

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(IN BANKRUPTCY & INSOLVENCY)  
[COMMERCIAL LIST]**

**IN THE MATTER OF THE BANKRUPTCY OF 0932293 B.C. LTD  
o/a CELLICON, OF THE CITY OF ABBOTSFORD  
IN THE PROVINCE OF BRITISH COLUMBIA**

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**FACTUM OF MNP LTD., TRUSTEE OF THE  
BANKRUPT ESTATE OF 0932293 B.C. LTD.**

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Date: May 19, 2021

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## PART I – OVERVIEW OF THE MOTION

1. On February 19, 2021, 0932293 B.C. Ltd. (“**Cellicon**”) filed a notice of intention to make a proposal under subsection 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the “**BIA**”) and on March 2, 2021, Cellicon was deemed to have filed an assignment in bankruptcy for failing to file a cash flow statement as required by the *BIA*. MNP Ltd. was appointed as licensed insolvency trustee (in such capacity, the “**Trustee**”) of Cellicon’s bankrupt estate.
2. This factum is filed by the Trustee in support of a motion for an order, *inter alia*:
  - (a) approving the asset purchase agreement (the “**283 APA**”) made between the Trustee, as vendor, and 2834868 Ontario Inc. (“**283Co**”), as purchaser; and, on closing of the transaction contemplated thereby, vesting in 283Co all of Cellicon’s and the Trustee’s rights, title and interests in and to those assets which are the subject of the 283 APA;
  - (b) as necessary, assigning to 283Co the rights and obligations of Cellicon in and to the Assumed Leases (*as defined in the 283 APA*);
  - (c) approving the asset purchase agreement (the “**265 APA**”) made between the Trustee, as vendor, and 2652901 Ontario Inc. (“**265Co**”), as purchaser; and, on closing of the transaction contemplated thereby, vesting in the 265Co all of Cellicon’s and the Trustee’s rights, title and interests in and to those assets which are the subject of the 265 APA – e.g., two (2) leased retail locations at “Shoppers World” mall in Brampton, Ontario (the “**Shoppers World Locations**”);
  - (d) as necessary, assigning to the 265Co the rights and obligations of Cellicon in and to the Assumed Leases (*as defined in the 265 APA*);
  - (e) approving the asset purchase agreement (the “**RV APA**”) made between the Trustee, as vendor, and Rahim Viranee o/a Touchtel (“**RV**”), as purchaser; and, on closing of the transaction contemplated thereby, vesting in the RV all of Cellicon’s and the Trustee’s rights, title and interests in and to those assets which are the

subject of the RV APA – e.g., two (2) leased retail locations at “Dufferin Mail” mall in Toronto, Ontario (the “**Dufferin Mall Locations**”); and

- (f) as necessary, assigning to RV the rights and obligations of Cellicon in and to the Assumed Leases (*as defined in the RV APA*).

## **PART II - THE FACTS**

3. Cellicon is a private corporation incorporated under the laws of British Columbia that operated as a nationally branded retailer of wireless accessories, through stores, kiosks and carts in shopping centres across Canada.

**First Report of the Trustee dated May 12, 2021 (the “First Report”), Tab 2 of Motion Record (“MR”) of the Trustee, dated May 12, 2021, at para. 2**

4. On February 19, 2021, Cellicon filed a NOI and on March 2, 2021, Cellicon was deemed to have filed an assignment in bankruptcy for failing to file a cash flow statement as required by the *BIA*. MNP Ltd. was appointed as Trustee of Cellicon’s bankrupt estate.

**First Report, Tab 2 of MR, at para. 1**

5. As of the date of its bankruptcy, Cellicon had one corporately owned store location, with the balance of locations being licensed retail outlets operated by independent operators (the “**Operators**”) under Management Services Agreements (each an “**MSA**” and collectively, the “**MSAs**”). Cellicon receives management service fees from the Operators for these locations. The Operators own all on-site inventory, but the brand name, leases and kiosk fixtures, which are held by Cellicon.

