



SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

COUNSEL/ENDORSEMENT SLIP

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NO.:

CV-22-00688248-00CL

HEARING
DATE:

Friday May 30, 2025

NO. ON LIST: 3

TITLE OF
PROCEEDING:

City of Toronto v. Harry Sherman Crowe Housing Co-Operative Inc. et al.

BEFORE:

JUSTICE KIMMEL

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Mark Siboni	City of Toronto	mark.siboni@toronto.ca

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info
Courtney Betty	Board of Directors of Harry Sherman Crowe Housing Co-Operative Inc.	betty@bettyslaw.com
Philip Cho	Receiver, TDB Restructuring Ltd.	pcho@weirfoulds.com
Arif Dhanani	Receiver, TDB Restructuring Ltd.	adhanani@tdbadvisory.ca

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info

ENDORSEMENT OF JUSTICE KIMMEL – BOARD’S FUNDING MOTION:

[1] The current and subsisting Board of Directors of the respondent is asking the court to approve funding of its past and continuing legal expenses incurred in connection with this receivership proceeding.¹ There is a timetable in place for a motion brought by the Receiver, that was adjourned at the respondent’s request and is now scheduled to be heard on June 20, 2025. That timetable requires the Board to deliver its responding material by the end of this week. The parties need the decision on this motion to carry that timetable forward, and committed to doing so if the decision was rendered in the early part of this week. The court has endeavoured to do so. All of the written and oral submissions of the parties have been considered, even if not referred to or elaborated upon in this endorsement.

The Receivership

[2] The City of Toronto brought an Application to appoint a Receiver and Manager over the property, assets and undertaking of Harry Sherman Crowe Housing Co-operative Inc. (the “Co-op”) pursuant to, and in accordance with the provisions of the *Housing Services Act*, 2011, S.O. 2011, c. 6, Schedule I (the “HSA” or the “Act”). The receivership application was brought because the City (the designated service manager of the Co-op under the HSA) determined that the Co-op was experiencing challenges regarding its operations and the administration of its Rent-Geared-to-Income (“RGI”) portfolio. The City also identified issues with the Co-op’s financial position and its governance structures and practices.

[3] The court was satisfied on the record before it that, in light of the circumstances of the Co-op and the challenges that it faced, it was both just and convenient that a Receiver be appointed to manage the affairs of the Co-op, and an Order appointing the Receiver was granted on March 16, 2023 (the “Appointment Order” or “Receivership Order”). Neither the City nor the Co-op requested that any Order be made as to costs when the Appointment Order was made.

[4] At the time of the Receiver’s appointment, the Co-op was insolvent. It owed approximately \$1.1 million to its unsecured creditors, not including amounts now claimed by the lawyers for the Board, Betty’s Law. The Receiver has reported to the court that the balance of the Co-op’s operating account, as of April 20, 2025, was approximately \$74,000. The Receiver continues its work to complete various outstanding capital repair projects, while operating the housing project in accordance with the provisions of the HSA.

[5] The powers of a Receiver appointed by order of the court pursuant to subsection 85(7) of the HSA are governed by the Appointment Order. The Receiver owes duties to all relevant stakeholders. One of its duties is to provide an annual report. The Receiver’s first annual report was presented to the court on April 29, 2024 (the “Receiver’s First Report - Approval Motion”), at which time the First Report, the Receiver’s activities described in it and its fees and disbursements were approved.

Receiver’s Upcoming Motion

[6] The Receiver’s motion to deliver its second annual report to the Court, and seeking the approval of that report and the Receiver’s activities described in it and its fees and disbursements, is returnable on June 20, 2025 (the “Receiver’s Second Report - Approval Motion”). This will include approval of a proposed Request for Expressions of Interest and Qualifications (“RFEIQ”) process.

[7] The RFEIQ process, and the Receiver’s reasons for proposing it, are outlined in the Receiver’s Second Report dated April 30, 2025. In summary, it contemplates that the Receiver will engage with the members and

¹ While it has been pointed out that there are some dockets in the supporting accounts from the Board’s lawyers that appear to relate to other matters, those amounts are small and the motion was approached on the basis of the general assertion that this motion is for funding for legal expenses of the Board incurred in connection with this receivership.

residents of the Co-op to solicit feedback that the Receiver would then evaluate and report back to the Court on, along with a recommendation as to what steps should be taken in respect of the Co-op to best ensure that the housing project can continue as a healthy, ongoing, viable concern.

