

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

B E T W E E N:

2615333 ONTARIO INC.

Applicant

- and -

**CENTRAL PARK AJAX DEVELOPMENTS PHASE 1 INC., 9654488 CANADA INC.,
9654461 CANADA INC., 9654372 CANADA INC., 9617680 CANADA INC. and
9654445 CANADA 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 RECEIVER
(Motion for Directions and Other Relief returnable March 4, 2024)**

February 23, 2024

THORNTON GROUT FINNIGAN LLP
TD West Tower, Toronto-Dominion Centre
100 Wellington Street West, Suite 3200
Toronto, Ontario M5K 1K7

Rebecca L. Kennedy (LSO# 61146S)
Tel: (416) 304-0603
Email: rkennedy@tgf.ca

Alexander Soutter (LSO#72403T)
Tel: (416) 304-0595
Email: asoutter@tgf.ca

Lawyers for the Court-appointed Receiver,
RSM Canada Limited

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PART I - OVERVIEW

1. This proceeding involves the Harwood Properties, real property in Ajax, Ontario.¹ Some, but not all, of the Harwood Properties are subject to a development agreement that granted the Town of Ajax (the “**Town**”) a right to repurchase such lands (the “**Repurchase Right**”).
2. The Receiver was appointed in April 2021 to sell the Harwood Properties. This receivership is somewhat unusual in that the Receiver’s authority to sell the Harwood Properties is fettered by the Appointment Order, which granted certain rights in favour of the Town. These rights include that none of the Harwood Properties subject to the Town’s development agreement could be sold without the purchaser agreeing to a new development agreement with the Town.
3. The Receiver went to considerable lengths to negotiate a draft new development agreement before undertaking the Sales Procedure. The Receiver was of the view that there would have been too much uncertainty if it had gone to market and required prospective purchasers to bid on the Harwood Properties only to then negotiate with the Town. The Receiver’s decision was approved by this Court when the Sale Procedure Order was made on June 1, 2023.
4. As reflected in the draft new development agreement ultimately included in the Sale Procedure data room, during negotiations the Town insisted that, among other things:

¹ Capitalized terms not defined in this Factum have the meaning given to them in the Receiver’s Fourth Report dated February 5, 2024 (the “**Fourth Report**”).

- (a) the developer agree to build according to the Town’s “vision” for the Harwood Properties – a pair of ten storey towers with two floors of underground parking;
 - (b) construction begin within 210 days of closing; and
 - (c) construction end within 30 months of commencing construction.
5. The Sale Procedure resulted in two bids, however, neither were selected as a Successful Bid. Bidder #1 failed to pay a deposit. During discussions with Bidder #2, it was discovered that, contrary to the Town’s prior representations, drawings sufficient to apply for a building permit did not exist. Given this, the timelines contemplated by the draft new development agreement were impossible to meet. Bidder #2 demanded a \$3 million purchase price abatement, which was unacceptable to the Receiver.
6. The feedback received after the Sale Procedure was completed suggests that the development agreement insisted upon by the Town had a chilling effect on bids.

PART II - FACTS

The Harwood Properties

7. The Harwood Properties are comprised of the “Phase 1A Lands” (a parking lot that is intended to be the main site of a future condominium development), the Phase 1B Lands (lands currently units in a strip mall adjacent to the parking lot) and the Utility Lands (other units in the strip mall).²

² Fourth Report at para 6, Motion Record of the Receiver (“**Receiver’s MR**”), Tab 2.

8. The Harwood Properties are not identically encumbered:³
 - (a) the Phase 1A Lands are encumbered by, in order of registration, a \$1.422 million mortgage in favour of the Town, a \$5 million mortgage in favour of the Applicant, a Notice of Option to Purchase in favour of the Town, and other mortgages; and
 - (b) the Phase 1B Lands and the Utility Lands are not encumbered by registrations in favour of the Town. Two mortgages in favour of the Applicant are registered on title in first position, followed by other mortgages.

