

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

BETWEEN:

ROYNAT INC.

Applicant

and

2796996 ONTARIO INC.

Respondent

REPLY FACTUM OF THE RECEIVER

**(Motion returnable June 26, 2023)
Approval and Vesting Order and Ancillary Order**

June 26, 2023

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TO: SERVICE LIST

REPLY FACTUM

1. All capitalized terms not otherwise herein defined have the same meaning as in the Receiver's Factum dated June 16, 2023.
2. The Respondent opposes the proposed sale of the Real Property and instead asks that the Court order that it be remarketed.
3. The Respondent has filed a factum to which the Receiver finds necessary to respond.

Appraisals

4. The Receiver obtained two appraisals from reputable and experienced professional appraisal companies. The point of retaining professionals is for the Receiver to rely on their advice and opinions. The Receiver cannot be expected to criticize, scrutinize and second guess the professionals (both the accredited appraisals and the real estate broker) they retain. This process would result in excessive costs and impair the progress of any receivership.

First Report, para 19 and Confidential Appendix "1" thereto

5. The Respondent has not provided any evidence, other than self-serving positions, that the two appraisals obtained by the Receiver are flawed.
6. In any event, the Real Property was listed above both the appraised values received by the Receiver.

First Report, paras 19-23 and Confidential Appendices "2", "3" and "4" and Appendices "6" and "7" thereto

7. The Respondent stayed silent through the period of the listing of the Real Property, and instead now opposes the approval of the Transaction, and offers no evidence that the continued marketing of the Real Property, with all of the additional costs associated with same, will benefit the estate.

MacEwen FSA

8. The Respondent speaks to the disclaimer of the MacEwen FSA as a matter of right; this is not the case.

9. The Receiver requires leave of the Court to disclaim contracts. In *Peoples Trust Company v Censorio Group (Hastings & Carleton) Holdings Ltd.* the court stated that typically the Court order will empower the receiver to disclaim contracts and that any disclaimer must arise from a Receiver's proper exercise of discretion including consideration of its duties and the equitable interests involved. The Court held that an assessment as to whether a disclaimer is appropriate must consider the following framework:

- a) What are the respective legal priority positions as between the competing interests?
- b) Would a disclaimer enhance the value of the assets? If so, would a failure to disclaim the contract amount to a preference in favour of one party? and,
- c) If a preference would arise, has the party seeking to avoid disclaimer and complete the contract established that the equities support that result rather than a disclaimer?

[Peoples Trust Company v. Censorio Group \(Hastings & Carleton\) Holdings Ltd., 2020 BCSC 1013, paras 25 and 26](#)

10. The Receiver consulted with counsel about the potential success of seeking leave to disclaim the McEwen FSA prior to the commencement of the sales process or through the sales process and noted the following with respect to the above test:

- a) The McEwen FSA was registered on title prior to the mortgage held by Roynat;
- b) Prior to and until the completion of the sales process (with offers in hand) there was no real market evidence that a disclaimer of the MacEwen FSA would enhance the value of the assets. In fact, the Respondent fails to recognize or address the potential positive benefit of marketing a turn-key Esso branded gas station.

11. As a result of Avison Young's comments with respect the MacEwen FSA, MacEwen and the Receiver entered into negotiations whereby the MacEwen ROFR was waived

and every interested party was provided an opportunity to negotiate a new contract with MacEwen.

First Report, para 17

12. A request for disclaimer of contracts by a Receiver is not a right. The Court in *Bank of Montreal v Probe Exploration Inc.* thoroughly reviewed the Receiver's ability to disclaim a contract and provided that the obligation of a Receiver in carrying out its duties is to act for the benefit of all interested parties, including in this case MacEwen.

[Bank of Montreal v Probe Exploration Inc., 2000 CanLII 28177 \(AB KB\) \("Probe Exploration"\), para 34 and 40](#)

13. The Court in *Royal Bank of Canada v Penex Metropolis Ltd.* reviewed a Receiver's ability to disclaim contracts and confirmed that a Receiver is not bound by existing contracts, but the Receiver must exercise discretion before disclaiming a contract. Further, a Receiver is not entitled to prefer the interests of one creditor over another. In deciding whether or not to adopt a contract, the duty of the Receiver is to exercise reasonable care, supervision and control that an ordinary man would give to the business if it were his own.

[Royal Bank of Canada v Penex Metropolis Ltd., 2009 CanLII 45848 \(ON SC\) \("Penex"\), paras 23 and 24](#)

14. The Court further stated that if a decision by a receiver is within the broad bounds of reasonableness, and if the receiver conducts itself fairly and considers the interests of all stakeholders, the Receiver's business decisions will not be interfered with lightly and should be supported by the Court.

[Penex, para 26](#)

15. The Receiver submits that its decision to proceed with the Transaction without disclaiming the McEwen FSA is reasonable and is entitled to deference from the Court.

Discretion

16. As is made clear in the Receiver's fulsome responses to questions posed to it by the Respondent, the Receiver considered all factors and the interests of all parties when concluding that the Accepted Offer was the best offer in the circumstances. The Accepted Offer is the highest and most provident transaction available to the Receiver and the estate.

Supplemental Report dated June 21, 2023 and Second Supplemental Report dated June 24, 2023

17. It is the Receiver's position that no evidence has been submitted by the Respondent that the sale of the Real Property is improvident or that there was an abuse of process and as such the Court should grant deference to the recommendation of the Receiver with respect to the Transaction.

Conclusion

18. The Respondent does not provide any evidence to support its propositions and relies heavily on hypotheticals.
19. The Respondent also fails to address the issue of who would fund the requested re-marketing. The estate has no funds and has thus far been funded by Roynat. Roynat is supportive of the approval of the Transaction.
20. The Respondent made no enquiries, showed no interest or raised any concerns with the Receiver during the sale process.
21. The sale by the Receiver was performed in the very normal course with regard to all circumstances. The purchase price is in line with the two appraisals received by the Receiver.
22. The sales process and resulting Transaction meets the Soundair test and it is respectfully submitted should be approved.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of June, 2023.

A handwritten signature in black ink, appearing to be 'TH' with a stylized flourish.

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Peoples Trust Company v. Censorio Group (Hastings & Carleton) Holdings Ltd.*, 2020 BCSC 1013.
2. *Bank of Montreal v Probe Exploration Inc.*, 2000 CanLII 28177 (AB KB).
3. *Royal Bank of Canada v Penex Metropolis Ltd.*, 2009 CanLII 45848 (ON SC).

ROYNAT INC.

-and-

2796996 ONTARIO INC.

Applicant

Respondent

Court File No. CV-22-00683167-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at
Toronto, Ontario

RESPONDING FACTUM OF THE RECEIVER

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