

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

BETWEEN:

AMERICAN GENERAL LIFE INSURANCE COMPANY,  
LEXINGTON INSURANCE COMPANY, AND  
THE VARIABLE ANNUITY LIFE INSURANCE COMPANY

Applicants

- and -

SOUTHMOUNT HEALTHCARE CENTRE INC., 180 VINE INC., 2478658 ONTARIO LTD.,  
2009 LONG LAKE HOLDINGS INC., 65 LARCH HOLDINGS INC., 100 COLBORNE  
HOLDINGS INC., 240 OLD PENETANGUIH HOLDINGS INC., GROSS PROPERTIES  
INC., 180 VINE PURCHASER INC., AND 2413667 ONTARIO INC.

Respondents

**APPLICATION UNDER section 243 of the Bankruptcy and Insolvency Act, R.S.C. 1985,  
c. B-3, as amended, and under section 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43**

**FACTUM OF THE RECEIVER  
(Discharge, Distribution and Ancillary Matters)  
Returnable July 5, 2023**

June 29, 2023

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Lawyers for the Receiver

**TO: SERVICE LIST**

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**PART I - OVERVIEW**

1. This factum is filed in support of a motion by KPMG Inc., in its capacity as Court-appointed receiver and manager (the “**Receiver**”), without security of the assets, undertakings and properties, including, without limitation, the real properties with legal descriptions set out in **Schedule “A”** (the “**Real Property**”) of the Appointment Order granted on June 29, 2021 (the “**Appointment Order**”), of (i) Southmount Healthcare Centre Inc., 180 Vine Inc., 2478658 Ontario Ltd., 2009 Long Lake Holdings Inc., 65 Larch Holdings Inc., 100 Colborne Holdings Inc.,

and 240 Old Penetanguish Holdings Inc. (the “**Legal Owners**”) acquired for, or used in relation to the Legal Owner’s business (collectively, the “**Legal Owners’ Property**”), and (ii) the beneficial owners of the Legal Owners’ Property (collectively, the “**Beneficial Owners**”), but solely in respect of all of each Beneficial Owners’ right, title and interest in and to the Legal Owners’ Property, including the Real Property and all proceeds thereof, whether held directly or indirectly by any Beneficial Owner for themselves or for others (together with the Legal Owners’ Property, the “**Property**”), for an Order (the “**Discharge, Distribution and Ancillary Matters Order**”), among other things:

- (a) dispensing with the requirement of the Receiver and Receiver’s Counsel (defined below) to pass their fees and disbursements (“**Accounts**”);
- (b) approving the activities of the Receiver (the “**Activity Approval**”) as set out in the Receiver’s fourth report to the Court dated June 26, 2023 (the “**Fourth Report**”);
- (c) discharging the Receiver upon filing of the Discharge Certificate (as defined in the Discharge, Distribution and Ancillary Matters Order) and granting certain customary releases in favour of the Receiver, its counsel, Blake, Cassels and Graydon LLP (“**Blakes**”) and its independent counsel, Norton Rose Fulbright Canada LLP (“**Norton Rose**” and together with Blakes, the “**Receiver’s Counsel**”);  
and
- (d) authorizing the Receiver to make further distributions to the Applicants;

2. This factum will address the requested relief in connection with: (a) the Activity Approval, (b) dispensing with the requirement of the Receiver and Receiver’s Counsel to pass their Accounts, and (c) the discharge of the Receiver and the release of the Receiver and Receiver’s Counsel. The

relief requested in connection with the payment of further distributions to the Applicants will be addressed in a separate factum filed by the Receiver's independent counsel, Norton Rose.

## **PART II - FACTS**

3. A summary of the background of these receivership proceedings (the "**Proceedings**") is set out in the Fourth Report.

