

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

**B E T W E E N:**

**CITY OF TORONTO**

Applicant

- and -

**HARRY SHERMAN CROWE HOUSING CO-OPERATIVE INC.**

Respondent

**FACTUM OF THE RESPONDING PARTY, THE RECEIVER,  
TDB RESTRUCTURING LIMITED**

May 28, 2025

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**SERVICE LIST**  
**(as at May 28, 2025)**

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## PART 1 - OVERVIEW

1. Ostensibly, the Respondent, Harry Sherman Crowe Housing Co-Operative Inc. (“**HSC**” or the “**Co-op**”) brings this motion in connection with legal fees payable to Betty’s Law Office (“**Betty’s Law**”), which can be divided into two parts (i) fees for representation incurred prior to the appointment of the Receiver, and (ii) for ongoing legal fees incurred, or to be incurred, for continued representation by Betty’s Law following the appointment of the Receiver.

2. However, as appears from the Notice of Motion and on a careful review of the affidavit<sup>1</sup> sworn in support of the motion, it is the board of directors (the “**Board**”) that brings this motion. More importantly, it is not clear that the Board’s request is in the best interests of the Co-op or its members.

3. As a result, this Court should deny relief to both requests.

## PART 2 - FACTS

4. On March 14, 2023, by Order of the Honourable Justice Penny (the “**Appointment Order**”), TDB Restructuring Limited<sup>2</sup> was appointed as receiver and manager (in such capacity, the “**Receiver**”) of all of the assets, undertakings and properties of HSC, acquired for, or used in relation to, a business carried on by HSC, including all proceeds thereof (the “**Property**”).<sup>3</sup>

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<sup>1</sup> The Affidavit of Rosell Kerr sworn on May 12, 2025 (the “**Kerr Affidavit**”). Pursuant to a Court-ordered timetable, cross-examinations were to take place on May 22 or 23, 2025. However, Mr. Courtney Betty, counsel to the moving party, advised that he was not available on those dates. Counsel agreed to schedule the cross-examination on May 26, 2025 at 3:00PM. A Notice of Examination was served on May 23, 2025. On May 26, 2025 at 1:05PM, Mr. Betty advised that Ms. Kerr was feeling ill and at her doctor’s office. At 2:11PM, without any update as to whether Ms. Kerr could proceed, Mr. Philip Cho, counsel to the Receiver advised Mr. Betty that the examination should be cancelled. At 2:29PM, Mr. Betty also requested that the cross-examination be cancelled. Given the Court-ordered timetable and return date of the Motion, the Receiver was unable to conduct a cross-examination on the Kerr Affidavit.

<sup>2</sup> On March 14, 2023, RSM Canada Limited was appointed receiver-manager. On March 1, 2024, the Court granted an order substituting the name TDB Restructuring Limited in place of the name RSM Canada Limited.

<sup>3</sup> Responding Motion Record of the Receiver, 16 May 2025 (“**Receiver’s RMR**”), Second Supplement to the Receiver’s Second Report to the Court (“**Second Supplement Report**”), Tab 1, at para 1.

5. Pursuant to the Appointment Order, the Receiver is empowered and authorized to act in respect of the Property, provided that the Receiver complies with the *Housing Services Act, 2011* (the “**HSA**”) and its regulation, and where it takes such actions, it does so to the exclusion of all other persons, including the Board, and without interference from the Board.<sup>4</sup>

6. HSC is a housing provider operating a housing project within the meaning of the HSA and in respect of in respect of this operation, is funded and administered in accordance with the HSA and the regulations thereunder.<sup>5</sup>

(i) **HSC’s Board’s Role and Conduct Prior to Receivership**

7. Prior to the appointment of the Receiver, the Board managed the affairs of HSC in its operation of the housing project, which included collecting rents (of both Rent-Geared-to-Income (“**RGI**”) and market-rent units), seeing to ongoing maintenance concerns and ensuring the completion of repairs, handling banking on behalf of HSC and paying invoices, dealing with terminations and evictions, and ensuring the completion of financial statements and tax returns.<sup>6</sup>

8. The City of Toronto (the “**City**”) brought an application before this Court for the appointment of the Receiver in accordance with the City’s powers under the *HSA* (the “**Application**”). The triggering events that led to the City’s application to appoint the Receiver were:

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<sup>4</sup> Receiver’s Motion Record dated May 1, 2025 (“**Receiver’s MR**”), Receiver’s Second Report to the Court dated April 30, 2025 (“**Second Report**”), Appendix A, Tab 2-A, Order of Justice Penny dated March 14, 2023, at para 2.

