

Court File No.: CV-18-595577-00CL

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

BETWEEN:

AMERICAN IRON & METAL COMPANY INC.

Applicant

- and -

**1340923 ONTARIO INC. and
WAXMAN REALTY COMPANY INC.**

Respondents

**APPLICATION UNDER
SUBSECTION 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 APRIL 20, 2018)**

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(returnable APRIL 20, 2018)**

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(RETURNABLE April 20, 2018)

PART I - INTRODUCTION

1. American Iron & Metal Company Inc. (“**AIM**”) brings this application for the following relief:

(a) An Order appointing A. Farber & Partners Inc. (“**Farber**”), as receiver (the “**Receiver**”), over all the property, assets and undertakings of Waxman Realty Company Inc. (“**WRI**”) and 1340923 Ontario Inc. (“**134**”, and together with WRI, the “**Debtors**”) pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”) and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the “**CJA**”);

(b) An Order approving a stalking horse sale process, proposed by the proposed Receiver, for the marketing and sale of the Debtors' respective ownership interests in certain real property, including, without limitation, the approval of the execution of a proposed stalking horse asset purchase agreement (the "**Stalking Horse Agreement**") between the Receiver and AIM; and,

(c) An Order sealing confidential Exhibit "1" to the Report of the Proposed Receiver to the Court dated April 17, 2018 (the "**Proposed Receiver's Report**"), and confidential Exhibit "I" to the Affidavit of Kamila Wirpszo, sworn April 11, 2018 (the "**Wirpszo Affidavit**"), (collectively referred to as the "**Confidential Exhibits**");

2. WRI is indebted to AIM in the amount of \$2,057,152.61 (the "**WRI Indebtedness**") pursuant to a letter agreement, a joint venture agreement and a demand debenture. 134 is indebted to AIM in the amount of \$278,854.49 (the "**134 Indebtedness**", and collectively with the WRI Indebtedness, the "**Indebtedness**") under the terms of a joint venture agreement and a demand debenture.
3. The Debtors have granted security in favour of AIM over their present and after-acquired real property. Under their respective loan and security documents, the Debtors agreed to the Court-appointment of a receiver in the event that they are unable to pay the Indebtedness.
4. The Debtors have acknowledged, among other things, their respective indebtedness and the validity of AIM's security over their property under a

forbearance agreement dated December 22, 2017 entered into by AIM's predecessor entities and the Debtors (the "**Forbearance Agreement**").

5. The Debtors acknowledge that the Indebtedness is due and payable and that they are unable to pay such indebtedness, and have consented to the enforcement of AIM's security. Under the Forbearance Agreement, the parties also further agreed to the Court-appointment of a receiver over the property of the Debtors in this application.
6. This application is made to facilitate a sale of the Debtors' property interests in a stable, fair, transparent, court-supervised process. Farber, a licensed insolvency trustee, has provided its consent to being appointed as the Receiver.
7. The appointment of Farber as receiver is just and convenient in the circumstances.
8. The proposed stalking horse sale process contemplates a thorough marketing of the Debtors' real property interests based on a stalking horse bid by AIM. The proposed sale process represents the best option for obtaining maximum value for the Debtors' estates. The interests of creditors will not be prejudiced by granting the relief sought.
9. The relief sought on this application is also necessary because the applicant, the Debtors and their respective ownership interests in certain real property are all affected by separate ongoing litigation. In order to monetize the Debtors' assets for the benefit of creditors and stakeholders, it is necessary to effect a Court-

approved sale of the Debtors' real property interests pursuant to a vesting order that vests the relevant property free and clear of any claims. Without such a vesting order, it will not be possible to unlock the maximum value of the Debtors' assets for the benefit of all of its creditors and stakeholders. The appointment of the Receiver will also create an efficient and proper venue for the determination of competing claims to the net cash proceeds of the Debtors' assets.

10. The Confidential Exhibits include commercially sensitive information that should not be disclosed. A sealing order is necessary to protect the integrity of the stalking horse sale process and the legitimate commercial interests of the parties to the Forbearance Agreement.