The Legal Fees and Disbursements of the Board for Which Approval for Funding is Sought

[8] Betty's Law Office was retained in 2022, prior to the receivership proceedings, by the then Board of Directors of the Co-op (the "Board"). Betty's Law acted for and advised the Board in its initial opposition to the appointment of the Receiver and in the Board's eventual withdrawal of that opposition. Following the appointment of the Receiver, Betty's Law continued to represent the Board in connection with the receivership proceedings.

[9] This motion was initially framed as a motion by the Co-op for:

- a. An order authorizing the City of Toronto and the Receiver TDB Restructuring to pay legal fees outstanding since 2023 in the amount of \$30,809.08 (CAD), these fees said to have been incurred in respect of Board representation by Betty's Law in responding to ongoing legal issues, including in connection with the Receivership Order.
- b. An order further authorizing the Receiver to pay all ongoing legal fees reasonably incurred by the Board of Directors for continued legal representation by Betty's Law, to be paid from the Co-op's market funds, currently controlled by the Receiver.
- c. Such further and other reliefs as this Honourable Court may deem just, recognizing that representation of the Co-op is required to ensure the smooth transitioning of the Co-op out of Receivership.

[10] Mr. Betty confirmed at the hearing of this motion that he represents the individuals and authority of the Board of the Co-op elected prior to the Appointment Order. The Board maintains that it continues to require ongoing legal representation to participate in receivership proceedings, respond to motions by the Receiver, and protect the rights and interests of Co-op members, while governance issues remain unresolved and the RFEIQ process proceeds. Mr. Betty also confirmed at the hearing that the Board is not seeking an order that the City pay any of the outstanding legal fees directly. The order sought is for the court to authorize the Receiver to pay these outstanding and future amounts from market rents paid to the Co-op by members.

[11] As part of the relief being sought in the within motion, the Board relies on three invoices it has received from Betty's Law that appear to relate to fees and disbursements incurred prior to the Appointment Order, namely Invoices 1123, 1124, and 1251, totaling \$34,556.16, as follows:

- a. Invoice 1123 (for work that Betty's Law performed in January and February 2023) in the amount of \$14,125.00;
- b. Invoice 1124 (for work that Betty's Law performed between March 4th and March 14th, 2023), in the amount of \$14,229.21; and
- c. Invoice 1251 (for disbursements that Betty's Law paid in the course of work performed between January 1st and March 14th, 2023), in the amount of \$6,131.95.

[12] Before the Appointment Order was made on March 14, 2023, the Co-op continued to have control over its Property. According to transactions disclosed on Invoices 1124 and 1247 from Betty's Law, it received retainer funds on deposit from the Co-op prior to the Appointment Order of \$10,000 and \$13,355.66, for a total of

\$23,355.66 (approximately 67% of the original total claimed invoices for this pre-Appointment Order period). In the absence of any evidence or explanation to the contrary, it is reasonable for the court to infer, and I do so infer, that those retainer funds were or could be applied to the oldest to newest outstanding invoiced amounts, which reduces the balance owing for legal fees and expenses to \$11,200.50 in the pre-Appointment period, specifically with respect to the Board's initial opposition to, and eventual support of, the Appointment Order.

[13] At the hearing of this motion, without addressing directly this analysis put forward by the Receiver, counsel for the Board advised the court that the request for funding was being reduced by approximately 50% to \$15,400, from the original request for \$30,809.08.

[14] Betty's Law has also rendered one invoice that appears to relate to work that was undertaken and completed following the issuance of the Appointment Order. This is Invoice 1247 dated May 1, 2024, in the amount of \$6,252.92, for work done in connection with the Receiver's First Report Approval Motion that the Board initially opposed.

Analysis

Legal Framework and the Parties' Positions

[15] The Court of Appeal set out the framework for assessing a request by a board of a corporation to be paid out of the assets of a corporation in a receivership in *Peterborough (City) v. Kawartha Native Housing Society Incorporated*, 2010 ONCA 705. In *City of Peterborough* the board of a non-profit housing corporation sought similar relief (funding of legal fees of that board) in respect of a receivership commenced by the City of Peterborough.

[16] Neither the Receiver nor the City take issue with the right of the Board to take positions in connection with matters brought before the court and retain legal counsel in appropriate circumstances, although it is noted that this is not an unfettered right and the court must be satisfied that the Board has acted responsibly and reasonably in doing so: see *City of Peterborough*, at paras. 31 and 32. Where the Board wants assurance of reimbursement, it can bring an application for an advance costs award. That was not done in this case in respect of the pre-Receivership funding request but it is what the Board is now doing in connection with ongoing funding that it seeks.