The Development Agreement

9. The Phase 1A Lands and the Utility Lands are subject to the Development Agreement between Lemine Real Estate Consulting Inc. (“**Lemine**”) and the Town. Lemine is a developer and an affiliate of the Respondents.⁴
10. The Phase 1B Lands are not subject to the Development Agreement.
11. The Repurchase Right is set out in the Development Agreement and provides that, if Lemine defaulted under the Development Agreement, the Town could purchase the Phase 1A Lands and the Utility Lands at a certain price. Prior to the commencement of this proceeding, the Town commenced its own proceeding to enforce its Repurchase Right and determine that price (a price “which would be less than could be realized through a sale of the Ajax Properties in a court supervised receivership”).⁵ It was a live issue in that

³ Fourth Report at para 8, Receiver’s MR, Tab 2.

⁴ Fourth Report at para 9, Receiver’s MR, Tab 2.

⁵ [Reasons for decision of Justice Cavanagh dated April 15, 2021](#) (“**Appointment Reasons**”) at para 70(g).

proceeding whether the Applicant's rights under its first mortgages were in priority to the Repurchase Right.⁶

12. In appointing the Receiver, this Court characterized one of the principal purposes of this proceeding as ensuring that the Town did not exercise its Repurchase Right at a price lower than what could be achieved under a Court-supervised receivership.⁷

The Appointment Order

13. The Appointment Order did not determine the priority issue between the Applicant and the Town, nor was such a determination sought at the hearing of the Applicant's application to appoint the Receiver. The issue was seemingly avoided by including provisions in the Appointment Order in favour of the Town. The Appointment Order provides that the Receiver may:

- (a) market and negotiate the terms and conditions of sale of the Property, *provided that such terms and conditions are satisfactory to the Town*, unless otherwise ordered by the Court; and
- (b) sell, convey, transfer, lease or assign the Property with the approval of the Court, *in consultation with the Town*.⁸

⁶ Fourth Report at paras 11-15.

⁷ [Appointment Reasons](#) at para 70(g).

⁸ Appointment Order at para 3(i) and (j)(ii) – Appendix “A” to the Fourth Report, Receiver's MR, Tab 2A (*emphasis added*).

14. The Appointment Order also provides that, unless otherwise agreed to by the Town and the applicable purchaser or transferee (a “**Prospective Purchaser**”), none of the lands subject to the Development Agreement could be sold, conveyed, transferred, leased or assigned by the Receiver without the Prospective Purchaser agreeing to enter into a development agreement (a “**New Development Agreement**”) with the Town, on mutually agreeable terms, which include a “Right of Repurchase” in favour of the Town. Such right was to be “substantively similar to such right provided for in the Development Agreement”.⁹
15. There was no provision in the Appointment Order that the New Development Agreement would be on the same terms as the Development Agreement, or that the business terms of the New Development Agreement were to be the same or similar.

A Draft New Development Agreement was Necessary

16. Too much uncertainty would have resulted if the Receiver had obtained Court approval to market the Harwood Properties for sale without being able to present to the market a draft New Development Agreement acceptable to the Town. Negotiating such an agreement was, however, challenging given the competing interests of the Town and the Respondents’ other secured creditors.
17. The Town’s interests include ensuring that it enters into a New Development Agreement with a reputable, capable developer, and that such New Development Agreement included to a right similar to its Right of Repurchase. The Respondents’ secured creditors hold a

⁹ Appointment Order at para 3(j)(iii) – Appendix “A” to the Fourth Report, Receiver’s MR, Tab 2A (*emphasis added*).

competing interest in maximizing the value of the Property regardless of the future development of the Property.¹⁰

18. The Receiver made extensive efforts to negotiate a draft New Development Agreement with the Town. Those activities were discussed in the Second Report and were approved by the Court.¹¹

Terms of the draft New Development Agreement

19. The terms of the draft New Development Agreement,¹² particularly the timelines set out in it, reflected certain positions taken by the Town, including its insistence:

- (a) on its “vision” for the Harwood Properties being built (the Town has characterized this as an “overriding concern” that it has consistently advanced);¹³ and
- (b) that the development was “shovel ready” and that plans for the project “have been through the complete development process and are at the point where a building permit can be issued” (the Town took this position with the Applicant, the Receiver, and the Broker).¹⁴

¹⁰ [Appointment Reasons](#) at paras 58-59.