PART II - THE FACTS

11. The facts relevant to this application are set out in detail in the Wirpszo Affidavit. Below is a brief summary of those facts.

A. Overview of the parties

12. AIM belongs to a group of companies that carries on business in the scrap metal and recycling industry across North America and elsewhere. AIM is the successor in interest to, among other entities, American Iron & Metal LP ("AIM LP"), and its former general partner American Iron & Metal GP Inc. ("AIM

GP”), following certain corporate reorganizations. AIM LP’s and AIM GP’s rights and liabilities have continued in AIM.¹

13. 134 was incorporated in June 2007 for the purpose of acquiring the property located at 143 Adams Boulevard, Brantford Ontario (the “**Brantford Property**”).²

14. WRI was incorporated in July 2010 for the purpose of acquiring the property located at 4350 Harvester Road, Burlington, Ontario (the “**Burlington Property**, together with the Brantford Property, the “**Properties**”).³

B. Overview of the Properties

15. In June 2007, 134 acquired the Brantford Property.⁴ In December 2012, AIM purchased a 50% ownership interest in the Brantford Property from 134. Since that time, AIM and 134 have co-owned the Brantford Property as tenants in common.⁵

16. AIM and 134 entered into a joint venture agreement that governs certain aspects of their tenancy in common of the Brantford Property (the “**Brantford Property JVA**”).⁶

¹ Affidavit of Kamila Wirpszo, sworn April 11, 2018 [**Wirpszo Affidavit**], paras. 3 and 4, Application Record of the Applicant [**AIM’s Application Record**], Tab 2, p.17. Reference in this Factum to the transactions, rights and liabilities of “AIM” includes those of its predecessor entities for which AIM is the successor in interest.

² Wirpszo Affidavit, para 5.

³ Wirpszo Affidavit, para 6.

⁴ Wirpszo Affidavit, para 14.

⁵ Wirpszo Affidavit, paras 13-15.

⁶ Wirpszo Affidavit, para 16 and Exhibit “G”.

17. In July 2010, WRI acquired the Burlington Property. This acquisition was financed by a loan in the amount of \$3,165,000 from Roynat Capital Inc. (“**Roynat**”) pursuant to a loan agreement dated July 30, 2010 (the “**Roynat Loan Agreement**”).⁷ WRI issued a debenture in favour of Roynat (the “**Roynat Debenture**”) granting security over certain of WRI’s assets, including its ownership interest in the Burlington Property.⁸
18. In December 2012, AIM purchased a 50% ownership interest in the Burlington Property from WRI. Since that time, AIM and WRI have co-owned the Burlington Property as tenants in common.⁹
19. AIM and WRI entered into a joint venture agreement that governs certain aspects of their tenancy in common of the property (the “**Burlington Property JVA**”).¹⁰

C. Indebtedness and Security

20. On October 12, 2012, 134 issued a demand debenture in favour of AIM in the amount of \$3,000,000 (the “**134 Debenture**”).¹¹
21. Also on October 12, 2012, WRI issued a demand debenture in favour of AIM in the amount of \$3,000,000 (the “**WRI Debenture**”, and together with the 134 Debenture, the “**Demand Debentures**”).¹²

⁷ Wirpszo Affidavit, para 8 and Exhibit “C”.

⁸ Wirpszo Affidavit, para 8 and Exhibit “C”.

⁹ Wirpszo Affidavit, para 9.

¹⁰ Wirpszo Affidavit, para 10 and Exhibit “D”.

¹¹ Wirpszo Affidavit, para 17 and Exhibit “H”.

¹² Wirpszo Affidavit, para 11 and Exhibit “E”.