[17] The crux of the issue in this case is about whether the Board is entitled to have the legal fees and disbursements reflected in past and future invoices of Betty's Law (or such other lawyer as the Board may engage instead of Betty's Law) paid for by the Receiver out of the funds of the Co-op. The Receiver emphasizes that: "There are no blank cheques. The court will decide whether a board is to be reimbursed for the legal expenses in taking a particular course of action": see *City of Peterborough*, at para. 35.

[18] The court in the *City of Peterborough* went on (at para. 35) to describe the test to be applied by the court in deciding whether to approve funding of legal expenses to be as follows:

On exercising its discretion to make a costs award in favour of a board of a corporation in receivership, the court may, in addition to the factors under Rule 57 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, consider the following:

- (i) whether the position advanced by counsel for the board had any merit;
- (ii) whether the board was acting in the interest of the corporation;

(iii) whether the position advanced by the board was properly advanced by the board rather than by the receiver; and

(iv) whether the position advanced by the board detracted from the orderly administration of the receivership. The above is obviously a non-exhaustive list and, as always, each case will turn on its own particular facts.

[19] The Board maintains it satisfies these criteria and should be granted the amended order it seeks, whereas the Receiver, supported by the City of Toronto, maintains that the Board has not met any of these criteria and the requested order should not be granted.

Funding of Pre-Receivership Legal Expenses and Post-Receivership Legal Expenses Already Invoiced (the Appointment Order – Receivership Motion and Receiver’s First Annual Report - Approval Motion)

[20] In part, the Receiver’s practical approach to this issue relies upon the inference it urged the court to draw (and the court did draw for reasons detailed earlier in this endorsement) that the historic legal expenses that are the subject of those motion have already been, or could be, partially paid for from retainer funds held on deposit that the Board had provided to Betty’s Law before the Receiver was appointed. The Receiver says that amount, the \$23,355.66 that the court has inferred has been applied or will be applied by Betty’s Law to invoices in rendered in connection with the Receivership application, is a rough approximation of the partial indemnity costs of the Board in connection with the Appointment Order (as noted above, it is approximately 67% of the total amount of the invoices of Betty’s Law referable to this period of time).

[21] In a situation such as this where partial indemnity costs have already been paid by the Co-op (through its retainer funds) in respect of the Board’s legal representation regarding the appointment of the Receiver, the court should not exercise its discretion under Rule 57 and the *City of Peterborough* factors to grant what would in effect be full indemnity costs, or possibly even double recovery of some costs already paid. This is particularly so in a situation where the Board’s initial opposition was not sustained, but nonetheless resulted in increased legal fees to both sides.

[22] For its part, the Board has reduced its request for pre-Appointment Order legal expenses to \$15,400 but has not explained how this is reconciled with the invoices rendered for this period and amounts indicated to have been paid, or held, on account of amounts owing to Betty’s Law prior to the Appointment Order. Based on the Receiver’s accounting, approval of funding from the Co-op of a further \$15,400 would result in more than full indemnification of the legal expenses invoiced to the Board by Betty’s Law.

[23] Ms. Kerr says in her May 12, 2025 affidavit filed by the Board in support of its motion that Betty’s Law submitted cumulative invoices for legal fees totaling \$30,908.00 CAD for services rendered to the Board from 2023 through early 2025. The invoices were attached to her affidavit, but no mention was made in the supporting affidavit or submissions of the Board about reconciling the invoices with trust funds received on retainer that are referenced in the invoices. Ms. Kerr was ill on the date that had been scheduled for her cross-examination so she was not cross-examined as the schedule did not have any additional time buffers in it in the lead up to this hearing. No adjournment was sought, nor was she cross examined at the hearing, which was offered.

[24] While the responding parties could have asked questions of Ms. Kerr about the application of previously retainer funds reflect on the invoices that she references in her affidavit, they were not obligated to do so. It is the Board, that seeks to have legal expenses of its lawyer paid, that would be required to fully account for and reconcile the balances actually owing on the invoices tendered in support of this motion. The Board did, however, at the outset of the hearing indicate that it was reducing the amount of pre-hearing legal expenses that it is seeking

funding for to \$15,400 (by approximately 50%). The explanation provided in court for this offer was that the Board wanted to be reasonable in what it was asking for.