<sup>5</sup> RMR, Tab 2, Excerpts from the Affidavit of Julie Western-Set sworn on November 10, 2022 (“**Western-Set Excerpts I**”), at paras 3, 10 and 23.

<sup>6</sup> Receiver’s RMR, Second Report, Western-Set Excerpts I, RMR, Tab 2, at paras 14-22.

- (1) HSC failed to operate the housing project and govern itself in accordance with the prescribed provincial requirements and local standards made by the City, including with respect to internal transfers, records management, and the implementation of policies and procedures regarding administration of RGI households and unit vacancies;
- (2) HSC failed to ensure that the housing project was well-managed, including failing to establish appropriate governance procedures; and,
- (3) HSC failed to operate the housing project properly, evidenced by significant deficit, poor financial position and failure to establish adequate internal financial controls.<sup>7</sup>

9. At the time of the Receiver's appointment, HSC was insolvent with approximately \$1.1 million owed to its unsecured creditors, not including amounts now claimed by Betty's Law.<sup>8</sup>

10. The Receiver has reported in its Second Report that evidence reviewed by the Receiver and its property manager indicates that the Board's pre-Receivership conduct included:

- (1) assigning units to new members of the Co-op through the use of internal transfers (despite the fact that they were new members and not, in fact, members transferring from one unit to another), thereby circumventing the City's waiting list and RGI priority for residency;<sup>9</sup>

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<sup>7</sup> Receiver's MR, Second Report, Section 8.2, at paras 74-75.

<sup>8</sup> Receiver's RMR, Second Supplement Report, Tab 1, at para 11.

<sup>9</sup> Receiver's MR, Second Report, section 8.2, at paras 24-25, and Appendix "K": Examples of Inappropriate Allocation of Units and Related Record Keeping Issues.

- (2) Ms. Kerr giving, or wanting to give, units to friends and relatives, despite HSC's RGI requirements;<sup>10</sup>
- (3) renovating certain units of the Co-op, favouring units of members of the Board over units of non-Board members, and doing so:
  - (a) despite holding back payments to certain contractors and holding back utility payments;<sup>11</sup> and,
  - (b) despite making ongoing payments to Sinai Plumbing, who's sole director and officer is a resident of the Co-op;<sup>12</sup>
- (4) pressuring a resident to petition against the RGI requirements;<sup>13</sup>
- (5) donating HSC funds to Ms. Kerr in relation to the passing of her brother;<sup>14</sup> and,
- (6) failing to address ongoing residents' maintenance concerns.<sup>15</sup>

11. According to Ms. Kerr, the Board authorized HSC's retainer of Betty's Law in 2022, in advance of the appointment of the Receiver.<sup>16</sup> Prior to the Appointment Order on March 14, 2023, HSC continued to have control over its Property. The invoices enclosed with Ms. Kerr's affidavit confirm that the Board caused HSC to transfer funds into Betty's Law's trust account to cover payments of legal fees.<sup>17</sup>

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<sup>10</sup> Receiver's MR, Second Report, section 8.2, at paras 26-29.

<sup>11</sup> Receiver's MR, Second Report, section 8.2, at paras 30-39.

<sup>12</sup> Receiver's MR, Second Report, section 8.2, at para 31(d), 38.

<sup>13</sup> Receiver's MR, Second Report, section 8.2, at para 40(c).

<sup>14</sup> Receiver's MR, Second Report, section 8.2, at para 40(b).

<sup>15</sup> Receiver's MR, Second Report, section 8.2, at para 41.

<sup>16</sup> Kerr Affidavit, at para 6.

<sup>17</sup> Kerr Affidavit, Exhibit "A", Betty's Law Invoices 1123 and 1124 ("**Invoices**").

(ii) **HSC's Board's Role and Conduct Following Receivership**

12. Justice Penny, in his April 29, 2024 endorsement, confirmed that the Receiver had spent the previous year “dealing with the most urgent and pressing problems; this was necessarily so given the extent and seriousness of the physical, financial, governance and other problems being faced by the Co-op”.<sup>18</sup> His Honour recommended that the Receiver and the City work with the Co-op towards a plan for when and how the transition back to Board control might be achieved.<sup>19</sup> The Board has not had meetings nor conducted any material business following the Receiver's appointment. It has not responded to the Receiver's requests to engage on the issues recommended by Justice Penny.<sup>20</sup>

13. The Board has provided no evidence of any attempts to engage with the Receiver or the City to address the issues leading to the triggering events. The Board has provided no evidence of any efforts to engage with the members or residents of the Co-op. The Board has provided no evidence that it is acting in the best interests of the Co-op or its members.