22. In July 2013, Roynat alleged that WRI was in default under the Roynat Loan Agreement and was prepared to enforce its security under the Roynat Debenture.¹³ To avoid the prospect of Roynat enforcing its security, AIM assumed the debt owed by WRI to Roynat. AIM and WRI agreed by letter agreement that AIM's payment of \$1,414,313.08 to Roynat on behalf of WRI was advanced by AIM on substantially the same terms as attached to the Roynat Loan (the "**Letter Agreement**").¹⁴ AIM effectively stepped into the shoes of Roynat to assume its existing debt on similar terms. The funds paid to Roynat by AIM on behalf of WRI represent almost 70% of the WRI Indebtedness.¹⁵
23. The WRI Indebtedness in the amount of \$2,057,152.61 is owed to AIM pursuant to advances made under the Letter Agreement, the Burlington Property JVA and the WRI Debenture.¹⁶
24. The 134 Indebtedness in the amount of \$278,854.49 is owed to AIM pursuant to advances made to 134 under the terms of the Brantford Property JVA and the 134 Debenture.¹⁷
25. The WRI Indebtedness and the 134 Indebtedness, pursuant to the loan and security documents described above, are each demand obligations that are payable by WRI and 134, respectively, on demand by AIM.¹⁸

¹³ Wirpszo Affidavit, para 12.

¹⁴ Wirpszo Affidavit, para 12 and Exhibit "F".

¹⁵ Wirpszo Affidavit, para 13.

¹⁶ Wirpszo Affidavit, para 18.

¹⁷ Wirpszo Affidavit, para 19.

¹⁸ Wirpszo Affidavit, para 21.

26. The proposed Receiver has obtained from its legal counsel an opinion that concludes that the Indebtedness is secured by a valid and enforceable security interests in certain personal property of the Demand Debentures.¹⁹

D. The Forbearance Agreement

27. On December 22, 2017, AIM and the Debtors entered into the Forbearance Agreement.²⁰
28. Under the Forbearance Agreement, the Debtors have acknowledged their respective indebtedness and AIM's security interest over their respective properties, and provided further consent to the Court-appointment of a receiver over their property.²¹

E. Demand for Payment

29. On December 22, 2017, McMillan LLP ("**McMillan**"), AIM's legal counsel, sent letters to WRI and 134 demanding payment of their respective Indebtedness on behalf of AIM, and provided each of the Debtors with notice of its intention to enforce its security in accordance with section 244 of the BIA.²²

¹⁹ Report of A. Farber & Partners Inc., in its Capacity as Proposed Receiver of Waxman Realty Company Inc. and 1340923 Ontario Inc., dated April 17, 2018 [**Proposed Receiver's Report**], para. 8.

²⁰ Wirpszo Affidavit, para 22.

²¹ Wirpszo Affidavit, para 24.

²² Wirpszo Affidavit, para 26 and Exhibit "J".

F. Other Creditors and Contingent Claimants

30. The Ministry of National Revenue has certain lien rights registered on title of the Burlington Property.²³
31. The Business Development Bank of Canada (“**BDC**”) has a mortgage registered on title of the Brantford Property in the principal amount of \$2,050,000, which ranks in priority to the 134 Debenture.²⁴ BDC also has security interest registrations against the assets of 134 on the Personal Property Security Registry (Ontario).²⁵
32. Morris Waxman (both in his personal capacity and as the trustee of the Estate of I. Waxman & Sons Limited) and Solid Waste Reclamation Inc. have brought an action, bearing Court File Number 07-CL-6901, against various parties, including WRI (the “**Waxman Action**”). Among other things, the plaintiffs seek a constructive trust over WRI’s assets. The plaintiffs in the Waxman Action have provided their consent to the Court-appointment of a receiver and Court-approved sale of WRI’s real property interest, while reserving their rights to pursue the net cash proceeds of such sale.²⁶
33. NASG Inc. (“**NASG**”) has commenced a separate action, bearing court file number CV-14-10606-00CL, against WRI, 134, their principals and AIM, among other defendants (the “**NASG Action**”). NASG seeks, among other remedies, a constructive trust in both AIM’s and the Debtors’ ownership interests in the

²³ Wirpszo Affidavit, para. 35, Exhibit “M”.

²⁴ Proposed Receiver’s Report, para. 10.