¹¹ Fourth Report at para 27, Receiver’s MR, Tab 2; Second Report – Receiver’s MR, Tab 3; Sale Procedure Order at para 7 – Appendix “B” to the Receiver’s MR, Tab 2B.

¹² Fourth Report at para 39, Receiver’s MR, Tab 2.

¹³ November 13, 2023, letter from John Hart – Appendix “H” to the Fourth Report, Receiver’s MR, Tab 2H.

¹⁴ Fourth Report at paras 24(b), 32(c) and 40(b), Receiver’s MR, Tab 2; October 20, 2022, letter from John Hart – Exhibit “E” to the Fourth Report, Receiver’s MR, Tab 2E.

The Sale Procedure

20. The Receiver undertook the Sale Procedure. As further described in the Fourth Report, the Receiver and the Broker (a) marketed the property; (b) contacted industry contacts; (c) listed the Harwood Properties on MLS; and (d) established the Data Room and provided information regarding the Property and the Sale Procedure to nineteen potential purchasers who agreed to satisfactory confidentiality agreements.¹⁵
21. The Sale Procedure resulted in two bids. Bidder #1 failed to pay a deposit, despite being given ample opportunity to do so, and was disqualified. During the Receiver's discussions with Bidder #2, the Receiver was advised by Bidder #2 that:
- (a) drawings sufficient to apply for a building permit did not exist;
 - (b) approximately 6-7 months, and approximately \$3 million, would be required for such plans to be prepared; and
 - (c) they required a \$3 million abatement to the price set out in their Bid.¹⁶
22. The proposed abatement to the purchase price was not acceptable to the Receiver or the Applicant.¹⁷

Understanding following the Sale Procedure

23. Following the Sale Procedure, the Receiver gathered feedback regarding the draft New Development Agreement. It was not well received by the market. Among other things, it

¹⁵ Fourth Report at paras 29-32, Receiver's MR, Tab 2.

¹⁶ Fourth Report at para 36, Receiver's MR, Tab 2.

¹⁷ Fourth Report at para 37, Receiver's MR, Tab 2.

was seen as “extremely onerous” and “one-sided”, with unrealistic timelines and severe penalties. The market did not feel that there was room to negotiate with the Town and felt that the draft New Development Agreement did not reflect current market conditions.¹⁸

24. The Receiver now understands that the Town’s representations that plans sufficient to make an application for a building permit had been granted were not accurate. The timelines contemplated by the draft New Development Agreement are closer to 50-60 months following closing (as opposed to the approximately 35 months contemplated by the draft New Development Agreement) because of current market conditions and construction timelines in today’s market.¹⁹

PART III - ISSUES

25. The questions to be decided on the Receiver’s motion are whether this Court should:
- (a) direct a case conference following the determination of the Priority Motion in order to provide directions regarding an amended or restated Sale Procedure – it should;
 - (b) approve the Receiver’s activities as described in the Third Report and Fourth Report, and the R&D – it should;
 - (c) approve of the Receiver’s fees and disbursements, and those of its counsel, as set out in the Fee Affidavits – it should; and
 - (d) seal the Confidential Appendices to the Fourth Report – it should.

¹⁸ Fourth Report at para 38, Receiver’s MR, Tab 2.

¹⁹ Fourth Report at paras 44-45, Receiver’s MR, Tab 2.

PART IV - LAW AND ARGUMENT

Directions

26. The Receiver has the authority to seek this Court's direction under [s. 249](#) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, and paragraph 26 of the Appointment Order.
27. The Sale Procedure did not result in a Successful Bid. As set out above, it appears that the terms of the development agreement insisted upon by the Town had a chilling effect on the Sale Procedure. Further, the representations of the Town, which underlie the timelines set out in the draft New Development Agreement, are not true – there are no plans sufficient to support an application for a building permit. It is not clear how the market would react to a draft development agreement that set out different timelines.
28. The Applicant has brought a motion for a determination of whether its rights as mortgagee have priority over the Town's Repurchase Right, and if so, for an order varying the Appointment Order to delete the rights included therein in favour of the Town. Given that the determination of that motion may affect Receiver's proposed amended or restated Sale Procedure, the Receiver asks that this Court direct the parties attend at a case conference following the determination of the Applicant's motion and adjourn the Receiver's request for directions to be scheduled at that case conference.

