

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

B E T W E E N:

CITY OF TORONTO

Applicant

- and -

HARRY SHERMAN CROWE HOUSING CO-OPERATIVE INC. Respondent

REPLY FACTUM

PART I - REPLY ARGUMENT

Introduction and Procedural History

1. This Reply Factum is submitted on behalf of the duly elected Board of Directors (the "Board") of the Harry Sherman Crowe Housing Co-operative Inc. ("HSC" or the "Co-op") in response to the Factum filed by the City of Toronto (the "City") and the court-appointed Receiver, TDB Restructuring Limited (the "Receiver"), which oppose the Board's motion for reimbursement of legal fees incurred in the discharge of its statutory governance duties.
2. At all material times, Betty's Law Office, through Mr. Courtney Betty, has represented the Board in these proceedings. No objection was raised by any party, including the City or the Receiver, regarding this representation. On the contrary, Betty's Law Office facilitated discussions leading to multiple consent-based orders, including the Appointment Order of March 14, 2023, and the fee approval orders of 2024. (Affidavit of Rosell Kerr, para. 4).
3. The Court's prior orders expressly contemplated that the Board may bring motions or applications before the Court in connection with the receivership. Such procedural engagement necessarily requires legal representation. Accordingly, the Board's retention of counsel is not only consistent with the Court's expectations but essential to ensure that

the Board may participate meaningfully in supervised proceedings affecting the governance and future of the Co-op.

Response to the Receiver submissions of the *Peterborough* Framework

First issue: (i) whether the board of a corporation in receivership is entitled to retain counsel on behalf of the corporation without the prior approval of the Court or the receiver.

4. In response to paragraph 22 of the Receiver's factum, it is respectfully submitted that the Court of Appeal Decision in *Peterborough (City) v. Kawartha Native Housing Society Incorporated*, 2010 ONCA 705 supports the position that the Harry Sherman Co-op is entitled to retain legal counsel where it is not frivolous or vexatious for the Board to defend the action before the Court; The Court of Appeal in Peterborough granted "the approval of legal fees where it is not frivolous or vexatious to defend and participate in the action before the court, especially when counsel's actions are helpful to the court."¹ It is respectfully submitted that counsel's actions to date have tremendous assistance to the Court.
5. It is further respectfully submitted that Counsel appeared at multiple hearings, including the appointment motion and subsequent motions concerning the Receiver's administration and Court approvals. As in Peterborough, the legal services were not disruptive but contributed meaningfully to resolutions and facilitated consented outcomes

Second issue: (ii) whether counsel so retained, is entitled to payment for services out of the assets of the corporation.

6. In reply to paragraph 28 of its factum, the receiver relies on the endorsement of Justice Penny dated March 14, 2023, to argue that the Board was unsuccessful on the remaining issues and that Betty's Law Office has already received a sum "substantially equal to an award of partial indemnity costs." It is respectfully submitted that the receiver's arguments failed to recognize that it was not an issue of success or unsuccessful as the consent order was framed by both parties. The decision of the Court of Appeal in *Peterborough (City) v. Kawartha Native Housing*, 2010 ONCA 705, that cost reimbursement is not solely based on outcome. The Court of Appeal held in Peterborough that "Boards participating in receivership litigation are entitled to costs where their involvement is legitimate and contributes meaningfully to the proceedings even where they are not successful on all issues."² The Peterborough decision supports the position that cost should be granted where the Board's participation was fair and reasonable, even without complete success merits recognition.
7. Furthermore, in response to paragraph 29 of the Receiver's factum, the outstanding payments to Betty's Law Office does not constitute a preference under the Bankruptcy Insolvency Act. As set by the Court of Appeal in *Golden Oaks Enterprises Inc. v. Scott*, 2022 ONCA 509 held "that a preference under section 95 of the *Bankruptcy and Insolvency*

¹ Peterborough (City) v. Kawartha Native Housing Society Incorporated, 2010 ONCA 705 at para 33

² Peterborough (City) v. Kawartha Native Housing, supra, at para 42

Act requires an intent to prefer one creditor over another”.³ Further the receiver has not provided any information of any other creditor who would be impacted by payment of the outstanding fees.

Applying the Peterborough Factors

Whether the Position Advanced by the Board Had Merit

8. In response to paragraph 32 of the Receiver’s factum that the Board’s positions “have little merit,” there is no factual or legal basis for such an argument based on the fact that the approach of consenting to the orders of Justice Penny has not only saved the Court a great deal of judicial time but also created a framework for the parties to work together. This indicated by the fact to date the Board has consented to the previous Orders made.
9. There is no legal or factual basis in the record that all parties including this Honorable Court did not benefit from the Board’s position and participation to date. The approach taken by the Board of institutional participation and creating a benefit to all parties is in line with the decision in Peterborough

Whether the Board Acted in the Interest of the Co-op

10. In response to paragraph 35–38, of the Receiver’s factum these issues require a full hearing since the credibility of not only the Board but Ms. Kerr as an individual is challenged. The legal steps taken were not personal or obstructive, but consistent with the Board’s institutional role under the *Housing Services Act*.
11. Moreover, it is respectfully submitted that the City and Receiver previously relied on the Board’s participation to secure consent-based orders, including the Appointment Order and approvals of fees.

Positions Were Properly Advanced by the Board Rather than the Receiver

12. It is respectfully submitted that the order of Justice Penny contemplated that the Board may bring motions or other proceedings where any issue arises.

Whether the Board’s Positions Detracted from the Orderly Administration of the Receivership

13. In response to paragraphs 42 to 45 of the Receiver’s factum, the record before the Court clearly establishes that the Board’s involvement did not disrupt the receivership process but facilitated the process for all parties. Furthermore, it is respectfully submitted that meaningful participation would be “hollow in the extreme” without access to counsel, as emphasized by Blair J.A. in *Peterborough* (para. 39). The Board’s engagement addressed critical matters of

³ *Golden Oaks Enterprises Inc. v. Scott*, 2022 ONCA 509 at paras 23-25

governance and member representation—core issues that support, rather than detract from, the orderly conduct of the receivership.

PART IV – RELIEF SOUGHT

It is respectfully requested that this Honourable Court issues an order:

- a. Authorizing the Receiver to pay \$30,809.08 in legal fees incurred by the Board of Directors to Betty's Law Office from the Co-op's market funds.
- b. Authorizing the Receiver to approve and pay future legal fees incurred by the Board on a reasonable basis without further motion, subject to objection rights.
- c. In the alternative, authorizing the Board to access Co-op market funds for the purpose of paying its legal fees and ensuring its continued representation.
- d. Granting such further and other relief as this Court may deem just.

Date: May 29, 2025

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CITY OF TORONTO **and**

HARRY SHERMAN CROWE HOUSING CO-OPERATIVE INC.

(Applicant)

(Respondent)

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