²⁵ Wirpszo Affidavit, para. 34 and 36, Exhibits “L” and “N”.

²⁶ Wirpszo Affidavit, para. 39.

Properties. NASG is asserting a contingent claim and has not established that it has any rights in the Properties nor that AIM has any liability to it.

G. The Stalking Horse Agreement and the Stalking Horse Sale Process

34. Farber has prepared a stalking horse sale process for the marketing and sale of the Debtors' respective 50% interests in the Properties (the "**Stalking Horse Sale Process**") that Farber proposes to run if appointed as Receiver and if approved by the Court.
35. A detailed summary of the material terms and conditions of the Stalking Horse Agreement and the Stalking Horse Sale Process is included in the Proposed Receiver's Report.²⁷
36. AIM has prepared a stalking horse bid for the purchase of the Debtors' real property interests (the "**Stalking Horse Bid**") that is reflected in the Stalking Horse Agreement, and includes a credit bid component as well as a substantial cash bid component.²⁸ Subject to Court approval, the Stalking Horse Bid will serve as the stalking horse bid under the Stalking Horse Sale Process.
37. In consideration for AIM's expenditure of time and money in preparing the stalking horse bid, and agreement to act as the initial bidder through the Stalking Horse Agreement, AIM will be entitled to a break fee of \$500,000 (the "**Break Fee**"), payable to AIM if a superior bid is selected. The Break Fee will be paid to

²⁷ Proposed Receiver's Report, paras. 13-20.

²⁸ Wirpszo Affidavit, para. 44 and Exhibit "P".

AIM from the sale proceeds of any such superior bid.²⁹ The Break Fee recognizes the underlying complexity of AIM's roles in negotiating the Stalking Horse Agree and the Sale Process as well as its ongoing requisite involvement and negotiation with any third-party purchaser that makes a superior bid to the Stalking Horse Bid.³⁰

38. The Stalking Horse Agreement provides an acknowledgement that the Break Fee represents a fair and reasonable estimate of the costs and damages that would be incurred by AIM if the Stalking Horse Bid is not consummated. It is not intended to be punitive in nature or to discourage competitive bidding in the Stalking Horse Sale Process.³¹
39. If the sale process is approved, the Receiver will begin marketing to interested parties within two business days of issuance of the approval order. A notice in *the Globe and Mail* (national edition) will be published within five business days of the approval order. The bid deadline is 4:00pm on May 22, 2018. The winning bid will be selected on or prior to 5:00pm on May 25, 2018. Court approval of the winning bid and issuance of an approval and vesting order will be sought on or prior to 5:00pm on June 8, 2018. The closing of the winning bid will be on or prior to June 20, 2018.³²
40. The Stalking Horse Sale Process provides for the marketing of the Debtors' real property interests and canvassing the market for superior bids to the Stalking

²⁹ Wirpszo Affidavit, Exhibit "P", Section 6.1, AIM's Application Record, Tab 2(P), p. 275.

³⁰ Proposed Receiver's Report, para. 17(k).

³¹ Proposed Receiver's Report, para. 17(k).

³² Proposed Receiver's Report, para. 17.

Horse Bid for a period that the proposed Receiver has determined to be reasonable. It contemplates a thorough marketing effort. The proposed Receiver is of the view that the Stalking Horse Sale Process is the most effective and commercially reasonable strategy to maximize the value of the Debtors' ownership interests in the Properties.³³

H. The Confidential Information

41. The Proposed Receiver's Report attaches Confidential Appendix "1", which includes an appraisal report prepared by Altus Group Limited providing a valuation of the Debtors' respective ownership interests in the Properties (the "**Altus Appraisals**"). The proposed Receiver is of the view that the Altus Appraisals contain commercially sensitive information, and believes that the public dissemination of the Altus Appraisals would be prejudicial to the integrity and effectiveness of the Sale Process. Accordingly, the Proposed Receiver recommends that the Altus Appraisals be sealed pending further Order of this Court.³⁴
42. The Wirpszo Affidavit attaches a redacted version of the Forbearance Agreement. An unredacted version of the Forbearance Agreement will be made available to the Court at the hearing of this application. The unredacted Forbearance Agreement includes commercially sensitive information that is not relevant to the issues for determination on this application.

