

Court File No. CV-21-00665375-00CL

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

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

**AMERICAN GENERAL LIFE INSURANCE COMPANY and  
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.**

Applicants

- and -

**VICTORIA AVENUE NORTH HOLDINGS INC. and  
THE PARTIES LISTED ON SCHEDULE "A"**

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 APPLICANTS  
(Appointing Receiver)  
Returnable August 3, 2021**

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Lawyers for the Applicants

**TO: SERVICE LIST**

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**SERVICE LIST**  
(as at July 22, 2021)

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***Parties with Encumbrances Registered on Title:***

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**FACTUM OF THE APPLICANTS  
(Appointing Receiver)  
Returnable August 3, 2021**

**PART I - OVERVIEW**

1. This Application is made by American General Life Insurance Company (“**AIG**”) and National Union Fire Insurance Company of Pittsburgh, PA. (together with AIG, the “**Applicants**”) for an order substantially in the form attached to their application record at Tab 5 (the “**Proposed Appointment Order**”), appointing KPMG Inc. (“**KPMG**”) as receiver and manager (in such capacities, the “**Receiver**”) without security, of: (i) all of the assets, undertakings and properties, including, without limitation, the properties with legal descriptions set out in Schedule “B” of the Proposed Appointment Order (the “**Real Properties**”) of Victoria Avenue North Holdings Inc. (the “**Legal Owner**”) acquired for, or used in relation to the Legal Owner’s business (collectively, the “**Legal Owner’s Property**”), and (ii) all right, title and interest of any beneficial owners (the “**Beneficial Owners**”) in and to the Legal Owner’s Property, including the Real Properties and all

proceeds thereof (together with the Legal Owner's Property, the "**Property**"), whether held directly or indirectly by the Beneficial Owners for themselves or for others, including the Beneficial Owners who are Respondents in these proceedings and are listed on Schedule "A" (the "**Original Beneficial Owners**"), pursuant to Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, and Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**").

2. The Applicants are related entities and part of the American International Group of companies. Collectively, the Applicants are the senior secured creditors of the Legal Owner. As a result of numerous events of default (including payment defaults) under the Loan and Security Documents (as defined below) (each an "**Event of Default**" and collectively, the "**Events of Default**") which have been continuing since February 2020, the Applicants are seeking the appointment of the Receiver pursuant to the Proposed Appointment Order.

3. On March 30, 2015, the Applicants advanced a loan (the "**Loan**") to the Legal Owner in the principal amount of \$24,500,000 to fund the acquisition of two medical office buildings (which comprise the Real Properties) by the Legal Owner.

4. As at June 30, 2021, the total amount of principal and interest outstanding under the Loan is \$22,897,734, comprised of outstanding principal in the amount of \$21,747,420.56 and accrued and outstanding interest in the amount of \$1,150,313.44 (together with all costs, fees, expenses, additional interest and other amounts payable pursuant to the Loan and Security Documents (as defined below), the "**Indebtedness**").

5. The Indebtedness is secured by the Loan and Security Documents which are comprised of, among other things, a mortgage, a general security agreement and a general assignment of rents and leases (all as described in greater detail below).

6. In early February 2020, the Applicants noted the Legal Owner in default under the Loan and Security Documents and (through their counsel) engaged KPMG as their financial advisor to review the Legal Owner's financial affairs and operations and obtain information regarding the Real Properties and any rent deferral arrangements with the tenants thereof.

7. On May 7, 2020, the Applicants noted additional Events of Default as a result of failure to pay when due scheduled loan payments for April and May of 2020. However, the Applicants did



not, at that time, make demand or seek to enforce the security granted to them under the Loan and Security Documents (the “**Security**”) and instead agreed to forbear from enforcing their rights for a period of time (the “**Forbearance Period**”) in order to provide the Legal Owner with an opportunity to pursue a refinancing and/or a sale of the Real Properties and repay the Indebtedness.

8. Since May 7, 2020, (i) a number of additional Events of Default have occurred and are continuing, and (ii) efforts to refinance the Indebtedness or sell the Real Properties have been unsuccessful.

9. The Forbearance Period was extended a number of times and the final Forbearance Period expired on June 17, 2021, without the Legal Owner having received a binding commitment in respect of a transaction that would permit it to repay the Indebtedness (let alone having closed same). At this time, (i) the Indebtedness remains unpaid, and (ii) many Events of Default have occurred and are continuing, including, without limitation, Events of Default as a result of:

- (a) the Legal Owner’s failure to pay when due, a single scheduled loan payment since March 2020 (a period of sixteen months);
- (b) the registration of certain mortgage charges and other security interests against the Real Properties by third parties, without the consent of the Applicants;
- (c) the registration of certain security interests against the Legal Owner by third parties, without the consent of the Applicants;
- (d) the failure of the Legal Owner to comply with its harmonized sales tax obligations; and
- (e) the failure of the Legal Owner to comply with numerous covenants provided for in forbearance agreements entered into with the Applicants since May 7, 2020.

10. On June 18, 2021 and June 23, 2021, the Applicants issued (i) a demand letter to the Legal Owner, with copies to the Original Beneficial Owners and Other Potential Parties of Interest (as defined below), which noted certain Events of Default and accelerated the Indebtedness (the “**Demand Letter**”), and (ii) notices to the Legal Owner, Original Beneficial Owners and Other Potential Parties of Interest under section 244 of the BIA (collectively, the “**Section 244 Notices**”).

