

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

BETWEEN:

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"¹

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
(Distribution Motion)
returnable May 30, 2023**

May 25, 2023

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TO: **THE SERVICE LIST**

¹ See Schedule "A" to the Appointment Order of Mr. Justice Koehnen granted August 3, 2021 ("**Appointment Order**")

PART I - INTRODUCTION

1. This factum is filed in support of a motion by KPMG Inc., as receiver and manager without security (the “**Receiver**”) of, among other things, all of the assets, undertakings and 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 all right, title and interest of any beneficial owners in and to the Legal Owner’s Property and all proceeds thereof (together with the Legal Owner’s Property, the “**Property**”), seeking orders, among other things:
 - (a) approving the Asset Purchase Agreement dated April 28, 2023 between the Receiver and Bou-Zaid General Contracting Inc. (“**BZGC Inc.**” with BZGC Inc. or any designated assignee thereof being the “**Purchaser**”) (the “**APA**”) and the proposed transaction contemplated thereby (the “**Proposed Transaction**”) and authorizing and directing the Receiver to take such steps as necessary to complete the Proposed Transaction;
 - (b) vesting title in and to the applicable Real Property Assets (as defined below) in the Purchaser on closing of the Proposed Transaction, free and clear of all liens, claims, and encumbrances, except certain permitted encumbrances;
 - (c) authorizing and directing the Receiver to pay the applicable broker commissions from the net proceeds of the Proposed Transaction upon closing of the Proposed Transaction;
 - (d) authorizing the Receiver to make further distributions to the Applicants from the Net Sale Proceeds (as defined below) (the “**Proposed Distribution**”);

- (e) approving the activities of the Receiver as set out in the Sixth Report of the Receiver, dated May 18, 2023 (the “**Sixth Report**”);
 - (f) releasing the Receiver and its counsel; and
 - (g) sealing and unsealing certain confidential appendices.
2. This Factum will address the request for approval of the Proposed Distribution (referred to as the “**Distribution Motion**”). The other relief sought by the Receiver will be addressed in a separate factum filed by the Receiver’s counsel, Blake, Cassels & Graydon LLP.

PART II - FACTS

Background

3. The background facts in the Receiver’s motion are set out in the Sixth Report.
4. Pursuant to an Order dated August 3, 2021 (the “**Appointment Order**”), KPMG Inc. was appointed as Receiver of the Property, which primarily consisted of interests in two medical office buildings, located at 304 Victoria Avenue North in Hamilton, Ontario and 414 Victoria Avenue North in Hamilton, Ontario and their related real property leases (the “**304 Victoria Real Property Assets**” and the “**414 Victoria Real Property Assets**”, respectively, and collectively, the “**Real Property Assets**”).²

² Sixth Report at paras 1 and 2.

5. The Distribution Motion is proceeding together with the Receiver's motion for, among other things, Court approval of the Proposed Transaction for the 414 Victoria Real Property Assets.
6. The Receiver seeks to distribute to the Applicants, in partial satisfaction of their secured claims, the anticipated net proceeds of the sale of the 414 Victoria Real Property Assets and other available cash on hand (collectively, the "**Net Sale Proceeds**"), excluding a holdback determined to be required by the Receiver for: (i) completion of its mandate; (ii) ongoing operating expenses; and (iii) the bankruptcy of the Legal Owner.³
7. Norton Rose Fulbright Canada LLP ("**NRFC**"), independent counsel to the Receiver has provided an independent legal opinion to the Receiver with respect to the validity and enforceability of the security granted by the Legal Owner in favour of the Applicants under the laws of the Province of Ontario. Subject to customary qualifications, assumptions and limitations included therein, NRFC is of the opinion that the Applicants hold a valid charge and security interest on the real property assets and leases and other personal property included in the Legal Owner's Property. NRFC has noted that first in time mortgage registrations have been made by the Applicants against the Real Property Assets, and in addition that first in time registrations have been made under the *Personal Property Security Act* (Ontario) against the Legal Owner.⁴
8. The Net Sale Proceeds are not sufficient to satisfy the secured obligations owing to the applicable Applicants.⁵

³ Sixth Report at paras 46 and 47.

⁴ Sixth Report at para. 38.

⁵ Sixth Report at para. 40.

9. Upon completion of the Proposed Transaction, and prior to the Proposed Distribution of any of the Net Sale Proceeds to the Applicants, the Receiver intends to assign the Legal Owner into bankruptcy.⁶

PART III - ISSUES

10. The issue to be addressed in the Distribution Motion is whether the Court should approve the Proposed Distribution to the Applicants in partial satisfaction of their secured claims.