(iii) **Betty's Law Invoices – Exhibit to the Affidavit of Rosell Kerr**

14. The Board seeks an order authorizing the City and the Receiver to pay \$30,809.08 in legal fees<sup>21</sup> for “services rendered to the Board from 2023 through early 2025.”<sup>22</sup> Of this amount, it appears that Invoices #1123, #1124 and #1251, totalling \$34,556.16, less a \$10,000 payment, for a balance of \$24,556.16, relate to fees and disbursements prior to the Appointment

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<sup>18</sup> Receiver's MR, Second Report, Appendix E: Endorsement of Justice Penny dated April 29, 2024, (“**Justice Penny's Endorsement**”), at para 9.

<sup>19</sup> Receiver's MR, Second Report, Appendix E: Justice Penny's Endorsement, at para 9.

<sup>20</sup> Receiver's MR, Second Report, section 8.2, at paras 48-55; Appendix “O” to Second Report: WeirFoulds Letter to Betty's Law, dated September 11, 2024, Appendix “P” to Second Report: Email Chain between WeirFoulds and Betty's Law from February 12, 2025 to March 6, 2025; and Appendix “Q” to Second Report: Email Chain between WeirFoulds to Betty's Law from March 6, 2025 to March 12, 2025.

<sup>21</sup> Inclusive of disbursements and HST.

<sup>22</sup> Kerr Affidavit, para 9.

Order.<sup>23</sup> Invoice #1247 relates to services provided by Betty's Law following the Appointment Order, specifically in connection with the Receiver's Motion for approval of its First Report, its activities, and its fees (the "**First Report Approval Motion**").<sup>24</sup>

15. While Betty's Law's invoices may shed some light upon the work of the Board before and after the Receiver was appointed, the four invoices provided also raise a number of concerns:

- (1) Invoice #1123, dated March 1, 2023, includes a reference to a retainer balance "as of 03/14/2023" of \$10,000.00, a date that is 2 weeks after the date of the invoice;
- (2) Invoice #1124, dated March 14, 2023, references a deposit paid by HSC on March 6, 2023 of \$13,355.66, which is then paid out of trust to Betty's Law on March 8, 2023, however, this payment is not accounted for in any of the running balance totals in the invoices;
- (3) Invoice #1124 shows another deposit into trust of \$10,000.00 on March 14, 2023, which appears to be the same \$10,000 deposit that inexplicably also appeared on the March 1 invoice (Invoice #1123);
- (4) Invoice #1147, dated May 1, 2024, is for \$6,252.92, and shows a previous invoice balance of \$18,424.21, but shows a total balance due of \$30,809.08, an amount that is \$6,131.95 higher than the total should be;

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<sup>23</sup> Kerr Affidavit, Exhibit "A": Invoices.

<sup>24</sup> Kerr Affidavit, Exhibit "A": Invoices.

(5) Invoice #1251, dated May 3, 2024, is for \$6,131.95, the same amount of the discrepancy noted in Invoice #1147;

(6) Invoice #1251 includes a disbursement for transcripts incurred on February 22, 2023, prior to the Appointment Order; and,

(7) Invoice #1251 includes a disbursement for April 27, 2023, prior to the Appointment Order, for consultation services from Dickerson [sic] Wright LLP, however the invoice related to this disbursement was not included, making it impossible to know what work was performed by the other law firm.<sup>25</sup>

16. In addition, the time entries in the invoices include dockets respecting matters that are not relevant to the appointment of the Receiver or the receivership. This includes a civil dispute with Maple Property, as well as ordinary business of the Co-op (such as with respect to the mortgage, audits, and financial statements).

(iv) **Current Stage of Receivership Proceeding**

17. The balance of HSC's operating account, as of April 20, 2025, was approximately \$74,000.<sup>26</sup> The Receiver continues to work with the City, HSC's property manager CFDI, and various other stakeholders, to ensure that HSC is operating in a manner consistent with the *HSA* and to complete capital repair projects, and has recommended the continuing appointment of the Receiver until such time as HSC is being operated in full compliance with the *HSA*, the capital

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<sup>25</sup> Kerr Affidavit, Exhibit "A": Invoices.