11. On June 25, 2021, Gross Capital Inc., the parent company of the Legal Owner (“**Gross Capital**”), made a voluntary assignment into bankruptcy and KSV Restructuring Inc. was appointed as bankruptcy trustee. On June 29, 2021, on application by certain AIG group entities, the Honourable Mr. Justice Dunphy appointed KPMG as receiver and manager over certain other subsidiaries of Gross Capital. Also on June 29, 2021, certain investor parties unrelated to the

Applicants which assert an interest in certain loans with Gross Capital, among others (but not the Legal Owner), brought an application alleging, among other things, fraudulent actions by Gross Capital and certain related companies and individuals.

Affidavit of Jacob Baron, sworn July 9, 2021 (the "**Baron Affidavit**") at para 13, Application Record, Tab 2.

12. The Applicants have lost confidence in the management of the Legal Owner and its ability to produce a transaction in a reasonable timeframe which would result in the repayment of the Indebtedness and are no longer prepared to forbear the exercise of their rights and remedies.

13. The notice periods in the Section 244 Notices have expired.

14. It is just and convenient to appoint the Receiver on the terms of the Proposed Appointment Order.

## **PART II - FACTS**

### **Business, Debtors & Properties**

15. The Real Properties are two medical office buildings located in Hamilton, Ontario.

Baron Affidavit at paras 2 and 4 and Exhibit "A", Application Record, Tab 2.

16. The Legal Owner is an Ontario corporation with its registered head office in Toronto, Ontario. The Legal Owner is a wholly owned subsidiary of Gross Capital.

Baron Affidavit at paras 21 and 29, Application Record, Tab 2.

17. The business of the Legal Owner is to own and manage the Real Properties and collect rents from tenants thereof.

Baron Affidavit at para 30, Application Record, Tab 2.

18. Gross Capital has historically engaged Prime Real Estate Group Inc. to manage and maintain the Real Properties. Gross Capital has also historically provided back office and management support functions for the Legal Owner; the Legal Owner does not appear to have any employees itself.

Baron Affidavit at paras 31 and 33, Application Record, Tab 2.

19. The Legal Owner holds legal title to the Real Properties as a bare nominee for the Original Beneficial Owners, pursuant to a nominee agreement executed by each of them at the time the Loan was advanced.

Baron Affidavit at para 20 and Exhibit “D”, Application Record, Tab 2.

20. There are 49 Original Beneficial Owners which are set out at paragraph 24 of the Baron Affidavit and are made up of 28 individuals, 9 trusts and 12 corporations. The majority of the Original Beneficial Owners hold a nominal beneficial interest in the Real Properties.

Baron Affidavit at para 24, Application Record, Tab 2.

21. Since the appointment of KPMG as financial advisor, the Legal Owner has provided KPMG with an unsigned amended and restated nominee agreement dated as of March 16, 2018 (the “**A&R Nominee Agreement**”) which purports to indicate certain changes to the beneficial ownership of the Real Properties and lists thirty-five additional parties (collectively, the “**Other Potential Parties of Interest**”).

Baron Affidavit at para 26 and Exhibit “G”, Application Record, Tab 2.

22. The Legal Owner has not produced a signed copy of the A&R Nominee Agreement nor did the Applicants receive notices of any changes to the Original Beneficial Owners, as required pursuant to the terms of the Mortgage (as defined below).

Baron Affidavit at para 26 and Exhibit “G”, Application Record, Tab 2.

### **Loan and Security Documents**

23. The Loan is evidenced by a mortgage registered on title for the Real Properties on March 31, 2015 (the “**Mortgage**”).

Baron Affidavit at para 35 and Exhibit “H”, Application Record, Tab 2.

24. To secure the Indebtedness, the Legal Owner has granted each of the Applicants, among other things: (i) a charge in respect of the Real Properties pursuant to the Mortgage, (ii) a security interest over all of its present and after acquired property (the “**Personal Property**”), pursuant to a general security agreement dated as of March 30, 2015 (the “**GSA**”), and (iii) an assignment of all leases and rents, pursuant to a general assignment of leases and rents dated as of March 30,

2015 (the “**General Assignment of Rents and Leases**” and together with the GSA, Mortgage, Nominee Acknowledgment (defined below) and other loan and security documents entered into with the Legal Owner and the Original Beneficial Owners in connection with the Loan, the “**Loan and Security Documents**”).

Baron Affidavit at para 38 and Exhibits “I” and “J”, Application Record, Tab 2.

25. Pursuant to the Mortgage and the General Assignment of Rents and Leases, charges have been granted to the Applicants in respect of each of the Real Properties, which charges include leases and rents derived from the Real Properties, and have been registered as a first charge against title to the Real Properties.

Baron Affidavit at paras 17 and 40 and Exhibit “C”, Application Record, Tab 2.

26. Each of the Applicants have also registered *Personal Property Security Act (Ontario)* (the “**PPSA**”) financing statements against the Legal Owner. PPSA search results indicate that the Applicants have a first in time registration against the Legal Owner.

Baron Affidavit at para 41 and Exhibit “K”, Application Record, Tab 2.