4. Pursuant to the Appointment Order, these Proceedings were commenced, and KPMG Inc. was appointed as Receiver of the Property, which primarily consisted of interests in seven medical office buildings (the "**Buildings**") and one associated parking lot located across Ontario (the parking lot, together with the Buildings, their related property leases and the interests of the Beneficial Owners therein, being the "**Real Property Assets**").<sup>1</sup>

5. On August 3, 2021, KPMG Inc. was appointed as receiver of, among other things, the properties of Victoria Avenue North Holdings Inc. ("**Victoria Avenue**") pursuant to an order of this Court (such proceedings being, the "**Victoria Receivership Proceedings**"). The primary assets subject to the Victoria Receivership Proceedings were two medical office buildings in the same asset class as the Buildings subject to these Proceedings (the "**Victoria Avenue Real Property Assets**"). Victoria Avenue is affiliated with the Legal Owners, and they are all indirect subsidiaries of Gross Capital Inc., which was assigned into bankruptcy on June 25, 2021.<sup>2</sup>

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<sup>1</sup> Fourth Report of the Receiver, dated June 26, 2023 [Fourth Report] at para. 3.

<sup>2</sup> Fourth Report at para. 6.

6. On October 29, 2021, the Court granted an order (the “**Sale Process Order**”) approving, among other things:

- (a) the broker listing agreement dated October 20, 2021 and the engagement of CBRE Limited (the “**Broker**”) as exclusive real estate broker for the Real Property Assets; and
- (b) a sale process for the Real Property Assets, as appended to the Sale Process Order (the “**Sale Process**”).<sup>3</sup>

7. On October 29, 2021, the Court also granted an order approving a substantially similar sale process for, and the engagement of the Broker in respect of, the Victoria Avenue Real Property Assets, which were marketed by the Broker and the Receiver alongside the Real Property Assets that are the subject of these Proceedings.<sup>4</sup>

8. Details of the conduct of the Sale Process by the Receiver and the Broker are set out in the Receiver’s second report to the Court dated May 13, 2022 (the “**Second Report**”), the Receiver’s third report to the Court, dated July 5, 2022 (the “**Third Report**”) and the Fourth Report. A summary of key facts as they relate to the Sale Process is set out below.

9. On May 24, 2022 the Court granted five approval and vesting orders in these Proceedings that approved transactions in respect of certain of the Real Property Assets, three of which were completed.<sup>5</sup> At a subsequent hearing on July 15, 2022 the Court granted four additional approval and vesting orders that approved the sale of the remaining Real Property Assets (the “**July 15 Transactions**”).<sup>6</sup>

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<sup>3</sup> Fourth Report at para. 5.

<sup>4</sup> Fourth Report at para. 7.

<sup>5</sup> Fourth Report at paras. 8 and 11.

<sup>6</sup> Fourth Report at para. 12.

10. All of the Real Property Assets have now been sold.<sup>7</sup> The Receiver's remaining cash on hand and any additional realizations will not be enough to repay the Applicants in full.<sup>8</sup> The outstanding amount of principal and interest owing to the Applicants' is estimated to be approximately \$21.1 million as at May 31, 2023.<sup>9</sup> The Applicants, as senior secured creditors, are the fulcrum creditors in these Proceedings and there are no subordinate creditors or Beneficial Owners that will receive a monetary recovery.<sup>10</sup>

11. The brokerage commissions in connection with the sale of each of the Real Property Assets have all been approved by the Court and paid.<sup>11</sup>

12. A number of distributions to the Applicants from the proceeds of sale of the Real Property Assets have been previously approved by this Court and made by the Receiver.<sup>12</sup>

13. All of the Legal Owners (with the exception of 180 Vine Inc.) and 180 Vine Purchaser Inc. have been bankrupted with KPMG appointed as bankruptcy trustee in respect thereof.<sup>13</sup>

14. The Receiver's activities since the granting of the Appointment Order are detailed in the Second Report, the Third Report and the Fourth Report. The activities of the Receiver from the date of the Third Report to the date of the Fourth Report have primarily consisted of: (i) Closing the July 15 Transactions; (ii) liaising with tenants and property managers in respect of lease, rent and operational matters; (iii) preparing and reviewing court materials, including this Fourth

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<sup>7</sup> Fourth Report at para. 47.

<sup>8</sup> Fourth Report at para. 47.

<sup>9</sup> Fourth Report at para. 46.

<sup>10</sup> Fourth Report at para. 62.

<sup>11</sup> Fourth Report at para. 25.

<sup>12</sup> Fourth Report at para. 55.

<sup>13</sup> Fourth Report at para. 25.