<sup>26</sup> Receiver's MR, Second Report, section 8.2, at para 79.

repairs projects have been completed, and HSC is capable of managing the housing project with the support of the City and other stakeholders.<sup>27</sup>

18. Though concerns respecting the former Board exist (as described in paragraph 10 above), the relief sought by the Receiver on its pending motion (the “**Second Report Approval Motion**”) is the Court’s approval of the Receiver’s Second Report to the Court, including the Request for Expressions of Interest and Qualifications (“**RFEIQ**”) process. The RFEIQ process, and the Receiver’s reasons for proposing the RFEIQ process, are outlined in section 8 of the Receiver’s Second Report to the Court, dated April 30, 2025.<sup>28</sup>

19. At a high level, the Receiver’s proposed RFEIQ process is structured in three phases: (i) an information phase designed to provide necessary information to the Co-op’s residents and members; (ii) a solicitation phase, where the Receiver solicits and receives expressions of interest and qualifications from members; and (iii) an evaluation phase, through which the Receiver will evaluate and assess the viability of continuation as a co-operative housing project. Following the RFEIQ process, the Receiver will report back to the Court and, if appropriate, provide recommendations as to whether an election should be implemented, or if another process may be more appropriate.<sup>29</sup>

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<sup>27</sup> Receiver’s MR, Second Report, section 8.2, at para 85-86.

<sup>28</sup> Receiver’s MR, Second Report, section 8.2, at para 87.

<sup>29</sup> Receiver’s MR, Second Report, section 8.2, at paras 77-78.

### PART 3 - ISSUES AND LAW

(i) *Approach to Legal Costs incurred by the Board*

20. 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 a similar set of circumstances. In the case of *Peterborough (City) v. Kawartha Native Housing Society Incorporated*,<sup>30</sup> the board of a non-profit housing corporation sought similar relief in respect of a receivership commenced by the City of Peterborough.

21. In the appeal, the Court of Appeal considered the issue of (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; and (ii) whether counsel so retained, is entitled to payment for services out of the assets of the corporation.

22. On the issue of the right of a board to retain counsel, the Court of Appeal acknowledged the general principle that when a corporation is placed into receivership, the directors retain residual powers, and those their powers exercised by the receiver are displaced. While the board may have some residual power to retain counsel, that right to retain counsel is not unfettered:

[31] Whatever their residual authority may be, the boards continue to have an obligation to act in the best interest of the corporations. If, in their opinion, the appointment of a receiver is not in the best interest of the corporations or if they believe that the steps being taken by the receiver on behalf of the corporations are not in the corporations' best interest, then they are entitled to retain counsel to bring the matter to the attention of the court. ***It will be for the court to decide if the boards have acted responsibly and reasonably in doing so.*** Clearly, if the boards were to advance defences in the action then they have a right to retain counsel in order to do so. ***To the extent that the boards need to be paid out of the funds of the corporations, then they may decide to bring an application for an advance costs award.*** However, approval of the court is not a prerequisite to retain counsel.

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<sup>30</sup> *Peterborough (City) v. Kawartha Native Housing Society Incorporated*, [2010 ONCA 705](#).

[32] *That said, the right to retain counsel by the board of a corporation in receivership is not unfettered. If, for example, a lawyer is retained for a purpose that has the effect of interfering with the receiver's legitimate duties as an officer of the court or his or her duties as the manager of the ongoing operation of the corporate enterprise, then I would agree with the motion judge that such a retainer is not appropriate.* One can think of other examples where the retainer would not be appropriate. [Emphasis added]<sup>31</sup>

23. With respect to the issue of counsel to the board being entitled to be paid out of the assets of the corporation, the Court of Appeal stated that this issue is a matter of discretion of the Court in making a costs award:

[35] *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.* 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 [Emphasis added].<sup>32</sup>

24. Further, legal work in respect of strategic planning or general corporate advice during a receivership should be done in conjunction with the receiver and with the approval of the court as long as the receivership is in place – whether the work is prior to the receivership or in the future.

If the boards have a specific strategic plan or project in mind for which they need corporate legal advice, then they should seek the co-operation of the receiver and/or take it to the court for its approval. On such an application to the court, counsel would have to persuade the court that the expenditure of legal fees for strategic planning or corporate restructuring by the boards was in the best interest of the corporations.<sup>33</sup>

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<sup>31</sup> *Peterborough (City) v. Kawartha Native Housing*, *supra*, at [paras 31 and 32](#).

<sup>32</sup> *Peterborough (City) v. Kawartha Native Housing*, *supra*, at [para 35](#).

<sup>33</sup> *Peterborough (City) v. Kawartha Native Housing*, *supra*, at [para 41](#).

25. In applying the framework set out by the Court of Appeal, the Receiver submits that the relief requested by the Board should be denied.

***(ii) Relief is not necessary on Pre-Receivership Legal Fees***

26. The Receiver does not oppose the engagement of legal counsel by the Board in response to the Application. However, the Receiver notes that a significant portion of the pre-Receivership legal costs appear to have already been paid out of the Co-op's funds.