27. Pursuant to a direction to nominee and acknowledgment dated as of March 30, 2015 (the “**Nominee Acknowledgment**”), each Original Beneficial Owner has, among other things, (i) agreed to be bound by the Loan and Security Documents and obligations thereunder, and (ii) postponed and subordinated all debts and liabilities of the Legal Owner to it in favour of the Indebtedness owing to the Applicants.

Baron Affidavit at paras 22 and 37 and Exhibit “F”, Application Record, Tab 2.

28. To further secure the Indebtedness, each of the Original Beneficial Owners has, pursuant to the Nominee Acknowledgment, granted to each of the Applicants, a security interest in and to all of its right, title and interest in and to the Legal Owner’s Property, including the Real Properties and all proceeds thereof.

Baron Affidavit at para 39, Application Record, Tab 2.

29. The Mortgage and GSA each provide that upon the occurrence of an Event of Default, the Applicants may, among other things, enforce their Security and seek the appointment of a Receiver.

Baron Affidavit at Exhibits “H” and “I”, Application Record, Tab 2.

**Defaults, Demands and Forbearance**

30. The Legal Owner has failed to make a single regularly scheduled monthly payment of principal and interest under the Loan (each, a “**Scheduled Loan Payment**”) since March 2020. Each failure to make a Scheduled Loan Payment is an Event of Default.

Baron Affidavit at paras 7, 54 and 65, Application Record, Tab 2.

31. Through real property searches, the Applicants are aware of several subsequent mortgage charges and notice of security interests that have been registered against the Real Properties (collectively, the “**Unpermitted Property Charges**”). Pursuant to the Mortgage, the Legal Owner is not permitted to charge or otherwise encumber the Real Properties (except in very limited circumstances which are not applicable to the Unpermitted Property Charges), without the prior written consent of the Applicants. The Mortgage is registered on title to the Real Properties and therefore such restrictions in the Mortgage were publicly available. The consent of the Applicants in respect of the Unpermitted Property Charges was not requested and has not been provided. Therefore, each Unpermitted Property Charge gives rise to an Event of Default.

Baron Affidavit at paras 42-44 and Exhibit “C”, Application Record, Tab 2.

32. In or around February 2020, the Applicants also became aware that certain proceeds generated from the Real Properties may have been distributed to the holders of the Unpermitted Property Charges.

Baron Affidavit at para 45, Application Record, Tab 2.

33. Further, the Applicants have become aware of additional purported security interests registered against the Legal Owner (collectively, the “**Unpermitted PPSA Registrations**”). Pursuant to the Mortgage and the GSA, the Legal Owner is required to keep its personal property free and clear of all charges, liens, security interests and other encumbrances, except where specifically permitted pursuant thereto or consented to in writing by the Applicants, which consent was never obtained. Each Unpermitted PPSA Registration is an Event of Default.

Baron Affidavit at paras 47-49 and Exhibit “K”, Application Record, Tab 2.

34. The Legal Owner has also committed certain defaults related to a failure to satisfy certain tax obligations, each of which gives rise to an Event of Default.

Baron Affidavit at paras 50-53, Application Record, Tab 2.

35. Beginning in February 2020 and through March 2020, the Applicants notified the Legal Owner that certain Events of Default had occurred and were continuing, including, as a result of a failure to make Scheduled Loan Payments.

Baron Affidavit at paras 54-57 and Exhibits “M” and “N”, Application Record, Tab 2.

36. On May 7, 2020, the Applicants and the Legal Owner entered into a forbearance agreement providing for a Forbearance Period, which was extended numerous times between the period of May 7, 2020 and May 15, 2021, in order to give the Legal Owner time to pursue an out-of-court refinancing or sale of the Real Properties that would permit it to fully repay the Indebtedness (an “**Acceptable Transaction**”).

Baron Affidavit at paras 58-60, Application Record, Tab 2.

37. As at June 4, 2021, more than 12 months after the commencement of the initial Forbearance Period, the Legal Owner still had not received a binding commitment in respect of an Acceptable Transaction and requested a final extension of the Forbearance Period. On June 4, 2021, the Applicants and the Legal Owner, among others, entered into a final amended and restated forbearance agreement, pursuant to which: (i) the Forbearance Period was extended one final time to 5:00 p.m. on June 17, 2021 (the “**Final Forbearance Period**”), and (ii) the Legal Owner acknowledged that there would be no further extension of the Forbearance Period and upon expiry thereof, the Applicants would, among other things, make demands, accelerate the Indebtedness, and enforce their Security.

Baron Affidavit at para 61 and Exhibit “O”, Application Record, Tab 2.

38. The Final Forbearance Period expired without the Legal Owner having received a binding commitment in respect of an Acceptable Transaction (let alone having closed same). At this time, the Indebtedness has been accelerated and remains unpaid and, as noted above, many Events of Default have occurred and are continuing, including, without limitation, the Legal Owner’s failure to pay when due, a single Scheduled Loan Payment since March 2020 (a period of sixteen months).

Baron Affidavit at paras 62 and 65, Application Record, Tab 2.

39. As set out above, on June 18, 2021 and June 23, 2021, the Applicants delivered, through their counsel, a Demand Letter and Section 244 Notices to the Legal Owner, Original Beneficial Owners and Other Potential Parties of Interest.