Report; (iv) bankrupting the remaining Legal Owners, and (v) communicating with the Applicants, vendors, creditors and other parties purporting to have an interest in the Proceedings.<sup>14</sup>

15. The Receiver and Receiver's Counsel have tracked their fees and disbursements incurred in connection with these Proceedings. Professional fees and disbursements for the period of June 2021 to May 31, 2023 (the "**Fee Period**") total \$1,537,886 (plus HST) for the Receiver, \$1,511,033 (plus HST) for Blakes, and \$139,773 (plus HST) for Norton Rose. The particulars of these fees and disbursements have been shared with the Applicants and they have provided their approval to such fees.<sup>15</sup>

16. The Receiver currently has certain remaining activities (the "**Remaining Activities**") to complete to conclude the administration of these Proceedings, all as set out in greater detail in the Fourth Report. The key Remaining Activities are as follows:<sup>16</sup>

- (a) make additional distributions to the Applicants;
- (b) attend to various outstanding tax-related matters, including filing outstanding tax returns; and
- (c) pay any remaining costs and close the Receiver's estate trust account.

### **PART III - ISSUES**

17. The following issues are before the Court on this Motion:

- (a) Should this Court dispense with the requirement for the Receiver and Receiver's Counsel to pass their Accounts?
- (b) Should this Court grant the requested Activity Approval?

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<sup>14</sup> Fourth Report at para. 25.

<sup>15</sup> Fourth Report at paras. 59-63.

<sup>16</sup> Fourth Report at para. 67.



- (c) Should the Receiver be discharged and should the Receiver and its counsel be released?

18. For the reasons that follow, the Receiver submits that these questions should be answered in the affirmative.

#### **PART IV - THE LAW AND DISCUSSION**

##### **A. The requirement for the Receiver and Receiver's Counsel to pass their accounts should be dispensed with**

19. The Receiver respectfully requests that this Court waive the requirement that the Receiver and Receiver's Counsel obtain Court approval of their Accounts for the Fee Period, and thereafter unless requested by the Applicants.<sup>17</sup>

20. This Court has dispensed with the requirement to obtain court approval of accounts or granted similar relief in other insolvency proceedings in Canada, including in the Victoria Receivership Proceedings.<sup>18</sup>

21. In addition to its inherent jurisdiction to waive compliance with an order, the Court has the authority to amend, set aside or vary an order under Rule 59.06, and may do so on a motion brought in the proceedings in which the order was made. The obligation to pass the Accounts is created by paragraph 19 of the Appointment Order and in the Receiver's submission may therefore be waived by this Court on a motion brought in the Proceedings.<sup>19</sup>

22. Based on the results of the Sale Process, the Applicants are the only party who will receive

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<sup>17</sup> Fourth Report at para. 64.

<sup>18</sup> [\*Tilden Car Rental Inc. \(Trustee of\) v Tilden Car Rental Inc.\*, 1996 CarswellMan 623 \(MB QB\); \*American General Life Insurance Company v. Victoria Avenue North Holdings Inc.\*, Distribution and Ancillary Matters Order, entered on May 24, 2022](#) at para. 9.

<sup>19</sup> *Rules of Civil Procedure* made under the *Courts of Justice Act*, Rule 59.06.

a monetary recovery in the Proceedings and the deficiency in their senior secured claim is significantly greater than the quantum of the Accounts. Put another way, if the Accounts were lower or higher, it would only impact distributions to the Applicants and not any other party.<sup>20</sup>

23. Accordingly, the Applicants are the only creditor with an economic interest in the quantum of professional fees incurred by the Receiver and Receiver's Counsel. The Accounts have been disclosed to the Applicants and the Applicants have advised the Receiver that they consent to such fees and support the Receiver's request. Any formal passing of accounts would add additional costs to the Proceedings, all of which would be borne by the Applicants.<sup>21</sup>

24. Pursuant to the terms of the order sought by the Receiver, the requirement to pass the fees and disbursements incurred during the Fee Period would be waived upon the granting of the Discharge, Distribution and Ancillary Matters Order, and subsequently incurred fees and disbursements would not be required to be court approved as long as the Applicants, being the fulcrum creditors, consent to them.

25. In the Receiver's view, given the foregoing, (i) it would not be a constructive use of estate funds to take steps to proceed with a fee approval motion, and (ii) waiving the requirement to pass accounts is not prejudicial to any stakeholder and promotes efficiency and judicial economy.