PART IV - LAW AND ANALYSIS

A. Repayments To The Applicants

11. Ontario Courts have held that it is appropriate to authorize a receiver to make distributions of sale proceeds concurrently with the approval of such sale in order to “maximize efficiency and avoid the need for an additional motion to seek approval for a distribution.”⁷
12. The outstanding principal, accrued interest and other costs owing to the Applicants, as at April 30, 2023 was approximately \$18.7 million.⁸
13. The Net Sale Proceeds will not be sufficient to repay the remaining principal and interest owing to the Applicants.⁹
14. The Applicants hold valid and enforceable security interests against the 414 Victoria Real Property Assets and the 304 Victoria Real Property Assets, the leases entered into in connection with those properties, and personal property of the Legal Owners. The

⁶ Sixth Report at para. 43.

⁷ [*GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.* 2014 ONSC 1173 at para 53.](#)

⁸ Sixth Report at para. 39.

⁹ Sixth Report at para. 40.

Applicants hold first in time real property registrations and registrations under the *Personal Property Security Act* (Ontario) against the Real Property Assets and the Legal Owner of those assets.¹⁰

15. The first in time registrations of the Applicants will in general result in a first priority ranking of their security interests. Subject to limited exceptions, under the *Personal Property Security Act* (Ontario) priorities of security interests in personal property perfected by registration are determined based on the order of registration.¹¹ Similarly, under the *Land Titles Act* (Ontario), priorities of security interests in real property are determined by the order of registration.¹²
16. Notwithstanding the validity and enforceability of the security interests of the Applicants and their first in time registrations, there are two potential issues that could affect priorities that should be evaluated.
17. First, the Legal Owner appears to have outstanding HST arrears related to the period prior to the commencement of these proceedings.¹³ In the ordinary course outside of a bankruptcy, unremitted HST may result in a deemed trust claim by the Crown under Section 222 of the *Excise Tax Act* (Canada). Section 222 of the *Excise Tax Act* (Canada) reads in part as follows:

222 (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and

¹⁰ Sixth Report at para. 38.

¹¹ *Personal Property Security Act*, R.S.O. 1990, c. P.10 at s. 30.

¹² *Land Titles Act*, R.S.O. 1990 c. L.5 at s. 78(5).

¹³ Sixth Report at para. 42.

apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

18. Such deemed trusts (to the extent they exist) would not survive in bankruptcies and would be resolved upon the proposed bankruptcy of the Legal Owner. The Ontario Court of Appeal has held that a bankruptcy order may be sought with the express purpose of affecting such priorities.¹⁴

19. Even prior to consideration of the effect of the proposed bankruptcy upon any potential deemed trust claim for HST arrears, there is a specific exception to the deemed trust provisions of the *Excise Tax Act* (Canada) that is applicable in this case. Section 222(4) of the *Excise Tax Act* (Canada) provides that for the purposes of these deemed trust provisions, a security interest does not include certain prescribed security interests:

(4) For the purposes of subsections (1) and (3), a security interest does not include a prescribed security interest.

20. A “prescribed security interest” is defined in Section 2(1) of the *Security Interest (GST/HST) Regulations* as follows¹⁵:

For the purpose of subsection 222(4) of the Act, a prescribed security interest, in relation to an amount deemed under subsection 222(1) of the Act to be held in trust by a person, is

¹⁴ [Grant Forest Products Inc. v. The Toronto-Dominion Bank, 2015 ONCA 570 at para. 118.](#)

¹⁵ SOR/2011-55.

that part of a mortgage or hypothec securing the performance of an obligation of the person that encumbers land or a building, but only if the mortgage or hypothec is registered pursuant to the appropriate land registration system before the time the amount is deemed under subsection 222(1) of the Act to be held in trust by the person.

21. Therefore, the deemed trust under Section 222(1) of the *Excise Tax Act* (Canada) that could otherwise be applicable outside of a bankruptcy in this case may not apply to the proceeds of sale of the Transaction Properties to the extent that: (i) such proceeds are allocated to the lands and buildings secured by the Applicants' mortgages, which all proceeds of sale are in this case; and (ii) the Applicants' mortgages were registered prior to the non-remittance of HST that would give rise to such deemed trust.
22. Second, the Legal Owner is the subject of registrations under the *Personal Property Security Act* (Ontario) against certain equipment and fixtures that may evidence purchase money security interests, having first ranking priority over the collateral that was financed. However, in all cases, any remaining obligations underlying such purchase money security interests are contemplated to be assumed by the Purchaser.
23. As a result of the foregoing, there are no known priority claims to the Net Sale Proceeds ranking ahead of the Applicants.

PART V - ORDER REQUESTED

24. The Receiver respectfully requests that the Court grant the relief requested by the Receiver in the Distribution Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of May, 2023.



NORTON ROSE FULBRIGHT CANADA LLP
Independent Counsel to the Receiver, KPMG Inc.