Baron Affidavit at paras 63 and 64 and Exhibits “P” and “Q”, Application Record, Tab 2.

40. Further, as noted above, the notice periods in the Section 244 Notices have now expired.

Baron Affidavit at para 66, Application Record, Tab 2.

41. The Notice of Application in these proceedings was issued on July 12, 2021, and, also on July 12, 2021, an Order for Substituted Service was granted in respect of the Original Beneficial Owners and Other Potential Parties of Interest. Those parties have been served with the Notice of Application and Application Record in accordance with such Order.

### **Receiver’s Borrowings**

42. The Applicants have agreed to terms with KPMG, in its capacity as the proposed Receiver, to provide the Receiver (if appointed) with up to \$500,000 in funding for an initial term of six months at an annual interest rate of 8.95%, pursuant to a budget set out in a term sheet (the “**Receiver Term Sheet**”). The purpose of the Receiver Term Sheet is to fund, among other things, operations and the professional costs of the receivership (including paying the Receiver’s fees and the fees of its counsel and independent counsel) for a period of time sufficient to permit the Receiver to devise, seek Court approval of and implement a robust sale process for the Real Properties which thoroughly canvasses the market.

Baron Affidavit at para 71 and Exhibit “R”, Application Record, Tab 2.

43. KPMG, in its capacity as proposed Receiver, has assessed the material terms of the Receiver Term Sheet and concluded that: (i) the proposed quantum of borrowings thereunder is reasonable, based on cash-flow projections for a period of six months, (ii) the economic terms thereof are reasonable in the circumstances, and (iii) the interest rate thereunder is reasonable in the circumstances and on the lower range of other similar facilities reviewed by KPMG.

The Pre-filing Report of KPMG, in its capacity as Proposed Receiver of Victoria Avenue North Holdings Inc. *et al*, dated July 26, 2021 at paras 32 to 33.

### **PART III - ISSUES**

44. The following issues are before the Court on this Application:

- (a) Is it just or convenient for the Court to appoint KPMG as Receiver?
- (b) Are the terms of the Proposed Appointment Order appropriate?

45. In the Applicants' respectful submission, the answer to both questions is affirmative.

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

#### **A. It is Both Just and Convenient to Appoint KPMG as Receiver**

46. It is both just and convenient for the Court to appoint KPMG as Receiver, including over all right, title and interest of the Beneficial Owners in and to the Legal Owner's Property, because the applicable statutory tests are met and the facts give rise to circumstances where the Court ought to exercise its discretion.

##### *(i) The Test for the Appointment of a Receiver*

47. The Applicants seek the appointment of the Receiver pursuant to subsection 243(1) of the BIA and section 101 of the CJA. Subsection 243(1) of the BIA is clear that where it is "just or convenient" to do so, the Court may appoint a receiver upon the application of a secured creditor. Similarly, the CJA enables the Court to appoint a receiver where such appointment is "just or convenient", whether or not the applicant is a secured creditor.

BIA, s. 243(1) and CJA, s. 101, Schedule "C" to this Factum.

48. In *Bank of Nova Scotia v. Freure Village of Clair Creek*, Blair J. (as he then was) described the basic principles governing the judicial appointment of a receiver as follows:

The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so [citation omitted]. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular, the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered, but so, in such circumstances, is the question of whether or



not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently [citations omitted]. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed [citation omitted].

*Bank of Nova Scotia v. Freure Village of Clair Creek*, 1996 CarswellOnt 2328 (Ct J (Gen Div - Commercial List)) [*“Freure Village”*] at para 11, Book of Authorities of the Applicants (*“BOA”*), Tab A; *1529599 Ontario Ltd v. Dalcors Inc.*, 2012 ONSC 5707, 2012 CarswellOnt 12474 (Commercial List) [*“Dalcors”*] at para 40, BOA, Tab B.

49. In determining whether it is “just or convenient” to appoint a receiver on an application by a secured creditor pursuant to section 243(1) of the BIA or section 101 of the CJA, the Court should have regard to all the circumstances of the case and, in particular:

- (a) the nature of the property over which the receiver is to be appointed;
- (b) the rights and interests of all parties in relation to the property over which the receiver is to be appointed;
- (c) whether the secured creditor has a right under its security to appoint a receiver privately; and
- (d) whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently.

*Freure Village* at para 10; *Callidus Capital Corp. v Carcap Inc.*, 2012 ONSC 163, at para 41, BOA, Tab C; *Dalcors* at para 41.

50. Where the security agreement between a borrower and a secured creditor grants the secured creditor the right to appoint a receiver, the burden of proof on the secured creditor is relaxed, as the Court is simply giving effect to a term of the contractual relationship agreed to by both parties. The fact that a security agreement acknowledges the right of the creditor to make an application for a receiver, is strong support for the imposition of a receiver.

*Textron Financial Canada Ltd v Chetwynd Motels Ltd.*, 2010 BCSC 477 at paras 60 and 75, BOA, Tab D; *Maple Trade Finance Inc v CY Oriental Holdings Ltd.*, 2009 BCSC 1527, at para 26, BOA, Tab E.

