, 2024 (the “**Filing Date**”), Organic Garage (Canada) Ltd. (“**Organic Garage**”), 2412383 Ontario Inc. (“**Junction LeaseCo**”), 2347018 Ontario Inc. (“**Bathurst LeaseCo**”), 2507158 Ontario Inc. (“**Oakville LeaseCo**”) and 2581751 Ontario Inc. (“**Liberty LeaseCo**” and collectively with Organic Garage, Junction LeaseCo, Bathurst LeaseCo and Oakville LeaseCo, the “**Debtors**”) each filed a Notice of Intention to Make a Proposal (the “**NOI**”) pursuant to subsection 50.4(1) of the *Bankruptcy and Insolvency Act (Canada)*¹ (the “**BIA**”). KPMG Inc. (“**KPMG**”) was appointed as proposal trustee (in such capacity, the “**Proposal Trustee**”) in each of the NOI proceedings.

2. The Proposal Trustee seeks the following orders:

- (a) An order (the “**Liberty Approval and Vesting Order**”), among other things, approving the sale transaction between 1000858769 Ontario Inc. (“**769 Ontario**”), as purchaser, and Organic Garage and Liberty LeaseCo (together in such capacity, the “**Liberty Vendors**”), as vendors, for the sale of assets pursuant to an asset purchase agreement dated April 16, 2024 between 769 Ontario and the Liberty Vendors (the “**Liberty APA**”) and vesting in 769 Ontario all right, title and interest of the Liberty Vendors in the Purchased Assets, free and clear of encumbrances and other charges and security interests as described in the Liberty APA (the “**Liberty Transaction**”);
- (b) An order (the “**Junction Approval and Vesting Order**”), among other things, approving the sale transaction between Junction Road Nominee Inc. (the “**Junction Nominee**”), as purchaser, and Organic Garage and Junction LeaseCo (together in

¹ R.S.C. 1985, c. B.-3, as amended.

such capacity, the “**Junction Vendors**”), as vendors, for the sale of assets pursuant to an asset purchase agreement dated April 19, 2024 between the Junction Nominee and the Junction Vendors (the “**Junction APA**”) and vesting in Junction Nominee all right, title and interest of the Junction Vendors in the Purchased Assets, free and clear of encumbrances and other charges and security interests as described in the Junction APA (the “**Junction Transaction**”); and

- (c) An order (the “**OG Approval and Vesting Order**”), among other things, approving the sale transaction between MAAB Global Ltd. (“**MAAB**”) as purchaser, and Organic Garage, Bathurst LeaseCo and Oakville LeaseCo (together in such capacity, the “**OG Vendors**”), as vendors, for the sale of assets pursuant to an asset purchase agreement dated April 14, 2024 between MAAB and the OG Vendors (the “**OG APA**”) and vesting in MAAB all right, title and interest of the OG Vendors in the Purchased Assets, free and clear of encumbrances and other charges and security interests as described in the OG APA (the “**OG Transaction**”) and collectively with the Junction Transaction and the Liberty Transaction, the “**Transactions**”); and

- (d) An ancillary order (“**Ancillary Order**”) which provides for, among other things:
- (i) Approval of the first report of the Proposal Trustee dated March 11, 2024 (the “**First Report**”), the second report of the Proposal Trustee dated April 19, 2024 (the “**Second Report**”) and the third report of the Proposal Trustee dated April 23, 2024 (the “**Third Report**”), and approval of the actions and activities of the Proposal Trustee described in each of these reports;

- (ii) Approval of the fees and disbursements of the Proposal Trustee and its counsel, as set out in the Third Report and the fee affidavits appended to the Third Report (the “**Fee Affidavits**”); and
- (iii) The sealing of the confidential documents appended to the Proposal Trustee's Third Report until completion of the, or further order of this Court.

PART II – FACTS

3. The facts underlying this motion are more fully set out in First Report, Second Report and Third Report. All capitalized terms used but not defined herein have the meanings ascribed to them in the Third Report.

