

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

BANK OF MONTREAL

Applicant

- and -

ACS PRECISION COMPONENTS PARTNERSHIP

Respondent

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 APPLICANT
(returnable May 6, 2010)**

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PART I - INTRODUCTION

1. The Applicant, Bank of Montreal ("BMO"), seeks:
 - (a) an Order appointing Zeifman Partners Inc. ("ZP") as receiver and manager (the "Receiver"), without security, of all of the assets, undertakings and properties of the Respondent, ACS Precision Components Partnership ("ACS"), acquired for, or used in relation to a business carried on by ACS pursuant to Section 243(1) of the *Bankruptcy and Insolvency Act* (the "BIA") and section 101 of the *Courts of Justice Act* (the "CJA"); and
 - (b) an Order ratifying and approving the Agreement Regarding Receivership entered into by ZP, BMO and ACS.
2. ACS consents to the appointment of ZP as Receiver in this Application.

Agreement Regarding Receivership, Exhibit I to the Affidavit of Alex McIntosh sworn May 4, 2010 (the "McIntosh Affidavit"), Application Record, Tab 3.

3. The Orders, if granted, will preserve the value of ACS's assets and allow for the orderly re-sourcing by ACS's customers of their production to new suppliers. The immediate appointment of a receiver by the Court is just, equitable and in the interests of all persons having an interest in ACS's assets and other stakeholders.

PART II - THE FACTS

4. ACS is a registered Ontario partnership of A-C (Plastics) Holdings Inc. and 2178124 Ontario Inc.

McIntosh Affidavit, Application Record, Tab 3, paragraph 3.

5. ACS carries on a plastics injection moulding business from leased premises in Cambridge, Ontario and employs approximately 180 non-unionized employees.

McIntosh Affidavit, Application Record, Tab 3, paragraphs 4-5.

6. BMO has provided credit facilities to both ACS and a related company, Omex Manufacturing ULC ("Omex"), to assist in the financing of their purchase of assets from ATS Automation Tooling Systems Inc. ("ATS") and day to day business operations. ACS has guaranteed payment of the loans made by BMO to Omex and vice versa. .

McIntosh Affidavit, Application Record, Tab 3, paragraphs 8-13.

7. ACS and Omex owed BMO in excess of \$2.7 million and \$1.1 million, respectively, as at April 22, 2010.

McIntosh Affidavit, Application Record, Tab 3, paragraphs 11-12.

8. As security for its obligations to BMO, ACS has granted to BMO the following:

- (a) General Security Agreement dated December 31, 2008; and
- (b) Security pursuant to Section 427 of the Bank Act dated December 31, 2008.

McIntosh Affidavit, Application Record, Tab 3, paragraphs 8, 13.

9. ACS also owes ATS approximately \$1.87 million on a secured basis. ATS has postponed and subordinated its security to the security held by BMO.

McIntosh Affidavit, Application Record, Tab 3, paragraph 16.

10. ACS has incurred substantial operating losses, estimated to be approximately \$2.1 million for fiscal December 31, 2009 and \$1.656 million for the first three months of 2010. ACS is in breach of its debt to tangible net worth covenant to BMO.

McIntosh Affidavit, Application Record, Tab 3, paragraphs 19-20.

11. ACS had unsecured debt of approximately \$4.2 million as of March 31, 2010.

McIntosh Affidavit, Application Record, Tab 3, paragraph 18.

12. ACS's consultants have advised BMO, *inter alia*, that ACS will continue to suffer substantial operating losses for an extended period and will run out of cash in the near future. A going concern purchaser is considered unlikely. ACS wishes to have its operations wound down on an orderly basis.

McIntosh Affidavit, Application Record, Tab 3, paragraphs 21-22.

13. On April 27, BMO demanded payment (the "Demand") of its loans from ACS and Omex. BMO has also demanded payment under the guarantee given by ACS for the loans made by BMO to Omex. On that same date, BMO served on ACS a notice of intention to enforce security under Section 244 of the *Bankruptcy and Insolvency Act* (the "BIA Notice").

McIntosh Affidavit, Application Record, Tab 3, paragraph 23.