*(ii) Appointment of Receiver over the Interests of the Beneficial Owners is Just and Appropriate*

(a) Valid and Enforceable Pledge of Beneficial Ownership Interests

51. In order to properly and efficiently administer the Property in the proposed receivership proceedings, it is necessary for the Receiver to be appointed over not only the Legal Owner's interests, but also the Beneficial Owners' interests in the Real Properties. The Applicants have a first ranking charge over the Beneficial Owners' interests in the Real Properties, including the real property leases related thereto and any rent payments generated thereby, and it is accordingly appropriate for the Proposed Appointment Order to apply to those Beneficial Owners' interests.

52. The PPSA does not apply to the Applicants' security interest in the Real Properties, including the leases related thereto, because it is explicitly excluded by Section 4.1(e) of the PPSA:

4(1) Except as otherwise provided under this Act, the Act does not apply... (e) to the creation or assignment of an interest in real property, including a mortgage, charge or lease of real property, other than... (ii) an assignment of a right to payment under a mortgage, charge or lease where the assignment does not convey or transfer the assignor's interest in the real property.

53. The Applicants' security interest in the leases under the Real Properties, contained in the Mortgage and General Assignment of Rents and Leases and acknowledged in the Nominee Acknowledgement, explicitly does include a transfer, assignment, setting over, charge and granting of a security interest to and in favour of the Applicants in and to all of the Original Beneficial Owners' right, title and interest in the Legal Owner's Property subject to the Mortgage and other Loan and Security Documents, together with all proceeds thereof. Accordingly, the PPSA does not apply to the Applicants' interest, and no PPSA financing statements have been registered.

Baron Affidavit at paras 35 and 38 and Exhibits "C", "F" and "K", Application Record, Tab 2.

54. 100% of beneficial ownership interests as at the date of the Loan were pledged to the Applicants pursuant to the Nominee Acknowledgement, in which the Legal Owner and each of the Original Beneficial Owners acknowledged, confirmed and agreed that, at the time the Loan was advanced, the only beneficial owners of the Real Properties were the Original Beneficial Owners.

Baron Affidavit at para 22 and Exhibit "F", Application Record, Tab 2.

55. Any other party who may have acquired a beneficial ownership interest in the Real Properties from any Original Beneficial Owner has done so subject to the security interests of the Applicants, including their first ranking, valid and enforceable Mortgage and General Assignment of Rents and Leases, both registered against title to the Real Properties.

56. Accordingly, all of the beneficial ownership interests in the Real Property, whether belonging to the Original Beneficial Owners or any subsequent Beneficial Owner, have been pledged to the Applicants.

(b) Priority of Interest in Leases

57. The PPSA is explicit that any personal property secured creditor that may have an interest in the leases under the Real Properties, but not the Real Properties themselves (i.e., an interest subject to the PPSA), is *subordinate* to the interest of the Applicants, because the Applicants have registered their interest on title. The PPSA defers to registrations in the land registry office to establish the priority of security interests in rents arising from real property. Section 36(1) of the PPSA provides:

A security interest in a right to payment under a lease of real property, to which this Act applies, is subordinate to the interest of any person who acquires for value the lessor's interest in the lease or in the real property thereby demised if the interest, or notice thereof, of the person is registered in the proper land registry office before the interest, or notice thereof, of the secured party is registered in the proper land registry office.

In the event of a dispute as to priorities to rents between one creditor asserting a claim to rents under a registered real property charge of assignment (i.e., a claim under a registered mortgage or general assignment of rents that includes an assignment of leases) and another creditor asserting a claim to rents under a pledge of receivables, section 36(1) provides that the creditor's interest in the leases, notice of which is registered in the proper land registry office, will prevail over the other creditor's claim that is registered under the PPSA, unless the PPSA secured party registers a notice of security interest in the proper land registry office before the real property interest with a competing interest in such leases or rents has been registered by the other creditor in such land registry office.

PPSA, s. 36(1), Schedule "C" to this factum.

58. There are no registrations against title to the Real Properties by secured creditors of any Beneficial Owners (let alone any registrations that are prior in time to those made by the Applicants). Accordingly, as a result of the first in time registration of the Mortgage and the General Assignment of Rents and Leases and by operation of sections 4(1)(e)(ii) and 36(1) of the PPSA, the interests of all Beneficial Owners as well as their respective secured creditors (if any) in the Real Properties and related real property leases and rents derived therefrom, are subject to and rank below the Applicants' security interests, irrespective of whether or not the Applicants have any PPSA registrations against the Beneficial Owners.

Baron Affidavit at Exhibit "C", Application Record, Tab 2.