27. The Board made payments into Betty's Law's trust account up until the date of the Receiver's appointment on March 14, 2023, with a retainer deposit of \$10,000.00 being made on that day. As noted, there appear to be issues with the accuracy and reliability of the invoices which have not been explained. In particular, a review of the invoices and trust transactions indicate that Betty's Law has received 67.6% of the pre-Receivership invoices, summarized as follows:

Date	Description	Amount Charged	Amount Received
March 1, 2023	Invoice #1123	\$14,125.00	
March 8, 2023	Transaction listed in Invoice #1124		\$13,355.66
March 14, 2023	Invoice #1124	\$14,299.21	
April 16, 2023	Transaction listed in Invoice #1247		\$10,000.00
May 3, 2024	Invoice #1251 (disbursements incurred pre-Receivership)	\$6,131.95	
	<b>TOTALS</b>	<b>\$34,556.16</b>	<b>\$23,355.66</b>
	Unpaid Portion	\$11,200.50	

28. The endorsement of Justice Penny when granting the Appointment Order indicates that the Board was unsuccessful on the remaining issues that were argued.<sup>34</sup> In accordance with the framework set out in *Peterborough (City) v. Kawartha Native Housing*, Betty's Law has

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<sup>34</sup> *City of Toronto v Harry Sherman Crowe Co-operative Inc.*, [Endorsement of Justice Penny dated March 14, 2023](#).

already received an amount that is substantially equal to an award of partial indemnity costs. Therefore, there is no basis on which the Board should be entitled to any further award of costs.

29. While not a reason to fetter to the Court's discretion in awarding costs, the Receiver was correct in approaching the request for direct payment by the Board as an unsecured claim that is stayed by the Appointment Order. Because these fees were incurred prior to the Receivership, at a time when the Co-op was insolvent, payment of them would *prima facie* constitute a preference. It does not matter, as the Board argues in its factum, that the Board was carrying out its statutory mandate (which is at issue), or if they are seeking to have their legal fees paid from "market funds" as opposed to subsidies.

30. Therefore, the Receiver submits that on the basis that Betty's Law has already received amounts from the Co-op's assets in respect of the pre-Receivership legal costs that are substantially consistent with an award of partial indemnity, relief is not appropriate in the circumstances.

***(iii) Nature of Legal Services does not Warrant a Costs Award***

31. Applying the factors set out by the Court of Appeal in *Peterborough (City) v. Kawartha Native Housing*, costs are not appropriate in the circumstances of this case.

32. First, the positions advanced by counsel to the Board have little merit. As noted above, on the Appointment Order, the Board's positions were rejected in favour of the City or the Receiver. At the First Report Approval Motion, similarly the Court granted the relief sought by the Receiver and noted that the Receiver comprehensively addressed the Board's concerns, "many

of which appear to have resulted from a misunderstanding of what is actually happening, what the true financial circumstances of the Co-op are and what should be done in the future.”<sup>35</sup>

33. On the Second Report Approval Motion, the Board sought an adjournment to seek approval of the legal fees, both past and on a go-forward basis. However, the Board has not articulated what, if any, position the Board might advance regarding the RFEIQ process.

34. The first factor of the test weighs against reimbursing the Board for legal expenses.

35. Secondly, it is far from obvious that the Board is acting in the interests of the Co-op in these proceedings. Ms. Kerr acknowledges the concerns as to the conduct of the Board in her affidavit when she admits that the Receivership was “sought by the City of Toronto in its role as Service Manager... due to its concerns about governance, financial control, and property management.”<sup>36</sup> In its Second Report, the Receiver has specifically called into question, the conduct of Ms. Kerr and the entire Board. Ms. Kerr has put herself forward as a representative of the Board throughout these proceedings and appears to have instructed Betty’s Law with respect to opposing the Receiver’s functions, described above. At a minimum, Ms. Kerr is in a conflict of interest in acting on behalf of the Co-op in these circumstances. No evidence has been provided demonstrating that Ms. Kerr disclosed these issues to the Board or the Co-op’s members.<sup>37</sup>

36. With respect to the Second Report Approval Motion, there is no relief sought against the Co-op or the Board. The 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

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<sup>35</sup> Receiver’s MR, Second Report, Appendix E: Justice Penny’s Endorsement, at para 5.

<sup>36</sup> Kerr Affidavit, at para 5.