[25] Absent the reconciliation and accounting that I would have expected from the Board regarding the net legal expenses for which they have no funding, it is reasonable for the court to infer, and I do so infer, that this reduced amount of \$15,400 reflects a reasonable amount of funded legal fees for the pre-Receiver's legal expenses incurred by the Board. In terms of the applicable Rule 57 factors, it reasonably reflects the outcome of the Receiver's application, that the Board initially objected to but eventually decided not to oppose, it is proportionate and objectively reasonable. I further conclude that more than this amount has already been paid, or is available to be paid, from the retainer trust funds held by Betty Law (totaling \$23,355, representing a \$13,355 payment noted on one of Betty's Law invoices at issue, and another \$10,000 noted to be a retainer held in trust).

[26] The only invoice from Betty's Law for legal services performed post-Receiver's is the invoice for \$6,252.92 that appears to relate specifically to work done in connection with the Receiver's First Report Approval Motion that the Board initially opposed. Even if this amount is added to the requested funding for pre-Receiver's legal expenses of \$15,400, the total is still less than the total of \$23,355 indicated to have been paid to Betty's Law in respect of the Board's legal fees prior to the Appointment Order.

[27] Thus, no further funding of already invoiced legal expenses is authorized. Implicit in this decision is the approval of some, but not all, of the legal expenses for which funding is sought to pay Betty's Law for its work representing the Board in connection with the Receiver's Application. I consider that to be appropriate under the *City of Peterborough* framework. It is within the court's discretion to decide whether approval of funding in a receivership context is appropriate, and I so find. While the Board backed away from its positions, some of which were attributed by the court in an earlier endorsement to misunderstandings, the airing of counter positions in this particular context introduced a vigor and transparency into the receivership that is not entirely unwelcome. That said, this must be kept in check to avoid unnecessary enhanced legal fees, not only of the Board (to the extent future funding is approved), but also in respect of the fees and disbursements of the Receiver and its counsel as well.

[28] Further, I agree that because the court has authorized the funding of the pre-Receiver's legal expenses of the Board from the retainer trust funds, that is an exception that will not constitute a preference payment to an unsecured pre-receivership unsecured creditor (Betty's Law). The Receiver recognized in the course of its submissions that, as in the *City of Peterborough*, if the court approves the payment of the pre-receivership legal expenses then it is not a preference.

Funding of post-Receiver's Legal Expenses Not Yet Invoiced (Second Annual Approval Motions)

[29] With respect to the Receiver's Second Report Approval Motion, there is no relief sought against the Co-op or the Board. The RFEIQ process that has been recommended by the Receiver invites the members of the Co-op (including members of the Board) to participate in a process that will assist the Receiver in making recommendations and "strategic planning".

[30] Ms. Kerr explains in her affidavit on behalf of the Co-op that court approval is sought for legal expenses incurred by the Board going forward. She attests that: "These fees will be incurred in good faith for the purpose of ensuring the Board's effective participation in legal processes and governance transition planning. Legal counsel may be required to review future filings, respond to the RFEIQ process, and attend before this Honourable Court or with external stakeholders.

[31] The Receiver and the City have raised concerns regarding the conduct of this particular Board, and whether the interests of the Co-op will be served by funding counsel to the Board going forward. They point to the recent example of the Board waiting until shortly before the return date of the Receiver's pending motion in

May 2025 to purport to call an annual general meeting of members, without any consultation with the Receiver. While the annual general meeting did not take place upon the court's direction (after an urgent hearing was convened), had the meeting taken place, it would have further complicated the Receiver's efforts to engage with the members as contemplated by its motion for, among other things, the court's approval of the RFEIQ process. Interference with the receivership and not acting in the interests of the Co-op are among the discretionary factors that the court may consider under the *City of Peterborough* test.

[32] The Board requests a blanket pre-authorization of the Receiver to disburse such ongoing legal fees as they arise, subject to reasonableness, without requiring further motions unless the Receiver objects. The request for authorization of the payment by the Receiver of the Board's legal expenses post-Receivership appears to be predicated on the assumption that the Board as presently constituted will continue and eventually the management and operation of the Co-op will be transitioned back to this Board. This is reflected in the third prayer for relief in this motion that seeks such further and other relief "recognizing that representation of the Harry Sherman Co-op is required to ensure the smooth transitioning of the Co-op out of Receivership".

[33] The Board's request and presumption that the transition will necessarily be back to this Board (as presently constituted) goes too far. The Receiver's proposed RFEIQ process, if approved, or some further direction or order of the court will determine what the transition will look like, and to whom at the appropriate time. The concerns that existed at the outset when the Appointment Order was made, that included financial management and governance issues associated with this Board, may factor into this analysis. That remains an open question.