*(iii) The Test for the Appointment of a Receiver is Met*

59. In the present case, having regard to all the circumstances, it is both just and convenient for this Court to appoint the Receiver, for the following reasons:

- (a) Events of Default have occurred and are continuing, and the Mortgage and the GSA provide that, on the occurrence of an Event of Default, the Applicants may appoint a receiver;
- (b) the Indebtedness of the Legal Owner currently owing to the Applicants is in excess of \$22,500,000;
- (c) the Original Beneficial Owners have all agreed to be liable for the obligations of the Legal Owner under the Loan and Security Documents and have granted security to the Applicants;
- (d) the proposed scope of the Receiver's appointment with respect to the Beneficial Owners is minimally invasive, and limited to only their right, title and interest in the Real Properties;
- (e) the Receiver's appointment with respect to the Beneficial Owners is necessary in order to put the Receiver in a position to convey all right, title and interest in the Real Properties to a potential purchaser;

- (f) the Applicants have issued a Demand Letter and Section 244 Notices to the Legal Owner, Original Beneficial Owners and Other Potential Parties of Interest and the notice periods thereunder have long expired, without the Indebtedness having been repaid;
- (g) there are Unpermitted Property Charges and Unpermitted PPSA Registrations against the Real Properties and the Legal Owner and the appointment of the Receiver will permit the nature, validity and priority of such claims to be identified and, if necessary, for such claims to be addressed in a structured and organized manner, under Court supervision;
- (h) Gross Capital, the Legal Owner's parent company, has made a voluntary assignment into bankruptcy and the Legal Owner is suffering from a management void; and
- (i) the appointment of the Receiver will bring stability and management and facilitate a transparent, orderly, fair, and robust marketing and sale process for the Real Properties.

**B. The Terms of the Proposed Appointment Order Sought are Appropriate**

*(i) Terms of Proposed Appointment Order*

60. The Proposed Appointment Order is based in large part on the Commercial List model order (the “**Model Order**”) and the variations to the Model Order are made to address the commercial realities of the Legal Owner's business and the present circumstances.

61. In the Applicants' respectful submission, these provisions are each reasonable and necessary to maximize the efficiency of the Receiver's mandate.

*(ii) Receiver's Borrowings Charge and Priority*

62. Pursuant to subsection 243(6) of the BIA, if the Receiver is appointed under subsection 243(1), the Court may make an order respecting the payment of fees and disbursements of the Receiver, including one that gives the Receiver a charge, ranking ahead of any secured creditors (the “**Secured Creditors**”), over all or part of the debtors' property, but only if this Court is satisfied that the Secured Creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

63. In addition, section 101(2) of the CJA provides that any order under section 101(1) of the CJA may include such terms as are considered just.

64. The Proposed Appointment Order provides for a “Receiver’s Charge” on the Property (as defined therein) to secure the reasonable fees and disbursements of the Receiver and its counsel, in each case at their standard rates, and a “Receiver’s Borrowings Charge” (together with the Receiver’s Charge, the “**Charges**”) to secure monies borrowed by the Receiver from time to time pursuant to the Receiver Term Sheet for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by the Proposed Appointment Order.

65. Given the limited cash resources and limited positive cashflow of the Legal Owner, it is expected that the Receiver (if appointed) will require additional funding during the course of the receivership proceedings. As set out above, it is contemplated that the costs of the receivership will be funded through borrowings by the Receiver from the Applicants pursuant to the Receiver Term Sheet.

66. The Charges will rank ahead of the Applicants’ existing security and the security of any other Secured Creditors, all of whom have been given notice of this Application, namely the parties who have registered Unpermitted Property Charges and the Unpermitted PPSA Registrations.

67. The Applicants accordingly submit that the granting of the Charges is both appropriate in the circumstances and within the Court’s statutory jurisdiction. As set out above, in its Pre-filing Report, KPMG as proposed Receiver has concluded that the proposed quantum of the Receiver’s Borrowings Charge is reasonable.

*(iii) Deemed Termination of any Employees of the Legal Owner*

68. The Proposed Appointment Order provides, at paragraph 13, that any employees of the Legal Owner shall be deemed to have been terminated by the Legal Owner immediately prior to the issuance of the Proposed Appointment Order. Although the Applicants understand that the Legal Owner does not have any employees, this provision in the Proposed Appointment Order is intended to ensure that the Receiver (if appointed) assumes no obligations for any potential employees.

69. Courts have previously granted this relief in Orders appointing a receiver.

[American General Life Insurance Company et al., v Southmount Healthcare Centre Inc. et al.](#) (CV-21-00664273-00CL), Order Appointing Receiver dated June 29, 2021 [“**Southmount Receivership Order**”] at para 13, BOA, Tab F; [Michael Richard Weir v Mike Weir Wine Inc.](#) (CV-19-00612095-0000), Order Appointing Receiver dated January 30, 2019 at para 14, BOA, Tab G; [OSC v Buckingham Securities Corporation](#), (Court File No. 01-CL-4192), Appointment Order dated July 26, 2001 at para 12, BOA, Tab H; [Corner Flag LLC v Erwin Hymer Group North America, Inc.](#) (CV-19-614593-00CL), Appointment Order dated February 15, 2019 at para 14, BOA, Tab I.

(iv) *Ability of Receiver to Assign Legal Owner into Bankruptcy*

70. The Proposed Appointment Order also provides for the ability of the Receiver to assign the Legal Owner into bankruptcy. This relief is being requested at this time in the interest of efficiency and judicial economy and preserving the need for a further attendance before this Court, should the Receiver deem it appropriate to assign the Legal Owner into bankruptcy.

71. Courts have previously granted this relief in Orders appointing a receiver.

Southmount Receivership Order at para 3(1), BOA, Tab F; [Royal Bank of Canada v Mundo Media Ltd et al](#) (CV-19-00617777-00CL), Order Appointing Receiver dated April 9, 2019 at para 3, BOA, Tab J; [1056420 Alberta Ltd v Heavy North Construction Ltd](#) (1901-05010), Receivership Order dated April 16, 2019 at para 3, BOA, Tab K; [Bank of Montreal v Best Made Toys International, ULC](#) (CV-19-00618506-00CL), Order Appointing Receiver dated April 25, 2019 at para 3, BOA, Tab L.