A. Background

4. Organic Garage is an independent, Ontario-based natural and organic grocery chain which operates four retail stores in the Greater Toronto Area. Organic Garage was formed under the laws of the Province of Ontario and is a wholly-owned subsidiary of Oragin Foods Inc. (“**Oragin**”).²

5. The leases for each of Organic Garage’s stores are held by its wholly-owned subsidiaries, four of which are included in these NOI proceedings as follows:

- (a) Junction LeaseCo is the tenant under the lease for the grocery store located at 43 Junction Road, Toronto, Ontario (the “**Junction Store**”);
- (b) Bathurst LeaseCo is the tenant under the lease for the grocery store located at 8020 Bathurst Street, Vaughan, Ontario (the “**Bathurst Store**”);

² Third Report at para. 9.

- (c) Oakville LeaseCo is the tenant under the lease for the grocery store located at 579 Kerr St, Oakville, Ontario (the “**Oakville Store**”); and
 - (d) Liberty LeaseCo is the tenant under the lease for the grocery store located at 42 Hanna Avenue, Toronto, Ontario (the “**Liberty Store**”).³
6. Following the Filing Date, the Court granted an order (the “**SSP Order**”) approving, among other things:
- (a) an Asset Purchase Agreement dated March 7, 2024 (the “**Stalking Horse APA**”) between each of Organic Garage, Bathurst LeaseCo, Oakville LeaseCo, and Liberty LeaseCo, as vendors, and MAAB (in such capacity, the “**Stalking Horse Bidder**”), as purchaser, to act as the stalking horse sale transaction (the “**Stalking Horse Bid**”) in the proposed sale and solicitation process (the “**SSP**”);
 - (b) the SSP to be carried out by the Proposal Trustee, including the bidding procedures (the “**Bidding Procedures**”) to be used in connection therewith;
 - (c) the key employee retention plan (the “**KERP**”) extended by Organic Garage to certain senior management personnel;
 - (d) the procedural consolidation of the proposal proceedings in respect of each of the Debtors; and
 - (e) an extension of the time by which the Debtors must file a proposal pursuant to section 62(1) of the BIA to April 30, 2024.⁴

³ Third Report at para. 10.

⁴ Third Report at para. 2.

Results of the SSP

7. The Proposal Trustee carried out the SSP in accordance with the SSP Order and the Bidding Procedures.⁵ Commencing on March 6, 2024, the Proposal Trustee contacted 118 potential interested parties, including 35 strategic parties, 72 financial parties, and 11 liquidators, with regards to the transaction opportunity. A total of 14 parties (the “**Potential Bidders**”) executed the non-disclosure agreement for the transaction opportunity.⁶ The Potential Bidders were required to submit “**Qualified Bids**” (as defined in the Bidding Procedures) to the Proposal Trustee by April 10, 2024 (the “**Bid Deadline**”).⁷

8. On April 5, 2024, the Stalking Horse Bidder notified the Proposal Trustee it was exercising its right to terminate the Stalking Horse APA, with the intention of placing a new bid by the Bid Deadline.⁸

9. A total of four Qualified Bids were received by the Proposal Trustee by the Bid Deadline, including a new Qualified Bid submitted by MAAB. A summary of the material terms of the Qualified Bids (the “**Offer Summary**”) is attached as Confidential Appendix “1” to the Third Report.⁹

10. Two of the Qualified Bids were each for separate single retail stores and the other two Qualified Bids received were in respect of multiple stores, which contained overlapping assets. On April 11, 2024, the Proposal Trustee contacted the Binding Offer Bidders (as defined in the Bidding Procedures) that submitted Qualified Bids covering multiple stores, including MAAB,

⁵ A copy of the SSP Order is attached as Appendix “A” to the Second Report. A copy of the Bidding Procedures is attached as Appendix “C” to the Third Report.

⁶ Third Report at para 11.

⁷ Third Report at para 12.

⁸ Third Report at para 12.