**First Report, Tab 2 of MR, at para. 2**

6. On March 15, 2021, at the first meeting of the creditors, Cellicon’s creditors, *inter alia*, confirmed the appointment of the Trustee and appointed two estate inspectors.

**First Report, Tab 2 of MR, at para. 3**



7. Upon its appointment, the Trustee discovered that, inter alia, the bankrupt estate had insufficient funds to satisfy occupation rent on a go-forward basis and so the Trustee (a) demanded from the operators of each location immediate payment of occupation rent and various other amounts owing under the MSAs, and (b) requested a concession from the landlords not to terminate the leases for failure to pay rent, until the Trustee canvassed the Operators for payment, and until the first meeting of the creditors.

**First Report, Tab 2 of MR, at paras. 11 - 12**

8. After making demand on the operators, the Trustee discovered that certain Cellicon locations had been permanently closed. In respect of the remaining locations:
  - (a) certain operators forwarded payment immediately;
  - (b) the Trustee concluded an agreement (the “**Operator Agreement**”) with other operators (the “**Operator Group**”) for more than forty-seven (47) locations for the payment of occupation rent for March; and
  - (c) five leases for locations for which rent was not paid were disclaimed, with approval of the estate inspectors.

**First Report, Tab 2 of MR, at para. 13**

### *The Stalking Horse Sale Process*

9. The Trustee has entered into three (3) separate transactions with three (3) separate purchasers in respect of the sale and acquisition of Cellicon’s assets, which transactions are conditional on Court approval.

**Confidential Supplemental Report, dated May 18, 2021 (the “Confidential Report”),  
Appendix 2, 4, 5 and 6**

10. After entering into the Operator Agreement, the Operator Group advised the Trustee that they were interested in acquiring the leases for their locations and the business of Cellicon. These discussions culminated in the Operator Group making an offer for Cellicon’s business which was conditional on (a) inspector approval, and (b) the Trustee obtaining an

approval and vesting order. However, by this time, the Trustee had been approached by various parties expressing an interest in the leases and Cellicon's business.

**First Report, Tab 2 of MR, at paras. 35, 36 and 38**

11. In light of the interest in Cellicon's business the Trustee determined that it could not recommend immediate approval and a quick sale to the Operator Group as, among other things, it did not anticipate it would be successful in obtaining an approval and vesting order.

**First Report, Tab 2 of MR, at para. 39**

12. Thereafter the Operator Group agreed to act as a stalking horse bidder in a stalking horse sales process (the "SHSP") in respect of the thirty-nine (39) locations that the Operator Group operated and, on April 18, 2021, the estate inspectors approved the SHSP.

**First Report, Tab 2 of MR, at para. 40**

13. The key terms of the SHSP include:

- (a) marketing for sale the 39 leased locations run by the Operator Group, the tangible personal property at such locations and the Cellicon brand name and all associated intellectual property.
- (b) ongoing funding of occupation rent for April and May 2021;
- (c) a stalking horse offer by the Operator Group with a purchase price equal to the sum of (i) a fixed sum of money, (ii) the amount advanced by the Trustee to pay occupation rent for April and May, 2021, and (iii) the amount necessary to cure all rent arrears;
- (d) the offer is conditional on the Court granting an approval and vesting order in respect of the purchased assets;
- (e) a commencement date of April 18, 2021;
- (f) an offer deadline of May 5, 2021 at 5:00pm; and
- (g) an auction, if necessary, to be held on May 7, 2021.

**First Report, Tab 2 of MR, at para. 41**

14. In accordance with the SHSP, the Trustee, among other things, developed a teaser letter, prepared a sales process and notice to readers, sent the teaser by email to thirteen (13) interested parties, sent an email to Wireless Dealer Magazine's subscription base of 76,000 independent cellular, electronic and audio retailers in the United States and Canada, and established and maintained a data room (the "**Data Room**") for interested parties.