(v) *Receiver’s Counsel*

72. The Proposed Appointment Order contemplates that counsel to the Applicants may act for the Receiver in these proceedings, with the Receiver being given the power to retain independent counsel when appropriate. Courts have previously granted this relief.

Southmount Receivership Order at para 3(d), BOA, Tab F; [2478888 Ontario Inc v 3070 Ellesmere Developments Inc](#) (CV-19-00627187-00CL), Order Appointing Receiver dated September 13, 2019 at para 26, BOA, Tab M; [Auxly Cannabis Group Inc v 2368523 Ontario Limited D/B/A Curative Cannabis](#) (CV-19-627308-00CL), Order Appointing Receiver dated September 19, 2019 at para 26, BOA, Tab N; [Canadian Imperial Bank of Commerce v Urbancorp \(Leslieville\) Developments Inc et al](#) (CV-16-11409-00CL), Order Appointing Receiver dated May 31, 2016, at para 5, BOA, Tab O.

73. As the senior creditor with a significant amount of secured Indebtedness, the interests and objectives of the Applicants, Receiver and other stakeholders of the Legal Owner are generally aligned to maximize recoveries.

74. The ability of the Receiver to retain counsel for the Applicants to act for it will advance such objectives by allowing for more efficient representation of the Receiver by counsel that is intimately familiar with the Legal Owner and the Real Properties. To the extent any issues arise in these proceedings where the Receiver determines that it would be appropriate to engage independent counsel, it is empowered by the Proposed Appointment Order to do so.

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

75. For the reasons stated herein, it is both just and convenient to appoint KPMG as Receiver over the Property.

76. Accordingly, it is respectfully submitted that the relief requested by the Applicants ought to be granted, and KPMG ought to be appointed as Receiver over the Property, on the terms of the Proposed Appointment Order.

#### **PART VI - RELIEF REQUESTED**

77. The Applicants seek an order substantially in the form attached at Tab 5 to their Application Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 28th day of July, 2021.

DocuSigned by:  
*Aryo Shalviri*  
0C02B5CE051A4EF...

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Pamela L.J. Huff/Aryo Shalviri/Jules Monteyne  
Lawyers for the Applicants



**SCHEDULE "A"**

<b>Individuals</b>
Allan Gross
Errol Yim and Andrea Yim, jointly
Ava Gross
Karen Nakagawa and Calvin Nakagawa, jointly
Carol Jaxon
Carole Kai Onouye
Diane Curtis
Dwight Otani and Theresa Otani, jointly
Edward Bugarin
Ellen Fleishman
Gemie Arakawa
George Tamashiro
Guy Pace and Caroline Berdusco, jointly
Heidi Berger
Henry Ko
Hongwei Su
James Brand
Janis L. Lai Trustee
Jean Morel
Jian Zhang
Johann Strasser
John Dattomo and Daniela Dattomo
Kelly Ann Hiraki and Jonathan Wah Hee Hee, jointly
Randall Y.C. Ho
Robert Atkinson
Roberta Sunahara and Paul Sunahara, jointly
Seymour Kazimirski
Stanley Salcedo

<b>Trusts</b>
Charlyn Shizue Honda Masini Trust, by and through its trustee(s)
Fleishman Family Trust, by and through its trustee(s)
J. Zachery Jones Trust, by and through its trustee(s)
Jane Shigeta Revocable Living Trust, by and through its trustee(s)
Jasen Takei Revocable Living Trust, by and through its trustee(s)
Melvin Shigeta Revocable Living Trust, by and through its trustee(s)
Ruth Hisaye Honda Trust, by and through its trustee(s)
S. Bucky Revocable Living Trust & Bruce E. Bucky Revocable Living Trust, by and through its trustee(s)
Wallace K. Tsuha Trust, by and through its trustee(s)
<b>Corporations / Partnerships</b>
1236068 Ontario Limited
1649750 Ontario Inc.
1818019 Ontario Limited
Citydrill Inc.
Gross Capital Inc.
Dirk and Dale IRA LLC
Gross Medical Opportunities Fund LP
Hybrid Activities Inc.
Mark Craig Gross Holdings Inc.
Randy 88, LLC
Rastogi Medicine Professional Corporation
RMK IRA LLC