⁹ Third Report at para 13.

and requested resubmissions of their bids to exclude the Liberty Store by April 12, 2024. MAAB was the only Binding Offer Bidder that submitted a revised Qualified Bid to the Proposal Trustee.¹⁰

11. After review of the Qualified Bids, on April 12, 2024, the Proposal Trustee declared each of 769 Ontario, Junction Nominee and MAAB as the “**Successful Bidders**” pursuant to the Bidding Procedures, subject to approval of the Court. Since this date, the Proposal Trustee and its legal counsel, Aird & Berlis LLP, in consultation with the Debtors, have worked with each of the respective purchasers and their counsel to finalize the asset purchase agreements.¹¹

12. The Proposal Trustee has contacted the other Binding Offer Bidder that was not a Successful Bidder to coordinate the return of its deposit in accordance with terms of the Bidding Procedures.¹²

The Proposed Transactions

13. The Liberty APA, the Junction APA and the OG APA, and the transactions contemplated thereunder, represent the only viable alternative to a liquidation of the Debtors’ assets through bankruptcy proceedings.

a) Liberty Transaction

14. The key terms of the Liberty Transaction can be summarized as follows:

- (a) **Purchased Assets:** These are comprised of i) the Liberty Vendors’ right, title and interest in and to the Specific Personal Property identified in Liberty APA, which includes various equipment located at the Liberty Store; and ii) the lease agreement for the Liberty Store;

¹⁰ Third Report at para 14.

¹¹ Third Report at para 15.

¹² Third Report at para 16.

- (b) **Purchase Price:** A fixed cash purchase price that is payable on closing. A deposit equal to 25% of the purchase price was provided to the Proposal Trustee;
- (c) **Employees:** 769 Ontario is not assuming any of the existing Liberty Store employees, all of whom shall be terminated by Organic Garage at least 24 hours prior to closing;¹³

b) Junction Transaction

15. The key terms of the Junction Transaction can be summarized as follows:

- (a) **Purchased Assets:** These are comprised of i) the Junction Vendors' right, title and interest in and to equipment and assets of the Junction Vendors used in connection with the operation of the Business at the Junction Store; ii) the lease agreement for the Junction Store;
- (b) **Purchase Price:** A fixed cash purchase price that is payable on closing. A deposit equal to 25% of the purchase price was provided to the Proposal Trustee;
- (c) **Employees:** Junction Nominee is not assuming any of the existing Junction Store employees;¹⁴

c) OG Transaction

16. The key terms of the OG Transaction can be summarized as follows:

- (a) **Purchased Assets:** These are comprised of:

¹³ Third Report at para 20. A copy of the redacted Liberty APA is at Appendix D to the Third Report. A copy of the unredacted Liberty APA is at Confidential Appendix 3 of the Third Report.

¹⁴ Third Report at para 21. A copy of the redacted Junction APA is at Appendix E to the Third Report. A copy of the unredacted Junction APA is at Confidential Appendix 4 of the Third Report

- (i) the OG Vendors' right, title and interest in and to equipment and assets of the OG Vendors used in connection with the operation of the Business at the Bathurst Store and Oakville Store;
 - (ii) all intellectual property owned by the OG Vendors used in connection with business;
 - (iii) the inventory of the OG Vendors at the Bathurst Store and Oakville Store;
 - (iv) the following Assigned Contracts:
 - (1) the leases with respect to the Bathurst and Oakville Stores;
 - (2) the license agreement between Pure Spirits Inc., as licensee, and Organic Garage, as licensor; and
 - (3) any contract for webhosting, data storage and management, email services and telecommunication services;
- (b) **Purchase Price:** A fixed cash purchase price that is payable on closing. A deposit was previously paid by MAAB as part of the subsequently terminated Stalking Horse Bid;
- (c) **Employees:** Organic Garage shall terminate the employment of all employees at the Bathurst Store and the Oakville Store immediately prior to Closing. MAAB shall offer employment to all or substantially all of the employees currently engaged in operations of the Business at the Bathurst Store and the Oakville Store; and