<sup>37</sup> *Canadian Aero Service Ltd v O’Malley*, [1973 CanLII 23 \(SCC\)](#), [\[1973\] SCJ No 97](#) at p 11; *UPM-Kymmene Corp. v UPM-Kymmene Miramichi Inc.*, [2002 CanLII 49507 \(ONSC\)](#), at [paras 119-126](#), aff’d [2004 CanLII 9479 \(ONCA\)](#).

assist the Receiver in making recommendations and “strategic planning”. Given the concerns raised by the City and the Receiver regarding the conduct of this particular Board, the interest of the Co-op will not be served in funding counsel to the Board.

37. The Board does not hold power to act on behalf of the Co-op in these proceedings. First, the Board cannot hold itself out as a parallel decision-making group for the affairs of HSC when, at law, it has no authority to do so. As held by this Court, the actions of a nominal board, which has had its powers stripped and granted to a Receiver, can “do more harm than good” particularly where “deep divides exist within a community”.<sup>38</sup> Not only are the interests of the Co-op’s residents at stake, but also the interest of York University (as landlord), the City, and other creditors.

38. Further, no evidence has been put forward to demonstrate that the Co-op supports the conduct of Ms. Kerr or the former Board, either prior to, or during, these proceedings. The Receiver seeks to engage with the Co-op membership through the RFEIQ process, which will enable the Receiver to analyze and, ultimately, make recommendations upon, the Co-op’s self-governance model. In doing so, the Receiver will hear from Co-op members themselves, rather than through the proxy of Ms. Kerr or the former Board, about their wishes. The Co-op’s members should be given an opportunity to know how the Co-op was managed by the former Board (during the first phase of RFEIQ process, the informational phase), and make informed decisions with respect to their wishes, including whether deciding whether any Co-op members are interested in acting as members of the Board (i.e., the solicitation phase of the RFEIQ process).

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<sup>38</sup> *York Condominium Corp 42 v Hashmi*, [2011 ONSC 2478](#), at paras [37-38](#).

39. In summary, based on the evidence before this Court, and the circumstances of this case, the second factor weighs against reimbursing, or funding in advance, legal costs of the Board.

40. The third factor concerns whether the Board's positions are ones that were properly advanced by the Board rather than the Receiver. In this case, the Board's positions have either been without merit, based on a misunderstanding, or consistent with the Receiver's mandate. With respect to the interests of the Co-op, nothing that has been raised by the Board in these proceedings is materially different from the Receiver's mandate and fiduciary obligations as a court-officer.

41. As such, this factor also weighs against granting the relief sought.

42. Finally, the fourth factor concerns whether the positions advanced by the Board have detracted from the orderly administration of the Receivership. On these proceedings, the Board has taken meritless positions throughout and has opposed the Receiver on numerous fronts. On each motion brought by the Receiver, the Board has insisted on adjournments, despite no relief being sought against the Board or the Co-op in each of the motions,<sup>39</sup> ultimately frustrating the administration of the Receivership and increasing the costs of these proceedings.

43. On the First Report Approval Motion, the Board ultimately withdrew its opposition and Justice Penny provided some direction:

For example, counsel for Toronto advised that there are various resources available to board members, and potential board members, to help them understand what is required to successfully manage a co-op housing project. **I strongly recommend that the board work with Toronto to understand and utilize these resources.** The history of this matter leads me to believe that, in the past, the board has on occasion failed to understand, and to follow, various requirements necessary to maintain the service manager's support and co-operation. **If the board wishes to successfully transition out of the receivership, it will have to show it has a clear**

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<sup>39</sup> [Endorsement of Justice Penny dated March 25, 2024.](#)

**understanding of what is required, from a regulatory, governance and financial point of view, for the successful operation of the Co-op** [Emphasis added].<sup>40</sup>

44. The Board has provided no evidence that it has followed Justice Penny's direction. The Receiver reports in the Second Report, at Section 7.0, that since Justice Penny's direction, the Board has not engaged with the Receiver, except in respect of outstanding legal fees. It was not until shortly before the return date of the Receiver's pending motion in May 2025 that the Board purported to call an annual general meeting of members, without any consultation with the Receiver. While the annual general meeting did not take place, had the meeting taken place, it would have further complicated the Receiver's efforts to engage with the members as contemplated.

45. The Board's positions and actions have only served to detract from the orderly administration of the Receivership. Approval of any funding as requested by the Board only risks continued detraction from the orderly administration of the Receivership. As such, the fourth factor also weighs against granting the relief sought by the Board.

#### **PART 4 - RELIEF REQUESTED**

46. For the reasons above, the Receiver respectfully submits that the Board's motion be dismissed, with costs.

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<sup>40</sup> Receiver's MR, Second Report, Appendix E: Justice Penny's Endorsement, at paras 9-10.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

A handwritten signature in blue ink, appearing to be 'P. Cho' or similar, with a stylized, flowing end.