14. BMO, ACS and ZP have entered into an Agreement Regarding Receivership which contemplates the funding of the receivership from current assets and the re-sourcing of production to other suppliers to maximize the value of ACS's assets and permit the orderly wind down of ACS's operation.

McIntosh Affidavit, Application Record, Tab 3, paragraphs 24-28.

PART III - ISSUES AND THE LAW

15. On application by a secured creditor, the Court may appoint a Receiver to take possession and control over property of an insolvent person where it is "just or convenient" to do so.

Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3), s. 243.

Courts of Justice Act, R.S.O. 1990, c. 43, section 101.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 41.

16. In all of the circumstances, it is just and convenient for the Court to appoint ZP as Receiver and Manager of ACS for, *inter alia*, the following reasons:
- (a) ACS has sustained and continues to sustain substantial operating losses and has breached its debt to net worth covenant to BMO;
 - (b) ACS does not have sufficient cash available to continue operations for an extended period;
 - (c) BMO has the right under its security to appoint a receiver;
 - (d) ACS wants its business operations wound down in an orderly fashion and consents to the appointment of ZP as Receiver;
 - (e) A receivership will allow for a controlled and orderly wind-down of ACS's operations which will maximize the value of ACS's assets and allow for the orderly re-sourcing of production by ACS's customers.

Bank of Nova Scotia v. Freure Village on Clair Creek, [1996] O.J. No. 5088 (Ont. Gen. Div.) at paras 10 and 12.

PART IV - ORDER REQUESTED

17. BMO respectfully requests an order be granted in the form contained in the Application Record appointing ZP as receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of May, 2010.



Tony Van Klink
MILLER THOMSON LLP

Lawyer for the Applicant

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088 (Ont. Gen. Div.).

SCHEDULE "B"
RELEVANT STATUTES

1. *Bankruptcy and Insolvency Act* (R.S.C., 1985, c. B-3), s. 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.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

Definition of "receiver"

(2) Subject to subsections (3) and (4), in this Part, "receiver" means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — 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 — under
 - (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
 - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of “receiver” — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition “receiver” in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver’s claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of “disbursements”

(7) In subsection (6), “disbursements” does not include payments made in the operation of a business of the insolvent person or bankrupt.

2. *Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 101

Injunctions and receivers

101.(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

3. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 41

RULE 41 APPOINTMENT OF RECEIVER

DEFINITION

41.01 In rules 41.02 to 41.06,
“receiver” means a receiver or receiver and manager. R.R.O. 1990, Reg. 194, r. 41.01.

HOW OBTAINED

41.02 The appointment of a receiver under section 101 of the *Courts of Justice Act* may be obtained on motion to a judge in a pending or intended proceeding. R.R.O. 1990, Reg. 194, r. 41.02.

FORM OF ORDER

- 41.03** An order appointing a receiver shall,
- (a) name the person appointed or refer that issue in accordance with Rule 54;
 - (b) specify the amount and terms of the security, if any, to be furnished by the receiver for the proper performance of the receiver’s duties, or refer that issue in accordance with Rule 54;
 - (c) state whether the receiver is also appointed as manager and, if necessary, define the scope of the receiver’s managerial powers; and
 - (d) contain such directions and impose such terms as are just. R.R.O. 1990, Reg. 194, r. 41.03.

REFERENCE OF CONDUCT OF RECEIVERSHIP

41.04 An order appointing a receiver may refer the conduct of all or part of the receivership in accordance with Rule 54. R.R.O. 1990, Reg. 194, r. 41.04.

DIRECTIONS

41.05 A receiver may obtain directions at any time on motion to a judge, unless there has been a reference of the conduct of the receivership, in which case the motion shall be made to the referee. R.R.O. 1990, Reg. 194, r. 41.05.

DISCHARGE

41.06 A receiver may be discharged only by the order of a judge. R.R.O. 1990, Reg. 194, r. 41.06.

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ACS PRECISION COMPONENTS PARTNERSHIP Court File No: 10-8702-00CL
Respondent

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Proceeding commenced at Toronto

**FACTUM OF THE APPLICANT
(RETURNABLE MAY 6, 2010)**

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