

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

B E T W E E N:

MARSHALLZEHR GROUP INC.

Applicant

- and -

FERNWOOD DEVELOPMENTS (ONTARIO) CORPORATION

Respondent

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

STATEMENT OF LAW OF MARSHALLZEHR GROUP INC.

(motion returnable November 27, 2020)

1. This statement of law is submitted by MarshallZehr Group Inc. (“**MarshallZehr**”) in support of the motion of RSM Canada Limited, Court-appointed receiver (the “**Receiver**”) and in response to the relief sought by Simcoe Standard Condominium Corporation No. 420 (the “**Condo Corporation**”).

Condo Corporation is Not a Secured Creditor

2. Fernwood Developments (Ontario) Corporation (“**Fernwood**”) became bankrupt on July 29, 2020. The Condo Corporation claims that it is a “secured creditor” under the *Bankruptcy and Insolvency Act* (Canada) (the “**BIA**”) as a result of the rights granted to it under section 87 of the *Condominium Act, 1998* (Ontario) (the “**Condominium Act**”).

3. Section 2 of the *BIA* defines a “secured creditor” as:

“*secured creditor* means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable...”¹

4. Section 87 of the *Condominium Act* entitles a condominium corporation to require a lessee of a condominium unit to pay rent owed under a lease directly to the condominium corporation where the owner is in default of its obligation to contribute common expenses.²

5. The rights under section 87 effectively only entitle the Condo Corporation to re-direct amounts, that would otherwise be paid to Fernwood by its tenants, to the Condo Corporation for amounts Fernwood owes for common expenses.

6. These rights do not result in the Condo Corporation being a secured creditor under the *BIA*, as the Condo Corporation is not a holder of a “mortgage, hypothec, pledge, charge or lien” on or against the property of Fernwood.

No Garnishments or Other Process Permitted Following Bankruptcy

7. Section 70(1) of the *BIA* provides that:

“[e]very bankruptcy order and every assignment made under this Act takes precedent over all ... garnishments ... or other process against the property of a bankrupt, except those that have been completely executed by payment to the creditor or the creditor’s representative, and except the rights of a secured creditor.”³

¹ [Section 2, Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3](#)

² [Section 87, Condominium Act, 1998, R.S.O. 1990, c. 19](#)

³ [Section 70\(1\), Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3](#)

8. The rights of the Condo Corporation under section 87 of the *Condominium Act* are effectively a statutory right to garnish, and in no substantive way differ from the rights of a judgment creditor to garnish amounts owed to a judgment debtor under rule 60.08 of the *Rules of Civil Procedure*.⁴

9. As a result, section 70(1) of the *BIA* prohibits the Condo Corporation from exercising its right under section 87 of the *Condominium Act* following Fernwood's bankruptcy, as it constitutes a garnishment or "other process" against the property of Fernwood, being the rents owed by tenants to Fernwood.

Condo Corporation Attempting to Jump the Queue

10. MarshallZehr is a secured creditor of Fernwood, as it holds a charge/mortgage and a general assignment of rents over the Fernwood owned condominium units.⁵ As of January 20, 2020, Fernwood owed \$24,051,019.23 to MarshallZehr.

11. As the Court of Appeal stated in *Toronto Standard Condominium Corporation No. 1908 v. StefcO Plumbing & Mechanical Contracting Inc.*, the *Condominium Act*:

"is designed to safeguard the financial viability of a condominium corporation in a manner that fairly balances the rights of the various stakeholders... a principal object to achieve fairness among the parties – owners, their tenants, their mortgagees, the corporation itself.... In restricting the availability of the priority for common expenses to circumstances where the condominium corporation has registered its lien and provided notice to encumbrancers, the legislature has balanced the right and obligation of a condominium corporation to collect common

⁴ [Rule 60.08, Rules of Civil Procedure, R.R.O. 1990, Reg. 194](#)

⁵ [Application Record, Tab 2, Affidavit of Murray Snedden sworn January 30, 2020, para. 17 and Exhibits "D" and "E" \(PDF pp. 17-18, 23, and 89-125\)](#)

expenses against the right of a mortgagee to have notice of a default in the payment of common expenses.”⁶ [emphasis added]

12. The relief sought by the Condo Corporation is an attempt to elevate its claim as an unsecured creditor of Fernwood for unpaid common expenses over the valid secured claim of MarshallZehr. The Condo Corporation had the ability to register a lien for such unpaid amounts under section 86 of the *Condominium Act*, but failed to do so.

13. The relief sought by the Condo Corporation would deliver an unfair benefit to the Condo Corporation to the detriment of MarshallZehr, a valid secured creditor, and would be unfair to Fernwood’s other unsecured creditors that are owed approximately \$2.5 million and are unlikely to receive any recovery in the receivership and bankruptcy proceedings.⁷

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of November, 2020.



Sam Rappos

CHAITONS LLP
5000 Yonge Street, 10th Floor
Toronto, Ontario M2N 7E9

Sam Rappos (LSO No. 51399S)
Tel: (416) 218-1137
Fax: (416) 218-1837
E-mail: samr@chaitons.com

Lawyers for MarshallZehr Group Inc.

⁶ [Toronto Standard Condominium Corporation No. 1908 v. Stefc0 Plumbing & Mechanical Contracting Inc., 2014 ONCA 696, paras. 45-46](#)

⁷ [Statement of Affairs of Fernwood Developments \(Ontario\) Corporation.](#)

MARSHALLZEHR GROUP INC.

-and-

FERNWOOD DEVELOPMENTS (ONTARIO) CORPORATION

Applicant

Respondent

Court File No. CV-20-00635523-00CL

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

PROCEEDING COMMENCED AT
TORONTO

**STATEMENT OF LAW OF
MARSHALLZEHR GROUP INC.**
(motion returnable November 27, 2020)

CHAITONS LLP

5000 Yonge Street, 10th Floor
Toronto, Ontario M2N 7E9

Sam Rappos (LSO No. 51399S)

Tel: (416) 218-1137

Fax: (416) 218-1837

E-mail: samr@chaitons.com

Lawyers for MarshallZehr Group Inc.