May 28, 2025

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Philip Cho/Kelsey Ivory  
WeirFoulds LLP

***Lawyers for the Receiver, TDB Restructuring  
Limited***

## STATEMENT OF AUTHENTICITY

Pursuant to Rule 4.06(2.1), I, **PHILIP CHO**, lawyer for the Receiver, TDB Restructuring Limited, am satisfied as to the authenticity of every authority cited in this factum and the factum dated May 28, 2025.



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WeirFoulds LLP  
*Lawyers for the Receiver,  
TDB Restructuring Limited*

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## SCHEDULE “A”

### List of Authorities

Tab	Description
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- |    |  |
|----|--|
| 1. | <i>Peterborough (City) v. Kawartha Native Housing Society Incorporated</i> , <a href="#">2010 ONCA 705</a>                                       |
| 2. | <i>Canadian Aero Service Ltd v O’Malley</i> , <a href="#">1973 CanLII 23 (SCC)</a> , [1973] SCJ No 97  |
| 3. | <i>UPM-Kymmene Corp. v UPM-Kymmene Miramichi Inc.</i> , <a href="#">2002 CanLII 49507 (ONSC)</a> , <a href="#">aff’d 2004 CanLII 9479 (ONCA)</a> |
| 4. | <i>York Condominium Corp 42 v Hashmi</i> , <a href="#">2011 ONSC 2478</a>  |

## SCHEDULE “B”

### Statutory Authorities

[Rules of Civil Procedure](#), RRO 1990, Reg 194

## RULE 57 COSTS OF PROCEEDINGS

### General Principles

#### *Factors in Discretion*

**57.01** (1) In exercising its discretion under [section 131](#) of the [Courts of Justice Act](#) to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

- (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
- (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
- (a) the amount claimed and the amount recovered in the proceeding;
- (b) the apportionment of liability;
- (c) the complexity of the proceeding;
- (d) the importance of the issues;
- (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
- (f) whether any step in the proceeding was,
  - (i) improper, vexatious or unnecessary, or
  - (ii) taken through negligence, mistake or excessive caution;
- (g) a party’s denial of or refusal to admit anything that should have been admitted;
- (h) whether it is appropriate to award any costs or more than one set of costs where a party,
  - (i) commenced separate proceedings for claims that should have been made in one proceeding, or
  - (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer;
- (h.1) whether a party unreasonably objected to proceeding by telephone conference or video conference under [rule 1.08](#); and
- (i) any other matter relevant to the question of costs. R.R.O. 1990, Reg. 194, r. 57.01 [\(1\)](#); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1; O. Reg. 689/20, s. 37.

#### *Costs Against Successful Party*

(2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case. R.R.O. 1990, Reg. 194, r. 57.01 [\(2\)](#).

### ***Fixing Costs: Tariffs***

(3) When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs. O. Reg. 284/01, s. 15 (1).

### ***Assessment in Exceptional Cases***

(3.1) Despite subrule (3), in an exceptional case the court may refer costs for assessment under Rule 58. O. Reg. 284/01, s. 15 (1).

### ***Authority of Court***

(4) Nothing in this rule or [rules 57.02](#) to [57.07](#) affects the authority of the court under [section 131](#) of the [Courts of Justice Act](#),

- (a) to award or refuse costs in respect of a particular issue or part of a proceeding;
- (b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding;
- (c) to award all or part of the costs on a substantial indemnity basis;
- (d) to award costs in an amount that represents full indemnity; or
- (e) to award costs to a party acting in person. R.R.O. 1990, Reg. 194, r. 57.01 [\(4\)](#); O. Reg. 284/01, s. 15 (2); O. Reg. 42/05, s. 4 (2); O. Reg. 8/07, s. 3.

### ***Bill of Costs***

(5) After a trial, the hearing of a motion that disposes of a proceeding or the hearing of an application, a party who is awarded costs shall serve a bill of costs (Form 57A) on the other parties and shall file it, with proof of service. O. Reg. 284/01, s. 15 (3).

### ***Costs Outline***

(6) Unless the parties have agreed on the costs that it would be appropriate to award for a step in a proceeding, every party who intends to seek costs for that step shall give to every other party involved in the same step, and bring to the hearing, a costs outline (Form 57B) not exceeding three pages in length. O. Reg. 42/05, s. 4 (3).

### ***Process for Fixing Costs***

(7) The court shall devise and adopt the simplest, least expensive and most expeditious process for fixing costs and, without limiting the generality of the foregoing, costs may be fixed after receiving written submissions, without the attendance of the parties. O. Reg. 42/05, s. 4 (3).