[34] Further, the Board's request, as currently framed, in respect of post-Receivership Board Legal Expenses, even if initially capped at \$10,000 up to the Receiver's Second Report Approval Motion (a limit only offered during submissions at the hearing in response to concerns raised by the court), is too general and could be considered to be tantamount to a blank cheque.

[35] Relief that is overreaching is not reasonable and appropriate and I am not prepared to grant the relief as it was set out in the Notice of Motion.

[36] All of that said, I agree that the Board may have something constructive to say about transition considerations given that it is the eventual objective for the Receiver to transition the management and direction of the Co-op back to a self-governing body of some sort, which might be this Board or might be constituted differently, something the Receiver will develop its recommendations about after the planned consultation and investigation procedures.

[37] I do not agree that the particulars and details of the positions that the Board is intending to take necessarily need to be spelled out chapter and verse in order for the court to approve some level of funding for the Board's legal expenses in advance. While the merits of positions taken are a relevant consideration for funding approval after the fact (as they were in *City of Peterborough*), the merits of positions taken may be a less significant factor to consider under the *City of Peterborough* test when approval of fees is sought in advance.

[38] The Court of Appeal in *City of Peterborough* expressly contemplates that approval of legal expenses of a board of a company in receivership can be sought in advance. In those circumstances, it may be unrealistic to expect the positions to have been fully formulated before knowing that counsel will have some funding to be paid for its work. While there is an initial onus on the Board to explain what it needs the funding for, in the circumstances of this case it is sufficient that the Board has said that it wants to contribute to the court's consideration of the RFEIQ process which, in turn, will engage transition considerations. Penny J. observed in his endorsement on the First Report Approval Motion, at paras. 9 and 10 that: "If the board wishes to successfully transition out of the receivership, it will have to show it has a clear understanding of what is required, from a regulatory, governance and financial point of view, for the successful operation of the Co-op". It seems to me

that this is the underlying objective of the Board's current proposed funding request in connection with the Receiver's Second Report Approval Motion.

[39] The Receiver makes a valid point that the Board does not have a great track record of succeeding on issues raised, as many have settled at the last minute due to changes in positions, adjournment requests, misunderstandings and the like, and that these positions were often at odds with the due administration of the receivership and ultimately may not have entirely served the interests of the Co-op. However, that does not necessarily mean that the Board's position in response to the next motion will be unreasonable.

[40] I am concerned that Betty's Law appears to have pulled the \$10,000 figure out of the air for the requested funding, when pressed at the hearing. No budget was provided and it was simply stated that this was a "discount". The court requires evidence of the need for advance funding and what it is for, and will not write a blank cheque. Given the timing, the court is provisionally approving a budget up to a maximum of \$10,000 in legal expenses for Betty's Law to provide legal representation to the Board in connection with the upcoming Receiver's Second Report Approval Motion, subject to the submission at the hearing a costs outline (or something similar to detail the basis for any amount of funding sought) that supports that amount of legal fees and disbursements that the funding is requested to cover and how it was calculated. It shall still remain in the discretion of the court to determine the amount of legal expenses, if any, that will be approved for funding in connection with this motion, up to this maximum amount.

Order and Amin

[41] The legal expenses of the Board in connection with this receivership that have been invoiced by Betty's Law are only approved to the extent of the retainer funds deposited with Betty's Law prior to the Receivership Order, as reflected (for example) on Invoices 1124 and 1247 from Betty's Law indicating that it received retainer funds on deposit from the Co-op prior to the Appointment Order of \$10,000 and \$13,355.66, for a total of \$23,355.66.

[42] The post-Receivership as-of-yet unbilled legal expenses incurred by legal counsel for the Board in connection with the Receiver's Second Report Approval Motion are approved up to an all-inclusive maximum of \$10,000 (or such lesser amount is substantiated and/or awarded by the court in its discretion at or after that motion).

[43] It should not be assumed that there will be approval for funding for future legal representation of the Board after the Receiver's Second Report Approval Motion and the consideration of the RFEIQ process, as the court's approval of or directions given in respect of that process may change the court's view on the application of the relevant factors to any future funding of Board legal expenses.

[44] Counsel for the Board represented that he would continue to work and ensure that he is in a position to deliver the responding materials that are due on June 6, 2025 in connection with the Receiver's Second Report Approval Motion so that motion stays on track for a hearing on June 20, 2025 in accordance with the court's May 13, 2025 endorsement. The court expects that timetable to be adhered to.

KIMMEL J.

Date: June 3, 2025