**SCHEDULE “B”****LIST OF AUTHORITIES**

	<b><u>Case</u></b>	<b><u>Tab</u></b>
1.	<a href="#"><i>Bank of Nova Scotia v Freure Village of Clair Creek</i></a> , 1996 CarswellOnt 2328 (Ct J (Gen Div - Commercial List))	A
2.	<a href="#"><i>1529599 Ontario Ltd v Dalcor Inc</i></a> , 2012 ONSC 5707, 2012 CarswellOnt 12474 (Commercial List)	B
3.	<a href="#"><i>Callidus Capital Corp. v Carcap Inc</i></a> , 2012 ONSC 163	C
4.	<a href="#"><i>Textron Financial Canada Ltd v Chetwynd Motels Ltd</i></a> , 2010 BCSC 477	D
5.	<a href="#"><i>Maple Trade Finance Inc v CY Oriental Holdings Ltd</i></a> , 2009 BCSC 1527	E
6.	<a href="#"><i>American General Life Insurance Company et al v Southmount Healthcare Centre Inc et al</i></a> (CV-21-00664273-00CL), Order Appointing Receiver dated June 29, 2021	F
7.	<a href="#"><i>Michael Richard Weir v Mike Weir Wine Inc</i></a> (CV-19-00612095-0000), Order Appointing Receiver dated January 30, 2019	G
8.	<a href="#"><i>OSC v Buckingham Securities Corporation</i></a> (Court File No. 01-CL-4192), Appointment Order dated July 26, 2001	H
9.	<a href="#"><i>Corner Flag LLC v Erwin Hymer Group North America, Inc</i></a> (CV-19-614593-00CL), Appointment Order dated February 15, 2019	I
10.	<a href="#"><i>Royal Bank of Canada v Mundo Media Ltd et al</i></a> (CV-19-00617777-00CL), Order Appointing Receiver dated April 9, 2019	J
11.	<a href="#"><i>1056420 Alberta Ltd v Heavy North Construction Ltd</i></a> (1901-05010), Receivership Order dated April 16, 2019	K
12.	<a href="#"><i>Bank of Montreal v Best Made Toys International, ULC</i></a> (CV-19-00618506-00CL), Order Appointing Receiver dated April 25, 2019	L
13.	<a href="#"><i>2478888 Ontario Inc v 3070 Ellesmere Developments Inc</i></a> (CV-19-00627187-00CL), Order Appointing Receiver dated September 13, 2019	M
14.	<i>Auxly Cannabis Group Inc v 2368523 Ontario Limited D/B/A Curative Cannabis</i> (CV-19-627308-00CL), Order Appointing Receiver dated September 19, 2019	N
15.	<a href="#"><i>Canadian Imperial Bank of Commerce v Urbancorp (Leslieville) Developments Inc et al</i></a> (CV-16-11409-00CL), Order Appointing Receiver dated May 31, 2016	O

## SCHEDULE “C”

### RELEVANT STATUTES

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

##### *Court may appoint receiver*

(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.

##### *Restriction on appointment of receiver*

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

##### *Definition of “receiver”*

(2) Subject to subsections (3) and (4), in this Part, “receiver” means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — 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 — under
  - (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
  - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

*Definition of “receiver” — subsection 248(2)*

(3) For the purposes of subsection 248(2), the definition “receiver” in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

*Trustee to be appointed*

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

*Place of filing*

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

*Orders respecting fees and disbursements*

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver’s claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

*Meaning of “disbursements”*

(7) In subsection (6), “disbursements” does not include payments made in the operation of a business of the insolvent person or bankrupt.

**Courts of Justice Act, R.S.O. 1990, c. C.43: Section 101**

*Injunctions and receivers*

(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

*Terms*

(2) An order under subsection (1) may include such terms as are considered just.

**Personal Property Security Act, R.S.O. 1990, c. P.10: Sections 4(1) and 36(1)**

*Non-application of Act*

4 (1) Except as otherwise provided under this Act, this Act does not apply,

- (a) to a lien given by statute or rule of law, except as provided in subclause 20 (1) (a) (i) or section 31;
- (b) to a deemed trust arising under any Act, except as provided in subsection 30 (7);
- (c) to a transfer of an interest or claim in or under any policy of insurance or contract of annuity, other than a contract of annuity held by a securities intermediary for another person in a securities account;
- (d) to a transaction under the Pawnbrokers Act;
- (e) to the creation or assignment of an interest in real property, including a mortgage, charge or lease of real property, other than,
  - (i) an interest in a fixture, or
  - (ii) an assignment of a right to payment under a mortgage, charge or lease where the assignment does not convey or transfer the assignor's interest in the real property;
- (f) to an assignment for the general benefit of creditors to which the Assignments and Preferences Act applies;
- (g) to a sale of accounts or chattel paper as part of a sale of the business out of which they arose unless the vendor remains in apparent control of the business after the sale;
- (h) to an assignment of accounts made solely to facilitate the collection of accounts for the assignor; or
  - (i) to an assignment of an unearned right to payment to an assignee who is to perform the assignor's obligations under the contract. R.S.O. 1990, c. P.10, s. 4 (1); 2006, c. 8, s. 124; 2017, c. 2, Sched. 3, 8 (1).

*Real Property Payments – Rents*

36 (1) A security interest in a right to payment under a lease of real property, to which this Act applies, is subordinate to the interest of a person who acquires for value the lessor's interest in the lease or in the real property thereby demised if the interest, or notice thereof, of the person is registered in the proper land registry office before the interest, or notice thereof, of the secured party is registered in the proper land registry office.

Court File No.: CV-21-00665375-00CL

AMERICAN GENERAL LIFE INSURANCE COMPANY, *et al.*  
Applicants

- and - VICTORIA AVENUE NORTH HOLDINGS INC., *et al.*  
Respondents

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

Proceeding Commenced at Toronto

**FACTUM OF THE APPLICANTS  
(Appointing Receiver)  
Returnable August 3, 2021**

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