**First Report, Tab 2 of MR, at para. 43**

15. The Trustee was contacted by nineteen (19) prospective purchasers in respect of the acquisition opportunity. Each party who contacted the Trustee executed an NDA and was provided access to the Data Room.

**First Report, Tab 2 of MR, at para. 44**

16. At the bid deadline, one additional qualifying offer was received from 283Co and so the Trustee invited both the Operator Group and 283Co to participate in an auction in respect of the thirty-nine (39) locations. At the auction, 283Co was declared the winning bidder.

**First Report, Tab 2 of MR, at paras. 45 - 48**

17. There were four (4) locations at two shopping centres – the Dufferin Mall Locations and the Shoppers World Locations – that were not part of the SHSH, as the operators at such locations were not part of the operator group.

**First Report, Tab 2 of MR, at para. 49**

18. Concurrently with the SHSP, the Trustee marketed these locations for sale on substantially the same terms as the SHSP, save and except the existence of a stalking horse bid, which sale was to be conditional on approval of the estate inspectors and the Court.

**First Report, Tab 2 of MR, at para. 50**

19. The Trustee received multiple offers for each location. In each case, one offer was from the existing operator and the other offer was from 283Co.

**First Report, Tab 2 of MR, at para. 51**

20. On May 8, 2021, the Trustee convened a meeting of the estate inspectors and the estate inspectors resolved:

(a) to confirm 283Co's offer as the winning bid in the SHSP as the highest and best offer, and to authorize and direct the Trustee to execute the 283 APA and to seek court approval of the same.

(b) to confirm that the existing operator's offer for the Shoppers World Locations – 265Co -was the highest and best offer for such locations, and to authorize and direct the Trustee to execute the 265 APA and to seek court approval of the same.

(c) to confirm that the existing operator's offer for the Dufferin Mall Locations – RV - was the highest and best offer for such locations, and to authorize and direct the Trustee to execute the RV APA and to seek court approval of the same.

**First Report, Tab 2 of MR, at paras. 52 - 53**

21. The purchase agreement with 283Co., 265Co and RV are (a) each conditional on an approval and vesting order in favour of the respective purchaser, and (b) require the Trustee to seek landlord consent to assign the leases that are the subject of the transactions and if the same is not obtained to apply to Court for an order effecting the assignment.

**First Report, Tab 2 of MR, at para. 55**

### **PART III – THE ISSUES**

22. The issues to be considered by the Court include:

(a) should the Court approve the transactions contemplated by the 283 APA, 265 APA and RV APA?

(b) should the Court make an order assigning Cellicon's interest in the Assumed Leases (as defined in each of the purchase agreement) to the respective purchaser?

23. In each instance, the Trustee submits the answer is – yes.

## PART IV – LAW AND ARGUMENT

### *A. The Court Should Approve the Transactions and Grant Vesting Orders*

24. The Court should approve the transactions contemplated by the 283 APA, 265 APA and RV APA, and grant vesting orders in respect of the same.
25. Pursuant to subsection 30(1)(a) of the BIA, a trustee, with the permission of the inspectors, may sell or otherwise dispose of, for such a price or other consideration as the inspectors may approve, all or part of the property of a bankrupt, including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt, by tender, public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels.

**BIA, ss. 30(1)(a)**

26. Section 100 of the *Courts of Justice Act* (the “**CJA**”) provides the Court with the power to vest in any person an interest in real or personal property that the Court has authority to order be conveyed.

**CJA, s. 100**

27. When the Court is asked to approve a transaction in a distressed scenario, the Courts commonly consider following principles (collectively, the “**Soundair Principles**”):
- (a) whether the party made a sufficient effort to obtain the best price and to not act improvidently;
  - (b) the interests of all parties;
  - (c) the efficacy and integrity of the process by which the party obtained offers;
  - (d) whether the working out of the process was unfair.

***Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (ONCA) at para. 16**

28. Provided the price is adequate, proper efforts have been made to get offers and there is no other good reason to reject an offer, the Court should approve the sale.

**Re Gray (1992), 16 C.B.R. (3d) (BCCA) at para. 8**

29. Based on the foregoing, it is respectfully submitted the Court should approve the transactions contemplated by the purchase agreements and grant approval and vesting orders in respect with the same, in accordance with the recommendation of the Trustee. It is the Trustee's position that the transactions should be approved by the Court for the following reasons:

- (a) ***Sufficient effort was made to obtain the best price.*** The trustee rejected the initial offer of the Operator Group in favour of conducting a sales process in an effort to obtain the best price for the purchased assets. The Trustee's efforts included marketing the opportunity across Canada and the United States to approximately 76,000 independent cellular, electronic and audio retailers and various other individuals who inquired with the Trustee about the acquisition opportunity. The Trustee's efforts to market the property for sale was constrained; however, the Trustee is of the view that the purchase price achieved under each purchase agreement is fair and reasonable given the limited period of time the Trustee had to market the assets for sale given the estate's inability to pay occupation rent on a go-forward basis.
- (b) ***Interests of all parties have been served.*** The transactions provide for the best outcome in the circumstances for all parties with an economic interest in these proceedings.
- (c) ***The process was run with integrity.*** The Trustee marketed the property for sale in accordance with the SHSP, which was approved by the estate inspectors. The Trustee submits that both the SHSP and the sales process in respect of the assets that are the subject of the 265 APA and RV APA were carried out with integrity.
- (d) ***There was no unfairness.*** The Trustee marketed Cellicon's assets for sale in accordance with the SHSP, which was approved by the estate inspectors. Furthermore, all purchase agreements arising from the Trustee's marketing efforts have been approved by the estate inspectors. The Trustee submits there was no unfairness in the sale process utilized.

30. In light of the reasons set out above, the Trustee states the transactions are provident – the purchase price is commercially reasonable in the relevant market conditions – and should be approved by the Court.

*B. The Court Should Order an Assignment of the Leases*

31. As described above, pursuant to the Purchase Agreements, the Trustee is obligated to use commercially reasonable efforts to obtain certain the consent of each landlord to assign the subject leases to the prospective purchasers, as the case may be. To the extent those consents or approvals are not obtained, the Trustee is obligated to apply to Court for an order approving the assignment of such agreements.

32. Subsection 84.1(1) of the *BIA* authorizes the Court to make an order assigning the rights and obligations of a bankrupt under an agreement to any person who is specified by the Court and agrees to the assignment.

**BIA, s. 84.1(1)**

33. In considering whether to order the assignment of a debtor’s company’s rights and obligations under an agreement, the BIA sets out a non-exhaustive list of factors the Court is to consider, including whether the assignee is (a) capable of performing the obligations under the subject agreement, and (b) whether it is appropriate to assign the agreement to the assignee.

**BIA, s. 84.1(4)**

34. Each of the assignees have provided to the Trustee evidence of their ability to close the transactions and perform the obligations under the respective assigned agreements and appear to the Trustee to be an appropriate person to whom such agreements should be assigned:

- (a) 283Co – 283Co is part of a well-funded corporate group that is a competitor of Cellicon, operating as a retailer of wireless accessories and servicer of mobile technology in more than 70 locations across the country, in many of the same shopping centres as Cellicon. The corporate group is an existing tenant of all but

two of Cellicon's landlords and therefore already has an ongoing business relationship with many of the landlords. As a member of the corporate group, 283Co will have access to the corporate group's capital and other resources. Furthermore, the principal of 283Co has ensured that 283Co is fully funded to complete the transaction and immediately fund June rent for the assigned leases on closing and has provided evidence of the same to the Trustee. Additionally, 283Co advise it has come to terms with the operators at the existing locations, many of whom will continue the seamless operation of the business out of the assigned locations.