³³ Proposed Receiver's Report, para. 21.

³⁴ Proposed Receiver's Report, para. 13.

PART III - ISSUES AND THE LAW

43. This application raises the following issues:

- (a) Is it just and convenient to appoint a receiver over all the property, assets and undertakings of WRI and 134?
- (b) Should the Court approve the Stalking Horse Sale Process and the Stalking Horse Agreement? and
- (c) Should the Court grant a sealing order over information contained in the Confidential Exhibits?

A. The Test for Appointment of a Receiver is met

44. Pursuant to section 243(1) of the BIA, the Court may, on application by a secured creditor, appoint a receiver where it considers it to be just or convenient to do so:³⁵

Court may appoint a 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 the court considers advisable.

³⁵ R.S.C. 1985, c. B-3, s. 243.

45. Section 101(1) of the CJA provides for the appointment of a receiver by interlocutory order where the appointment is “just or convenient”:³⁶

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.

46. In deciding whether it is “just and convenient” to appoint a receiver under BIA and CJA, a court must have regard to all of the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation to the property.³⁷
47. The factors to be considered in determining whether it is appropriate to appoint a receiver include, among others:³⁸
- (a) the effect on the parties of appointing the receiver (including potential costs and the likelihood of maximizing return and preserving the subject property);
 - (b) the parties’ conduct; and
 - (c) the nature of the property and rights and interests of all parties in relation to such property, including the rights of the secured creditor under its security.
48. It is not necessary that the secured creditor establish that it will suffer irreparable harm if the receiver is not appointed.³⁹

³⁶ R.S.O. 1990, c. C.43, s. 101.

³⁷ *Bank of Montreal v Carnival National Leasing Ltd.*, [2011] OJ No 671 (SCJ) at para 24, Applicant’s Book of Authorities (“BOA”), Tab 1; *Bank of Nova Scotia v Freure Village on Clair Creek*, [1996] OJ No 5088 (Gen Div), BOA, Tab 2.

³⁸ *Callidus Capital Corp v Carcap Inc.*, 2012 ONSC 163 at para 41, BOA, Tab 3.

³⁹ *Bank of Nova Scotia v Freure Village on Clair Creek*, [1996] OJ No 5088 (Gen Div) at para 11, BOA, Tab 2.

49. The circumstances of this case support the appointment of the Receiver. The Indebtedness is payable under the parties' loan documents. The Debtors are unable to satisfy their respective obligations to pay. This is not in dispute. The Debtors have acknowledged under the Forbearance Agreement that they are unable to pay the Indebtedness, and have consented to the enforcement of AIM's security.
50. The fact that the Debtors have consented, both in the Demand Debentures and in the Forbearance Agreement, to the appointment of a receiver is an important factor supporting the appointment. Justice Morawetz of this Court recently observed the following in *Bank of Montreal v. Sherco Properties Inc.*:⁴⁰
- While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.
51. In the present case, there is a real need for the appointment of a receiver to conduct a Court-supervised sale of the Debtors' 50% interests in the Properties. Due to the ongoing litigation affecting the Debtors and their interest in the Properties, tax and other claims, there is no realistic chance of recovering the market value of the Debtors' interests in the Properties in an out-of-Court sale without a vesting order.
52. The appointment of the Receiver and approval of the Stalking Horse Sale Process will protect the interests of all creditors. Under the terms of the Stalking Horse

⁴⁰ *Bank of Montreal v Sherco Properties Inc.*, 2013 ONSC 7023 at para 42, BOA, Tab 4.

Bid, 134's obligations to BDC will be assumed or fully paid out. The net cash proceeds of a sale will be more than sufficient to satisfy the outstanding debt to the Ministry of National Revenue, which is secured by a lien on the Burlington Property.