- (d) **Transfer Taxes:** Organic Garage and the Purchaser shall jointly execute an election under Section 167 of the Excise Tax Act (Canada) to cause the sale of the OG Purchased Assets to take place on an HST-free basis under Part IX of the Excise Tax Act (Canada).¹⁵

17. Each of the Transactions has an Outside Date of May 15, 2024, and includes a condition requiring the Court to have granted the appropriate approval and vesting order.¹⁶

Stay Extensions

18. The Liberty APA, the Junction APA and the OG APA, and the transactions contemplated thereunder, represent the only viable alternative to a liquidation of the Debtors' assets through bankruptcy proceedings.

19. Under the SSP Order, the Debtors obtained an extension to file a proposal to April 30, 2024.¹⁷ The Debtors have obtained an additional extension to file a proposal until May 17, 2024 to permit the closing of the Transactions, pending court approval.¹⁸

¹⁵ Third Report at para. 22. A copy of the redacted OG APA is at Appendix F to the Third Report. A copy of the unredacted Junction APA is at Confidential Appendix 5 of the Third Report

¹⁶ Third Report at paras 20-22.

¹⁷ Third Report at para. 2. A copy of the SSP is attached as Appendix A to the Second Report.

¹⁸ Order of the Honorable Justice Osborne, dated April 26, 2024.

PART III – ISSUES

20. The issues on this motion are as follows:
- (a) Whether each of the Liberty Approval and Vesting Order, Junction Approval and Vesting Order, and the OG Approval and Vesting Order should be granted; and
 - (b) Whether the Ancillary Order should be granted.

PART IV – LAW AND ARGUMENT**A. Each of the Approval and Vesting Orders should be granted**

21. Pursuant to subsections 65.13(1) and (7) of the BIA, this Court has the authority to grant an order approving the sale of assets outside the ordinary course of business, free and clear of any security and encumbrances.¹⁹ Subsection 65.13(4) of the BIA sets out the following non-exhaustive list of factors to consider when seeking such approval:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the trustee approved the process leading to the proposed sale or disposition;
- (c) whether the trustee filed with the court a report stating that, in their opinion, the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;

¹⁹ BIA, ss. 65.13(1) and (7).

- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.²⁰

22. These principles are similar to the factors also set out in *Royal Bank v. Soundair Corp.*²¹

The *Soundair* factors include the following:

- (a) whether sufficient effort has been made to obtain the best price, and that the receiver 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 have been obtained; and
- (d) whether there has been unfairness in the working out of the process.²²

23. Each of the foregoing factors have been met and the Transactions represent the best outcome for all stakeholders given that, among other things:

- (a) **The SSP was Extensive, Reasonable, Fair and Transparent:** The Transactions represent the culmination of a comprehensive, fair and transparent court-approved SSP conducted by the Proposal Trustee. The SSP was advertised in the Globe and Mail and the Proposal Trustee contacted over 100 potentially interested parties.²³ The Proposal Trustee also notified all Potential Bidders when the minimum bid

²⁰ *BIA*, s. 65.13(4).

²¹ [1991 CanLII 2727](#) (ONCA).

²² *Royal Bank v Soundair Corp*, [1991 CanLII 2727](#) (ONCA). at para 16.

²³ Second Report at para. 24(g) and Third Report at para. 11.

requirement pursuant to the SSP was removed, as a result of the withdrawal of the Stalking Horse Bid.²⁴ The Proposal Trustee has met or is on track to meet the deadlines in the SSP, other than a brief extension to the closing of the Transactions to accommodate a religious holiday.

- (b) **The Proposal Trustee supported and conducted the SSP:** The Proposal Trustee was actively engaged in the development of the SSP and supported its approval. Further, the Proposal Trustee conducted the SSP.