**Confidential Report, Appendix 7**

- (b) *265Co* – 265Co is the existing operator at the Shoppers World Locations. It has been paying occupation rent throughout, desires to continuing operating the same business, made the highest and best offer for the subject locations and has provided evidence of its ability to fund rent arrears and the purchase price on closing and to fund rent for June 2021 under the assigned lease, on a go-forward basis.

**Confidential Report at para. 18**

- (c) *RV* – RV is the existing operator at the Dufferin Mall Locations. It has been paying occupation rent throughout, desires to continuing operating the same business, made the highest and best offer for the subject locations and has provided evidence of its ability to fund rent arrears and the purchase price on closing and to fund rent for June 2021 under the assigned lease, on a go-forward basis.

**Confidential Report at para. 18**

35. The majority of landlords under the assigned leases have advised the Trustee that while they will not formally consent to the assignments sought, they will not take a position in respect of the Trustee's motion for an order mandating such assignments under the BIA.
36. As noted above, the Trustee does not see any reason why the purchasers will not each be capable of performing their respective obligations under the Assigned Leases following



the closings. Furthermore, all monetary breaches of the leases – rent arrears – will be remedied in conjunction with the completion of the transactions. Last, the rights and remedies of each landlord under the applicable lease will be preserved on the sale. For these reasons, the Trustee is of the view it is appropriate to order the assignment.

**Confidential Report at para. 19**

## **PART V – ORDER SOUGHT**

37. For the reasons set forth herein and in the First Report, the Trustee respectfully requires the granting of the orders substantially in the form attached to the Notice of Motion, as may be amended and presented at the hearing of this Motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**, this 19<sup>th</sup> day of May, 2021.



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*Lawyers for the Trustee, MNP Ltd.*

**SCHEDULE “A”**

**LIST OF AUTHORITIES**

1. *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2010 ABQB 798 (ABQB)
2. *Re Gray* (1992), 16 C.B.R. (3d) (BCCA)
3. *Royal Bank of Canada v. Soundair Corp.* (1991), 4. O.R. (3d) 1 (ONCA)

## SCHEDULE "B"

### RELEVANT STATUTES

#### *Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended*

##### **Powers exercisable by trustee with permission of inspectors**

30 (1) The trustee may, with the permission of the inspectors, do all or any of the following things:

(a) sell or otherwise dispose of for such price or other consideration as the inspectors may approve all or any part of the property of the bankrupt, including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt, by tender, public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels;

...

##### **Assignment of agreements**

84.1 (1) On application by a trustee and on notice to every party to an agreement, a court may make an order assigning the rights and obligations of a bankrupt under the agreement to any person who is specified by the court and agrees to the assignment.

##### **Individuals**

(2) In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and

(b) only rights and obligations in relation to the business may be assigned.

##### **Exceptions**

(3) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(a) an agreement entered into on or after the date of the bankruptcy;

(b) an eligible financial contract; or

(c) a collective agreement.

### **Factors to be considered**

(4) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the person to whom the rights and obligations are to be assigned is able to perform the obligations; and

(b) whether it is appropriate to assign the rights and obligations to that person.

### **Restriction**

(5) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the person's bankruptcy, insolvency or failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

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

#### **Vesting Orders**

100 A Court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

**IN THE MATTER OF THE BANKRUPTCY OF 0932293 B.C. LTD  
o/a CELLICON, OF THE CITY OF ABBOTSFORD  
IN THE PROVINCE OF BRITISH COLUMBIA**

Court/Estate File No.: 31-2714011

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(IN BANKRUPTCY & INSOLVENCY)  
[COMMERCIAL LIST]**

Proceeding commenced at **TORONTO**

**FACTUM OF MNP LTD.**  
*(returnable May 21, 2021 at 11:00am via “ZOOM”  
videoconference)*

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