**B. The Court should grant the requested Activity Approval**

26. In *Target Canada*, the Court noted that there are good policy and practical reasons to grant the approval of Monitor's reports and activities, including (i) allowing the Monitor to bring its

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<sup>20</sup> Fourth Report at para. 62.

<sup>21</sup> Fourth Report at para. 63.

activities before the Court; (ii) allowing an opportunity for stakeholders' concerns to be addressed; (iii) enabling the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners; (iv) providing protection for the Monitor not otherwise provided by the *Companies' Creditors Arrangement Act*; and (v) protecting creditors from delay that may be caused by re-litigation of steps or potential indemnity claims by the Monitor.<sup>22</sup>

27. Recently, the principles set out in *Target Canada* were reaffirmed by Chief Justice Morawetz in *Laurentian University*.<sup>23</sup>

28. These comments and the policy considerations identified by the Court apply with equal force to receivership proceedings and motions seeking approval of a receiver's report and activities described therein.<sup>24</sup>

29. This Court has jurisdiction to review and approve the activities of a receiver. If a receiver has met the objective test of demonstrating that it has acted reasonably, prudently and not arbitrarily, the court may approve the activities set out in its report.<sup>25</sup>

30. The activities of the Receiver that are set out in the Fourth Report were necessary, consistent with the Receiver's duties and powers granted in the Appointment Order and undertaken with efficiency and reasonableness in the interests of stakeholders generally. The Receiver therefore respectfully submits that the Activity Approval should be granted.

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<sup>22</sup> [Re Target Canada Co, 2015 ONSC 7574](#) at paras. 12, 22-23 [*Target Canada*].

<sup>23</sup> [Re Laurentian University of Sudbury, 2022 ONSC 2927](#) at paras 13-14; [Target Canada](#) at paras. 12, 22-23.

<sup>24</sup> [Re Hanfeng Evergreen Inc, 2017 ONSC 7161](#) at para. 15.

<sup>25</sup> [Bank of America Canada v Willam Investments Ltd, \[1993\] OJ No 1647 \(Gen Div\)](#) at paras. 2-5, [aff'd \[1996\] OJ No 2806 \(CA\)](#); [Lang Michener v American Bullion Minerals Ltd, 2005 BCSC 684](#) at para. 21.

**C. The discharge of the Receiver and the release of the Receiver and its counsel should be approved**

31. Other than the Remaining Activities, the Receiver has completed its administration of these Proceedings, as contemplated by the Appointment Order and the BIA.<sup>26</sup>

32. The Receiver respectfully submits that it is appropriate to discharge the Receiver upon the filing of a certificate of the Receiver, certifying that all matters to be attended to in connection with the Proceedings have been completed to its satisfaction (the “**Discharge Certificate**”).

33. The Receiver respectfully submits that it is also appropriate to grant a limited release in favour of it and Receiver’s Counsel. In *Pinnacle v Kraus*, this Court granted an Order discharging and releasing a court-appointed receiver. In doing so, the Court noted that such a release is expressly contemplated by the Commercial List Model Discharge Order and that in the absence of improper or negligent conduct on the part of the Receiver, such releases should be granted.<sup>27</sup>

34. The proposed Discharge, Distribution and Ancillary Matters Order seeks (i) a limited release in favour of the Receiver and Receiver’s Counsel which is temporally circumscribed by the period up to the date of the Discharge, Distribution and Ancillary Matters Order, and (ii) a limited subsequent release up to the date that the Discharge Certificate is filed, provided that parties of interest are given notice of same and have an opportunity to object to such subsequent release.

35. This bifurcated approach is intended to achieve a mechanism whereby parties of interest are given full and transparent disclosure of the releases being sought and an opportunity to raise any issues with the same.

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<sup>26</sup> Fourth Report at para. 68.

<sup>27</sup> [Pinnacle v Kraus, 2012 ONSC 6376](#) at para. 47.