The Receiver's Activities Should be Approved

29. The Receiver seeks approval of its activities as set out in the Third Report and Fourth Report. There are good policy and practical reasons to do so. In *Target Canada*,²⁰ Morawetz RSJ (as he then was) accepted that the approval of a monitor's activities,
- (a) allows all stakeholders to move forward confidently with next steps in the proceeding;
 - (b) brings their activities before the court, "allowing an opportunity for the concerns of the court or stakeholders to be addressed, and any problems to be rectified in a timely way;"
 - (c) provides certainty and finality, as all parties have an opportunity to raise specific objections and concerns;
 - (d) enables the court to satisfy itself that the monitor's activities have been conducted prudently and diligently;
 - (e) provides for protection for the monitor not otherwise offered by statute; and
 - (f) protects creditors from delay in distribution that would be caused by the re-litigation of steps taken to date and/or potential indemnity claims by the monitor.
30. The same principles apply in a receivership.²¹

²⁰ *Re Target Canada Co*, 2015 ONSC 7574 at [paras 12](#) and [22-23](#) [*Target Canada*]. See also *Laurentian University of Sudbury*, 2022 ONSC 2927 at [paras 13-14](#) [*Laurentian*].

²¹ *Hanfeng Evergreen Inc (Re)*, 2017 ONSC 7161 at [para 15](#).

31. The activities of the Receiver described in the Third Report and Fourth Report were undertaken in good faith and in furtherance of the Receiver's mandate. For example, those activities include: (a) seeking further funding on an urgent basis to fund this proceeding; (b) carrying out its obligations under the Sale Procedure Order; (c) negotiating with bidders in the Sale Procedure; and (d) bringing this motion.
32. The Receiver's activities described in the Third Report and the Fourth Report ought to be approved.

Fees Should be Approved

33. The Receiver seeks approval of the fees and disbursements set out in the Fee Affidavits. The Receiver's fees are \$387,438.70 and TGF's fees are \$424,740.00. These fees were incurred between October 2020 and December 2023.
34. In *Laurentian*, Morawetz CJ accepted that on a motion for fee approval the "overriding principle" is reasonableness. The Court should not engage in a docket-by-docket or line-by-line assessment of the accounts as minute details of each element of the professional services rendered may not be instructive when viewed in isolation. The focus should be on what was accomplished, and not how much time it took.²²
35. The following factors provide guidance regarding evaluating the quantum of fees:²³
 - (a) the receiver's knowledge, experience and skill;

²² *Laurentian* at [para 9](#) citing *Re Nortel Networks Corporation et al*, [2017 ONSC 673](#) [*Nortel*] and *Bank of Nova Scotia v Diemer*, 2014 ONCA 851 at [para 45](#).

²³ *Confectionately Yours Inc (Re)*, 2002 CanLII 45059 at [paras 42-54](#); *Laurentian* at [para 10](#); *Nortel* at [para 14](#).

- (b) the diligence and thoroughness displayed;
- (c) the responsibilities assumed;
- (d) the results of the receiver's efforts; and
- (e) the cost of comparable services when performed in a prudent and economical manner.

36. This is an unusual matter. Given the competing interests of the Town and the Respondents' other secured creditors, it took longer than it might otherwise have to negotiate an appropriate draft New Development Agreement and implement the Sale Procedure. The challenges and delays associated with the former are detailed in the Second Report.
37. The fees were necessarily incurred in connection with the Receiver's duties under the Appointment Order and Sale Procedure Order. The fees incurred are also reasonable given the uniqueness of this proceeding, the significant efforts undertaken in order to negotiate a draft New Development Agreement, and the other matters attended to by the Receiver and its counsel.
38. The Receiver's and TGF's fees should be approved.