### ***Directions to Assessment Officer***

**57.02** (1) Where costs are to be assessed, the court may give directions to the assessment officer in respect of any matter referred to in [rule 57.01](#). R.R.O. 1990, Reg. 194, r. 57.02 [\(1\)](#).

(2) The court shall record,

- (a) any direction to the assessment officer;
- (b) any direction that is requested by a party and refused; and
- (c) any direction that is requested by a party and that the court declines to make but leaves to the discretion of the assessment officer. R.R.O. 1990, Reg. 194, r. 57.02 [\(2\)](#).

## **Costs of a Motion**

### ***Contested Motion***

**57.03** (1) On the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall,

- (a) fix the costs of the motion and order them to be paid within 30 days; or
- (b) in an exceptional case, refer the costs of the motion for assessment under Rule 58 and order them to be paid within 30 days after assessment. O. Reg. 284/01, s. 16.

(2) Where a party fails to pay the costs of a motion as required under subrule (1), the court may dismiss or stay the party's proceeding, strike out the party's defence or make such other order as is just. R.R.O. 1990, Reg. 194, r. 57.03 [\(2\)](#).

### ***Motion Without Notice***

(3) On a motion made without notice, there shall be no costs to any party, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 57.03 [\(3\)](#).

## **Costs on Settlement**

**57.04** Where a proceeding is settled on the basis that a party shall pay or recover costs and the amount of costs is not included in or determined by the settlement, the costs may be assessed under Rule 58 on the filing of a copy of the minutes of settlement in the office of the assessment officer. R.R.O. 1990, Reg. 194, r. 57.04.

## **Costs where Action Brought in Wrong Court**

### ***Recovery within Monetary Jurisdiction of Small Claims Court***

**57.05** (1) If a plaintiff recovers an amount within the monetary jurisdiction of the Small Claims Court, the court may order that the plaintiff shall not recover any costs. O. Reg. 377/95, s. 4.

(2) Subrule (1) does not apply to an action transferred to the Superior Court of Justice under [section 107](#) of the [Courts of Justice Act](#). R.R.O. 1990, Reg. 194, r. 57.05 [\(2\)](#); O. Reg. 292/99, s. 2 (2).

### ***Default Judgment within Monetary Jurisdiction of Small Claims Court***

(3) If the plaintiff obtains a default judgment that is within the monetary jurisdiction of the Small Claims Court, costs shall be assessed in accordance with that court's tariff. O. Reg. 377/95, s. 4.

### ***Proceeding Dismissed for Want of Jurisdiction***

(4) Where a proceeding is dismissed for want of jurisdiction, the court may make an order for the costs of the proceeding. R.R.O. 1990, Reg. 194, r. 57.05 [\(4\)](#).

### ***Relief Sought Improperly***

(5) If the court determines that a plaintiff included a claim for relief in a proceeding in order to be able to commence the action in the Superior Court of Justice instead of in the Small Claims Court, the court may order the payment of costs by the plaintiff. O. Reg. 176/24, s. 3.

### **Costs of Litigation Guardian**

**57.06** (1) The court may order a successful party to pay the costs of the litigation guardian of a party under disability who is a defendant or respondent, but may further order that the successful party pay those costs only to the extent that the successful party is able to recover them from the party liable for the successful party's costs. R.R.O. 1990, Reg. 194, r. 57.06 [\(1\)](#).

(2) A litigation guardian who has been ordered to pay costs is entitled to recover them from the person under disability for whom he or she has acted, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 57.06 [\(2\)](#).

### **Liability of Lawyer for Costs**

**57.07** (1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,

- (a) disallowing costs between the lawyer and client or directing the lawyer to repay to the client money paid on account of costs;
- (b) directing the lawyer to reimburse the client for any costs that the client has been ordered to pay to any other party; and
- (c) requiring the lawyer personally to pay the costs of any party. O. Reg. 575/07, s. 26.

(2) An order under subrule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the lawyer is given a reasonable opportunity to make representations to the court. R.R.O. 1990, Reg. 194, r. 57.07 [\(2\)](#); O. Reg. 575/07, s. 1.

(3) The court may direct that notice of an order against a lawyer under subrule (1) be given to the client in the manner specified in the order. R.R.O. 1990, Reg. 194, r. 57.07 [\(3\)](#); O. Reg. 575/07, s. 1.

**CITY OF TORONTO**

Applicant

-and-

**HARRY SHERMAN CROWE HOUSING CO-OPERATIVE  
INC.**

Respondent

Court File No. CV-22-00688248-00CL

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

PROCEEDING COMMENCED AT  
TORONTO

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