36. Similar releases have been granted by this Court in other proceedings in favour of receivers, monitors and their counsel, including in the Victoria Receivership Proceedings.<sup>28</sup>

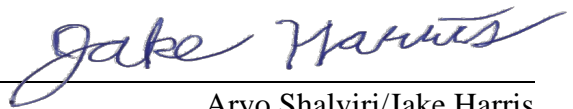
37. Throughout these Proceedings, the Receiver and its counsel have acted prudently and contributed substantially to the administration of the Proceedings, with the activities of the Receiver having been thoroughly disclosed throughout the Proceedings. Accordingly, the Receiver respectfully submits that the requested releases are reasonable in the circumstances, will provide the Receiver and its counsel with finality, and should be granted.

#### **PART V - CONCLUSION**

38. For the reasons set out above, the Receiver respectfully requests that this Court:

- (a) dispense with the requirement for the Receiver and Receiver's Counsel to pass their Accounts;
- (b) grant the requested Activity Approval; and
- (c) discharge the Receiver and release the Receiver and Receiver's Counsel;

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 29<sup>th</sup> day of June, 2023.



Aryo Shalviri/Jake Harris  
Lawyers for the Receiver

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<sup>28</sup> See *Urbancorp (Leslieville) Developments Inc et al*, Court File No CV-16-11409-00CL, [Order \(Final Distributions, Approval of Activities and Fees & Discharge\)](#) entered on September 14, 2020 at paras 18-19; *33 Yorkville Residences Inc et al*, Court File No CV-20-00637297-00CL, [Approval and Discharge Order](#) entered on March 22, 2023 at para 12; and *Primus Telecommunications Inc et al*, Court File No CV-16-11257-00CL, [Stay Extension, Discharge and Termination Order](#) entered on September 16, 2016 at paras 8-9 where similar relief has been granted with respect to the release of the Monitor and its legal counsel in a proceeding under the *Companies' Creditors Arrangement Act*.

## SCHEDULE "A"

### LIST OF AUTHORITIES

<u>Case</u>	
1.	<a href="#"><i>Tilden Car Rental Inc. (Trustee of) v Tilden Car Rental Inc.</i>, 1996 CarswellMan 623 (MB QB)</a>
2.	<a href="#"><i>American General Life Insurance Company v. Victoria Avenue North Holdings Inc.</i>, Distribution and Ancillary Matters Order, entered on May 24, 2022</a>
3.	<a href="#"><i>Re Target Canada Co.</i>, 2015 ONSC 7574</a>
4.	<a href="#"><i>Re Laurentian University of Sudbury</i>, 2022 ONSC 2927</a>
5.	<a href="#"><i>Re Hanfeng Evergreen Inc.</i>, 2017 ONSC 7161</a>
6.	<a href="#"><i>Bank of America Canada v Willann Investments Ltd.</i>, [1993] OJ No 1647 (Gen Div) aff'd [1996] OJ No 2806 (CA)</a>
7.	<a href="#"><i>Lang Michener v American Bullion Minerals Ltd.</i>, 2005 BCSC 684</a>
8.	<a href="#"><i>Pinnacle v Kraus</i>, 2012 ONSC 6376</a>
9.	<i>Urbancorp (Leslieville) Developments Inc et al</i> , Court File No CV-16-11409-00CL, <a href="#">Order (Final Distributions, Approval of Activities and Fees &amp; Discharge)</a>
10.	<i>33 Yorkville Residences Inc et al</i> , Court File No CV-20-00637297-00CL, <a href="#">Approval and Discharge Order</a>
11.	<i>Primus Telecommunications Inc et al</i> , Court File No CV-16-11257-00CL, <a href="#">Stay Extension, Discharge and Termination Order</a>

## SCHEDULE "B"

### RELEVANT STATUTES

#### **Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3: Section 243**

*Court may appoint receiver*

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

#### **Bankruptcy and Insolvency General Rules, C.R.C., c. 368: Section 3**

##### **General**

3 In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

#### **Rules of Civil Procedure, R.R.O., 1990, Reg 194: Rule 1.04**

##### **Interpretation**

*General Principle*

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

#### **Rules of Civil Procedure, R.R.O., 1990, Reg 194: Rule 1.04**

##### **Amending, Setting Aside or Varying Order**

*Amending*

59.06 (1) An order that contains an error arising from an accidental slip or omission or requires amendment in any particular on which the court did not adjudicate may be amended on a motion in the proceeding.

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Proceeding Commenced at Toronto

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