This Court Ought to Seal the Confidential Appendices

39. The Confidential Appendices to the Fourth Report contain commercially sensitive information.
40. Confidential Appendix "1" includes a summary of the salient points of the bids made in the Sale Procedure. Confidential Appendix "2" includes the identity of one of the bidders. Disclosing this information may affect a further sale procedure in respect of the Property.

41. The Court has the jurisdiction to seal those appendices,²⁴ and may do so when the *Sherman Estate* test is met:²⁵
- (a) there is a serious risk to an important public interest;
 - (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
 - (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.
42. The commercial interest in maintaining the integrity of the Sale Procedure and maximizing the value of the Property and net recovery to creditors in this proceeding is an important public interest that would be jeopardized if the Confidential Appendices are not sealed. There is no reasonably alternative means to prevent that jeopardy. The benefits of sealing these appendices far outweigh the infringement on the open court principle in this case. It is common to seal such commercially sensitive documents in insolvency proceedings.²⁶
43. Because an amended or restated sale procedure is anticipated, and disclosure of the Confidential Appendices could impact the results of such sale procedure, this Court should deviate from its standard practice of setting a specific date by which the Confidential Appendices are unsealed. Rather, these appendices should be sealed pending further order of this Court.

²⁴ *Courts of Justice Act*, RSO 1990, c C43, [s.137\(2\)](#).

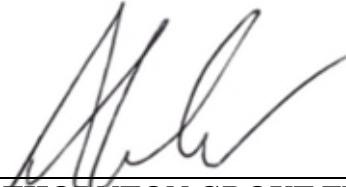
²⁵ *Sherman Estate v Donovan*, 2021 SCC 25 at [paras 38](#) and [41](#) [*Sherman Estate*]. See also *Sierra Club of Canada v Canada (Minister of Finance)*, [2002] 2 SCR 522 at [para 53](#).

²⁶ See, for example: *Elleway Acquisitions Ltd v 4358376 Canada Inc*, 2013 ONSC 7009 at [paras 47 and 48](#); and *GE Canada Real Estate Financing Business Property Company v 1262354 Ontario Inc*, 2014 ONSC 1173 at [para 32](#).

PART V - RELIEF REQUESTED AND ORDER SOUGHT

44. The Receiver respectfully requests, and recommends, that this Court make an order substantially in the form of the draft order enclosed in the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of February, 2024.



THORNTON GROUT FINNIGAN LLP
TD West Tower, Toronto-Dominion Centre
100 Wellington Street West, Suite 3200
Toronto, Ontario M5K 1K7

Rebecca L. Kennedy (LSO# 61146S)
Tel: (416) 304-0603
Email: rkennedy@tgf.ca

Alexander Soutter (LSO#72403T)
Tel: (416) 304-0595
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**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Target Canada Co. (Re)*, [2015 ONSC 7574](#)
2. *Laurentian University of Sudbury*, [2022 ONSC 2927](#)
3. *Hanfeng Evergreen Inc (Re)*, [2017 ONSC 7161](#)
4. *Re Nortel Networks Corporation et al*, [2017 ONSC 673](#)
5. *Bank of Nova Scotia v Diemer*, [2014 ONCA 851](#)
6. *Confectionately Yours Inc (Re)*, [2002 CanLII 45059](#)
7. *Sherman Estate v Donovan*, [2021 SCC 25](#)
8. *Sierra Club of Canada v Canada (Minister of Finance)*, [\[2002\] 2 SCR 522](#)
9. *Elleway Acquisitions Ltd v 4358376 Canada Inc*, [2013 ONSC 7009](#)
10. *GE Canada Real Estate Financing Business Property Company v 1262354 Ontario Inc*, [2014 ONSC 1173](#)

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THORNTON GROUT FINNIGAN LLP
TD West Tower, Toronto-Dominion Centre
100 Wellington Street West, Suite 3200
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Rebecca L. Kennedy (LSO# 61146S)
Tel: (416) 304-0603
Email: rkennedy@tgf.ca

Alexander Soutter (LSO#72403T)
Tel: (416) 304-0595
Email: asoutter@tgf.ca

Lawyers for the Court-appointed Receiver, RSM Canada Limited