53. The proposed receivership will also create an efficient and appropriate venue for the determination of any competing claims to the net cash proceeds of a sale following closing of the successful bid, including the contingent claims asserted in the Waxman Action and the NASG Action.
54. The appointment of a receiver is just and convenient. It is an appropriate enforcement mechanism in the circumstances.
55. Farber has provided its consent to being appointed as receiver.⁴¹

B. The Stalking Horse Sale Process Should be Approved

56. Stalking horse sale transactions have been routinely approved in Canada. As was noted by Justice Brown of this Court in *CCM Master Qualified Fund Ltd. v blutip Power Technologies Ltd.*:⁴²

[t]he use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process.

57. In *Re Nortel Networks Corp.*, the Court approved a stalking horse agreement for the purpose of conducting the stalking horse bidding process, including a break fee and expense reimbursement. In doing so, the Court considered four factors in

⁴¹ Wirpszo Affidavit, para 28.

⁴² *CCM Master Qualified Fund Ltd. v blutip Power Technologies Ltd.*, 2012 ONSC 1750 at para 7, BOA, Tab 6.

the exercise of its general statutory discretion to determine whether to authorize a sale process:⁴³

- (a) Is a sale transaction warranted at this time?
- (b) Will the sale benefit the whole “economic community”?
- (c) Do any of the debtors’ creditors have a *bona fide* reason to object to a sale of the business?
- (d) Is there a better viable alternative?

58. In this case, the above criteria support the approval of the Stalking Horse Sale Process and the Stalking Horse Agreement.

59. The Stalking Horse Sale Process is an open and transparent process. Its purpose is to market the Debtors’ real property interests to obtain a higher and better consideration than what is provided for in the Stalking Horse Bid, if possible.

60. There is no better viable alternative to the Stalking Horse Sale Process. The proposed Receiver has confirmed that the Stalking Horse Bid Process is the most effective and commercially-reasonable strategy to maximize the value of the Debtors’ assets.⁴⁴ This Court has previously recognized the value maximizing attributes of a stalking horse sale process.⁴⁵

61. The availability of credit bidding, as part of stalking horse bids, is well recognized in Canada.⁴⁶ The Court in *Re White Birch Paper Holding Co.* noted that “...if credit bidding is to take place, it goes without saying that the amount of

⁴³ *Re Nortel Networks Corp.*, (2009), [2009] OJ No 3169 (SCJ [Commercial List]) at para 49, BOA, Tab 7 [Nortel]; also see *Re Brainhunter Inc.*, 2009 CarswellOnt 8207 (Ont. SCJ) at para 13, BOA, Tab 3.

⁴⁴ Proposed Receiver’s Report, para. 21.

⁴⁵ *Re Eddie Bauer of Canada Inc.* (2009), 57 CBR (5th) 241 (Ont SCJ) at para 23, BOA, Tab 9.

⁴⁶ See *Re White Birch Paper Holding Co.*, 2010 QCCS 4915, BOA, Tab 10 [White Birch]; *CCM Master Qualified Fund Ltd. v blutip Power Technologies Ltd.*, 2012 ONSC 1750 at para 7, BOA, Tab 6.

the credit bid should not exceed, but should be allowed to go as high as the face value amount of the credit instrument upon which the bidder is allowed to rely."⁴⁷ In this case, the credit bid amount represents no more than the secured Indebtedness. While it is not a requirement, in this case the credit component of the Stalking Horse Bid is much smaller than its cash component, and will generate considerable net cash proceeds in the Debtors' estate.

62. The Break Fee is reasonable. The Break Fee reflects the costs that AIM would incur in the event of a superior bid arising and it would only be payable from cash proceeds upon closing of a winning bid by a third-party that is superior to the Stalking Horse Bid. The proposed Receiver believes that the Break Fee is not prejudicial to stakeholders.⁴⁸
63. In the view of the proposed Receiver, the Stalking Horse Sale Process and Stalking Horse Agreement represent the best option to maximize the benefit to stakeholders of the Debtors.