- (c) **The Transactions would be more beneficial for creditors than a sale or disposition under bankruptcy:** The Proposal Trustee had obtained a forced liquidation value (“**FLV**”) appraisal of the Debtors’ equipment and fixed assets located at each of its stores. The appraisal provided by the liquidator, Danbury Global Ltd. (the “**Danbury Report**”), a copy of which is attached as Confidential Appendix “2” to the Third Report, indicated an FLV of less than the consideration previously offered under the terminated Stalking Horse Bid.²⁵ The aggregate proceeds from the Transactions is materially higher than the consideration offered under the Stalking Horse Bid and provides some recovery for the unsecured creditors of Organic Garage.²⁶ In addition, the completion of the Transactions will protect jobs, as MAAB has indicated it will offer employment to all or substantially all of the employees at the Bathurst Store and Oakville Store.²⁷ The Transactions,

²⁴ Second Report at para. 31(f).

²⁵ Third Report at para. 23.

²⁶ Third Report at para. 24.

²⁷ Third Report at para. 22(g).

in aggregate, will address the leases at all four stores, thereby eliminating potential landlord claims. Further, the Debtors support or do not oppose the Transactions.

- (d) **Creditor Consultation:** With respect to Organic Garage's secured creditors, RBC had previously set-off the pre-filing amount owing under the credit card facility provided.²⁸
- (e) **The Consideration Received is Fair and Reasonable:** The consideration payable under the Transactions is fair and reasonable in the circumstances, taking into account the market value of the Debtors' assets. They represent the highest and best value for the Debtors' assets and business. They also achieve significantly better value for the Debtors' assets than what would have been achieved in a liquidation, as evidenced by the Danbury Report.²⁹

24. As a result, it is clear that the criteria in *Soundair* and subsection 65.13(4) of the BIA have been met, such that each of the Transactions should be approved, and orders vesting the applicable vendors' right, title and interest to the assets described in each of the Transactions be granted.

B. The Ancillary Relief should be Granted

25. The Proposal Trustee also seeks ancillary relief, which provides for the approval of the Proposal Trustee's activities and a sealing order.

i) Approval of the Proposal Trustee's Activities

²⁸ Second Report at para. 28(e).

²⁹ Third Report at para. 24.

26. The Proposal Trustee requests approval of its activities as described in the First Report, the Second Report, and the Third Report. The Proposal Trustee also requests that its fees and those of its counsel, as detailed in the Fee Affidavits and the Third Report, be approved.

27. The principles espoused by Justice Morawetz in *Re Target Canada Co*, a case involving proceedings under the *Companies Creditors' Arrangement Act*, are applicable here. He noted that requests to approve a court-appointed officer's reports are not unusual, and that there are good policy and practical reasons for such approval to provide a level of protection.³⁰ In particular, Justice Morawetz also noted that Court approval:

- (a) allows the Monitor to move forward with the next steps in the CCAA proceedings;
- (b) brings the Monitor's activities before the Court;
- (c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,
- (d) enables the Court to satisfy itself that the Monitor's activities have been conducted in a prudent and diligent manner;
- (e) provides protection for the Monitor not otherwise provided by the CCAA; and
- (f) protects the creditors from the delay and distribution that would be caused by:
 - (i) re-litigation of steps taken to date, and
 - (ii) potential indemnity claims by the Monitor.³¹

28. The activities of the Proposal Trustee since the beginning of these proceedings have been reported to the court and stakeholders in the First Report, the Second Report and the Third Report. Its activities were all necessary and undertaken in good faith in accordance with the SSP and the SSP order, further to the best interests of the Debtors' stakeholders generally. Its efforts were key to achieving a positive outcome in these proceedings, such that the aggregate proceeds from the

³⁰ *Target Canada Co. (Re)*, [2015 ONSC 7574 at para 2.](#)

³¹ *Target Canada Co. (Re)*, [2015 ONSC 7574 at para 23.](#)

Transactions is materially higher than the consideration offered under the Stalking Horse Bid and the assets' liquidation value. Court approval of those reports and activities would achieve the factors enumerated by Justice Morawetz in the *Target Canada* proceedings.

