

**ONTARIO SUPERIOR COURT OF JUSTICE (TORONTO REGION)
CIVIL ENDORSEMENT FORM**
(Rule 59.02(2)(c)(i))

BEFORE	Judge Stevenson	Court File Number: CV-24-00713711-0000
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Title of Proceeding:

..... **1000171168 Ontario Inc.** Plaintiff
 -v-
 **Port Severn Heights Inc.** Defendant

Case Management: **Yes** If so, by whom: _____ **No**

Participants and Non-Participants: *(Rule 59.02(2)(vii))*

Party	Counsel	E-mail Address	Phone #	Participant (Y/N)
1) Plaintiff	Elliot S. Birnboim Michael Crampton	ebirnboim@cpllp.com mcmpton@cpllp.com		Y
2) Defendant	Robert Cohen	rcohen@cassels.com		Y
3) Second Mortgage Group	Ben Blay	bblay@scottpetrie.com		Y

Date Heard: *(Rule 59.02(2)(c)(iii))* September 20, 2024

Nature of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

Motion Appeal Case Conference Pre-Trial Conference Application

Format of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

In Writing Telephone Videoconference In Person

If in person, indicate courthouse address:

Relief Requested: *(Rule. 59.02(2)(c)(v))*

The Defendant (Port Severn), as mortgagee, seeks the appointment of a receiver over the Property (vacant land in the village of Port Severn) and enjoining the plaintiff 1000 (the borrower) from interfering with its sale.

Disposition made at hearing or conference (operative terms ordered): *(Rule 59.02(2)(c)(vi))*

The receiver/manager will be appointed on the terms set out in the draft order filed, with the missing terms to be approved by counsel or by a judge

Costs: On a **As per the Order** indemnity basis, fixed at \$ are payable
by to [when]

Brief Reasons, if any: (Rule 59.02(2)(b))

The property has been under development as a multi-unit residential subdivision for several years. The last two under the ownership of 1000. The property was to be developed in at least three phases. Port Severn was the original owner/developer until it sold to one Dhillon, in trust, which purchase price included this \$6mm VTB. The phase 3 lands would also be reconveyed after a severance was obtained. (this later occurred- see the May 4, 2022 Phase 3 APS). The due diligence condition was waived. Dhillon (now the unconditional purchaser) assigned the APS to 1000 which became the owner and chargor i.e., it gave the VTB mortgage on closing to Port Severn on or about May 5, 2022.

A Nov 2023 Registration Covenant in the VTB provides for an event of default if the phase 1 subdivision is not registered by Nov 4, 2023. It was not registered on time and this obligation remains outstanding. Note that the municipality has given an 18-month extension on the development timing but the mortgagee did not give any similar extension.

When this default occurred, Port Severn says it was not only a default, it exposed the project to substantial economic and other risks, especially the potential loss of wastewater treatment plant capacity (and perhaps the lapse of the subdivision phases 1 and 2 approvals for failure to satisfy the conditions within the time limits- the latter is no longer a concern apparently). The municipality, District, has still not allocated any water or wastewater services because of the lack of phase 1 registration, and the available water capacity may be allocated to competing projects on a first come, first served basis.

Severance of Phase 3 was given on Sept 16, 2022. Phase 3 lands were re-conveyed on or about June 20, 2023.

Port Severn registered its mortgage on May 5, 2022 as a “vendor take back” mortgage on its sale of the property to 1000’s predecessor (Dhillon, in trust). The maturity date is April 14, 2025. 1000 emphasises that this is only 6 months away and therefore a receiver is not needed.

Para. 3 of the Additional Provisions in the mortgage require 1000 to register a phase 1 subdivision plan (as defined) on or before November 4, 2023. As I have noted, that did not happen. This is 1000’s **first default** under the mortgage. The first default has not been cured even though it is jeopardizing the development and the default has been outstanding for some nine months. While the default may not have justified a notice of sale because it is a non-monetary default (I am not deciding this today), it does provide a basis for appointing a receiver (see the Standard Charge terms).

The **second default** was 1000’s failure to pay quarterly interest (\$60,000) due on April 14, 2024.

The **third default** was 1000’s failure to pay the next quarterly interest payment due on July 14, 2024.

Port Severn issued notice of sale in respect of the second default, including all corollary BIA notices.

On Nov 17, 2023 a \$3mm second mortgage was registered to the Other Mortgagees. Their counsel appeared today but the Other Mortgagees take no position on this motion even though that mortgage is also in default.

1000 has commenced this action to challenge Port Severn’s self-help remedies. It argues that it only withheld the interest payments because of the prior, improper notice of sale.

Port Severn seeks to appoint a receiver to facilitate its sale of the property, notwithstanding that this action is pending. It is concerned a purchaser or agent will be reluctant to deal with the property without the intervention of a receiver.

In deciding this motion, I rely on s. 101 of the CJA rather than s. 243 of the BIA. I have also had regard to the following caselaw and have considered and balanced the equities on both sides.

BNS v. Freure Village on Clair Creek, 1996 O.J. No. 5088.

Urbancorp Management Inc (Re) 2021 ONSC 3593 at para. 27

While appointing a receiver is often an extraordinary remedy, that is not the case here given that the receiver will be preserving mortgage rights agreed by the parties.

A major concern here is the risk of water allocation/capacity needs being allocated to other developers who move more quickly to get their developments to that stage. There is limited capacity in the region and not everyone will get what they want when they need it. This factor combined with the lack of evidence that 1000 has done anything at all to satisfy the Phase I conditions and thereby to firm up allocation of the water service capacity weighs in favour of appointing the receiver. There is no evidence that 1000 has done anything to move this development forward (it did negotiate an extension with the municipality to preserve its conditional approval) but this is certainly not very useful in terms of preserving the value of the mortgage security. This is a concern when there is evidence (appraisal) that the value is less than \$7mm. 1000 says today for the first time that I should not consider that appraisal because it was filed contrary to the court ordered schedule, but I accept that the appraisal is before me properly for today's purposes.

It is just and appropriate to appoint the receiver which will be able to navigate the listing process and maintain any development applications while the sale process unfolds. The sale will only occur under the auspices of the court approval process.

Additional pages attached: Yes No

Sept 20

, 20 **24**

Date of Endorsement (*Rule 59.02(2)(c)(ii)*)

Signature of Judge/Associate Judge (*Rule 59.02(2)(c)(i)*)