C. A Sealing Order should be granted in respect of the Confidential Exhibits

64. Section 137(2) of the *Courts of Justice Act* provides that:⁴⁹

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.

⁴⁷ *Re White Birch Paper Holding Co.*, 2010 QCCS 4915 at para 34, BOA, Tab 10 [*White Birch*].

⁴⁸ Proposed Receiver's Report, para. 17(k).

⁴⁹ R.S.O. 1990, c. C.43, s. 137.

65. In the seminal decision in Canada on sealing orders, *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada set out a two part test to determine when a sealing order should be granted:⁵⁰

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest [...]; and,
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects [...].

66. Courts have applied the test in *Sierra Club* to the granting of sealing orders in the context of receiverships, including to seal confidential appendices to receivers' reports to the court that contain confidential information regarding bids received in the conduct of a court approved sale.⁵¹

67. The Confidential Exhibits include sensitive commercial information, the public dissemination of which would be prejudicial to the integrity and effectiveness of the Stalking Horse Sale Process and the legitimate commercial interests of the applicant.

68. The salutary effects of the sealing order outweigh any deleterious effects. The information contained in the Confidential Exhibits is helpful to the Court in determining whether the proposed Receiver has acted providently in endorsing the Stalking Horse Sale Process and to ensure that there has been no abuse of process. In light of the Court's supervisory role, no other party will be adversely affected if the Confidential Exhibits remain sealed.

⁵⁰ 2002 SCC 41 at para 53, BOA, Tab 5 [*Sierra Club*].

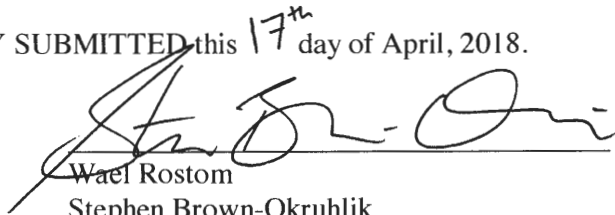
⁵¹ *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, 2014 ONSC 1173 at para 32, BOA, Tab 11.

69. Accordingly, the applicant respectfully requests that the Court grant an order sealing the Confidential Exhibits.

PART IV - ORDERS REQUESTED

70. For the reasons set out above, the applicant respectfully requests that the Court grant the relief sought on this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of April, 2018.

A handwritten signature in black ink, appearing to read "Stephen Brown-Okruhlik", is written over a horizontal line. The signature is stylized and cursive.

Wael Rostom
Stephen Brown-Okruhlik
McMillan LLP

Lawyers for the Applicant

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Bank of Montreal v Carnival National Leasing Ltd.*, [2011] OJ No 671 (SCJ)
2. *Bank of Nova Scotia v Freure Village on Clair Creek*, [1996] OJ No 5088 (Gen Div)
3. *Callidus Capital Corp v Carcap Inc.*, 2012 ONSC 163
4. *Bank of Montreal v Sherco Properties Inc.*, 2013 ONSC 7023
5. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41
6. *GE Canada Real Estate Financing Business Property Co. v 1262354 Ontario Inc.*, 2014 ONSC 1173
7. *Re Nortel Networks Corp.*, (2009), [2009] OJ No 3169 (SCJ [Commercial List])
8. *Re Brainhunter Inc.*, 2009 CarswellOnt 8207 (Ont. SCJ)
9. *Re Eddie Bauer of Canada Inc.* (2009), 57 CBR (5th) 241 (Ont SCJ)
10. *Re White Birch Paper Holding Co.*, 2010 QCCS 4915

SCHEDULE "B"
RELEVANT STATUTES

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

Court may appoint a 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 the court considers advisable.

2. *Courts of Justice Act*, R.S.O. 1990, c. C.43. as amended

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.

137(2) Sealing documents

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.

AMERICAN IRON & METAL COMPANY
INC. and
Applicant

1340923 ONTARIO INC. et al.
Respondents

Court File No.: CV-18-595577-00CL

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

Proceeding commenced at **TORONTO**

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(April 20, 2018)**

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