ii) Approval of the Proposal Trustee's and its Counsel's Fees

29. The SSP Order provides that the Proposal Trustee can tax its fees and those of its counsel.³²

30. The Court of Appeal in *Bank of Nova Scotia v. Diemer* set out a non-exhaustive list of factors that provide useful guidance in considering fees of a receiver and its counsel. These include:

- (a) the nature, extent and value of the assets;
- (b) the complications and difficulties encountered;
- (c) the degree of assistance provided by the debtor;
- (d) the time spent;
- (e) the receiver's knowledge, experience and skill;
- (f) the diligence and thoroughness displayed;
- (g) the responsibilities assumed;
- (h) the results of the receiver's efforts; and
- (i) the cost of comparable services when performed in a prudent and economical manner.³³

31. The above principles can provide guidance in the context of approval of a proposal trustee's fees.

³² SSP Order at para. 7(e), attached as Appendix A to the Second Report.

³³ *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851 at para 33](#).

32. The fees incurred by the Proposal Trustee and its counsel were higher than forecast due to unanticipated difficulties.

33. On March 24, 2024, the Court issued a Bankruptcy Order against Oragin. The parent company of Organic Company, Oragin is not part of these NOI proceedings. Zeifman Partners Inc. was appointed trustee of the estate of Oragin (the “**Oragin Trustee**”).³⁴

34. The Proposal Trustee incurred additional fees from having to respond to: i) information requests arising from the examination of Mr. Matt Lurie, Organic Garage’s president, by counsel to Tobias Ihde, a creditor of Oragin; and ii) substantial information and document requests from both the Oragin Trustee and counsel to Mr. Idhe.³⁵ These requests included details of the status of the NOI proceedings, KPMG’s historical involvement with Oragin, details of the status of the SSP (including the selection of the Stalking Horse APA), the Debtors’ actual to forecast cash flows, and the Debtors’ historical financials, including the treatment of Intercompany Accounts.³⁶

35. As none of these substantive inquiries were anticipated, they were not considered in the preparation of the cash flow. As a result, professional fees were higher than expected by approximately \$183,000.³⁷

36. As set out in the Third Report, the Proposal Trustee and its counsel also incurred fees and disbursements related to the implementation of the SSP; the drafting and negotiation of multiple agreements of purchase and sale; and communications with stakeholders.³⁸

³⁴ Second Report at paras. 13-15.

³⁵ Second Report at paras. 24(l) and 28(c).

³⁶ Second Report at para. 24(m).

³⁷ Second Report at para. 28(d).

³⁸ Third Report at para. 17.

37. The Proposal Trustee respectfully submits that it and its counsel's fees are fair, reasonable and justified in the circumstances. They accurately reflect the work done in the course of these proceedings, and the increase in professional fees was due to unforeseen inquiries from third parties. The results of the Proposal Trustee's efforts are positive given that the Transactions, if approved, will result in significantly better value for the Debtors' assets than would have been achieved in a liquidation. They will also result in jobs being preserved at two stores.

iii) The Sealing Order should be Granted

38. The Proposal Trustee also seeks a sealing order with respect to Confidential Appendices 1 through 5 of the Third Report ("**Confidential Appendices**"). These appendices are as follows:

- (a) Confidential Appendix "1" – Summary of Qualified Bids at the Bid Deadline
- (b) Confidential Appendix "2" – Danbury Appraisal dated March 21, 2024. This appraisal contains the liquidation value of the Debtors' assets and equipment.
- (c) Confidential Appendix "3" – An unredacted copy of the Liberty APA
- (d) Confidential Appendix "4" – An unredacted copy of the Junction APA
- (e) Confidential Appendix "5" – An unredacted copy of the OG APA

39. Confidential Appendices "3" through "5" are unredacted copies of the asset purchase agreements of the Transactions. They contain the quantum of the purchase price and deposits provided for each of the Transactions.

40. The applicable legal test for granting a sealing order is that the party seeking such relief must establish that:

- (a) court openness poses a serious risk to an important public interest;

- (b) the order sought is necessary to prevent this serious 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.³⁹

41. This Court has granted sealing orders in respect of commercial information that could negatively impact any sales process in the event that the proposed transaction does not close and the property must undergo another marketing process.⁴⁰ This Court has also observed that disclosure of items such as realization estimates may have a negative impact on future realizations and be detrimental to efforts to maximize value for shareholders.⁴¹ This Court has further held that, in such circumstances, there is no reasonable alternative to a sealing order; stakeholders will not be materially prejudiced; and any deleterious effects are outweighed by the benefits of granting such relief.⁴²

42. Disclosure of the confidential appendices could have a detrimental impact of any future sales process, should one be required if any of the Transactions are not approved or otherwise do not close. Disclosure of the purchase price and the liquidation value could also impact any future realizations and set a “ceiling” in a future sales process, should one be required. There is no reasonable alternative to any sealing order here, and stakeholders would not be materially prejudiced by this sealing order. The benefits of maximizing value for shareholders outweigh any deleterious effects of the relief sought.

PART V – RELIEF SOUGHT

³⁹ *Sherman Estate v. Donovan*, [2021 SCC 25 at para 38](#).

⁴⁰ *Romspen Investment Corporation v. Tung Kee Investment Canada Ltd. et al.*, [2023 ONSC 5911 at paras 104-107](#).

⁴¹ *Ontario Securities Commission v. Bridging Finance Inc.*, [2022 ONSC 1857 at paras 50-53](#).

⁴² *Ontario Securities Commission v. Bridging Finance Inc.*, [2022 ONSC 1857 at paras 50-53](#).

43. The Proposal Trustee therefore requests that this Court grant the Liberty Approval and Vesting Order, the Junction Approval and Vesting Order, the OG Approval and Vesting Order, and the Ancillary Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of April, 2024.

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

AIRD & BERLIS LLP

Per: Kyle Plunkett/Miranda Spence/Adrienne Ho

Lawyers for KPMG Inc., in its Capacity as Proposal Trustee

SCHEDULE “A” – AUTHORITIES CITED

1. *Royal Bank v. Soundair Corp.*, 1991 CanLII 2727 (ONCA)
2. *Target Canada Co. (Re)*, 2015 ONSC 7574.
3. *Sherman Estate v. Donovan*, 2021 SCC 25
4. *Romspen Investment Corporation v. Tung Kee Investment Canada Ltd. et al.*, 2023 ONSC 5911.
5. *Ontario Securities Commission v. Bridging Finance Inc.*, 2022 ONSC 1857.

SCHEDULE “B” – LEGISLATION CITED

Bankruptcy and Insolvency Act, RSC 1985, c. B-3

Restriction on disposition of assets

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Marginal note:Individuals

(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

Marginal note:Notice to secured creditors

(3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Marginal note:Factors to be considered

(4) In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the trustee approved the process leading to the proposed sale or disposition;
- (c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Marginal note:Additional factors — related persons

(5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Marginal note:Related persons

(6) For the purpose of subsection (5), a person who is related to the insolvent person includes

(a) a director or officer of the insolvent person;

(b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and

(c) a person who is related to a person described in paragraph (a) or (b).

Marginal note:Assets may be disposed of free and clear

(7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Marginal note:Restriction — employers

(8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

Marginal note:Restriction — intellectual property

(9) If, on the day on which a notice of intention is filed under section 50.4 or a copy of the proposal is filed under subsection 62(1), the insolvent person is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (7), that sale or disposition does not affect the other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

2005, c. 47, s. 44

2007, c. 36, s. 27

2018, c. 27, s. 266

IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, C. B-3, AS AMENDED

IN THE MATTER OF ORGANIC GARAGE (CANADA) LTD., 2412383 ONTARIO INC., 2347018 ONTARIO INC., 2507158 ONTARIO INC., AND 2581751 ONTARIO INC.

District of Ontario Division No.: 09 – Toronto
Court File No.: 31-3051650
Estate File No.: 31-3051650

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY
Proceedings commenced at Toronto

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