**SCHEDULE “A”
LIST OF AUTHORITIES**

Case Law

1. *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.* [2014 ONSC 1173](#)

Unreported Orders

2. *American General Life Insurance Company, et al. and Victoria Avenue North Holdings Inc., et al.*, Order (Appointing Receiver), dated August 3, 2021, (Court File No. CV-21-00665375-00CL).
3. *American General Life Insurance Company, et al. and Victoria Avenue North Holdings Inc., et al.*, Order (Approval of Broker Engagement, Sale Process and Ancillary Matters), dated October 29, 2021, (Court File No. CV-21-00665375-00CL).

**SCHEDULE “B”
RELEVANT STATUTES**

PERSONAL PROPERTY SECURITY ACT
R.S.O. 1990, c. P.10

PART III – PERFECTION AND PRIORITIES

Priorities

30(1) If no other provision of this Act is applicable, the following priority rules apply to security interests in the same collateral:

1. Where priority is to be determined between security interests perfected by registration, priority shall be determined by the order of registration regardless of the order of perfection.
2. Where priority is to be determined between a security interest perfected by registration and a security interest perfected otherwise than by registration,
 - i. the security interest perfected by registration has priority over the other security interest if the registration occurred before the perfection of the other security interest, and
 - ii. the security interest perfected otherwise than by registration has priority over the other security interest, if the security interest perfected otherwise than by registration was perfected before the registration of a financing statement related to the other security interest.
3. Where priority is to be determined between security interests perfected otherwise than by registration, priority shall be determined by the order of perfection.
- 3.1 Where priority is to be determined between perfected security interests in a prescribed class of collateral, priority shall be determined in accordance with the regulations.
4. Where priority is to be determined between unperfected security interests, priority shall be determined by the order of attachment.

Idem

(2) For the purpose of subsection (1), a continuously perfected security interest shall be treated at all times as if perfected by registration, if it was originally so perfected, and it shall be treated at all times as if perfected otherwise than by registration if it was originally perfected otherwise than by registration.

Future advances

(3) Subject to subsection (4), where future advances are made while a security interest is perfected, the security interest has the same priority with respect to each future advance as it has with respect to the first advance.

Exception

(4) A future advance under a perfected security interest is subordinate to the rights of persons mentioned in subclauses 20 (1) (a) (ii) and (iii) if the advance was made after the secured party received written notification of the interest of any such person unless,

- (a) the secured party makes the advance for the purpose of paying reasonable expenses, including the cost of insurance and payment of taxes or other charges incurred in obtaining and maintaining possession of the collateral and its preservation; or
- (b) the secured party is bound to make the advance, whether or not a subsequent event of default or other event not within the secured party's control has relieved or may relieve the secured party from the obligation.

Proceeds

(5) For the purpose of subsection (1), the date for registration or perfection as to collateral is also the date for registration or perfection as to proceeds.

Reperfected security interests

(6) Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period.

Same, extended time

(6.1) Despite subsection (6), where a security interest that is perfected by registration becomes unperfected between February 26, 1996 and April 3, 1996, the security interest shall be deemed to have been continuously perfected from the time of first perfection if the security interest is again perfected by registration by April 12, 1996.

Deemed trusts

(7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act, 2000*, the *Pension Benefits Act* or the *Pooled Registered Pension Plans Act, 2015*. R.S.O. 1990, c. P.10, s. 30 (7); 2015, c. 9, s. 32.

Exception

(8) Subsection (7) does not apply to a perfected purchase-money security interest in inventory or its proceeds.

LAND TITLES ACT
R.S.O. 1990, c. L.5

PART VII – SUBSEQUENT REGISTRATIONS

General

Registration

Priorities

78(5) Subject to any entry to the contrary in the register and subject to this Act, instruments registered in respect of or affecting the same estate or interest in the same parcel of registered land as between themselves rank according to the order in which they are entered in the register and not according to the order in which they were created, and, despite any express, implied or constructive notice, are entitled to priority according to the time of registration.

EXCISE TAX ACT
R.S.C. 1985, c. E-15

PART IX – GOODS AND SERVICES TAX

Division V – Collection and Remittance of Division II Tax

Subdivision A – Collection

Trust for amounts collected

222 (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

Amounts collected before bankruptcy

(1.1) Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the [*Bankruptcy and Insolvency Act*](#)), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

Withdrawal from trust

(2) A person who holds tax or amounts in trust by reason of subsection (1) may withdraw from the aggregate of the moneys so held in trust

- (a) the amount of any input tax credit claimed by the person in a return under this Division filed by the person in respect of a reporting period of the person, and

- (b) any amount that may be deducted by the person in determining the net tax of the person for a reporting period of the person,

as and when the return under this Division for the reporting period in which the input tax credit is claimed or the deduction is made is filed with the Minister.

Extension of trust

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

- (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
- (b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Meaning of security interest

(4) For the purposes of subsections (1) and (3), a security interest does not include a prescribed security interest.

Security Interest (GST/HST) Regulations,

SOR/2011-55

Prescribed Security Interest

2 (1) For the purpose of subsection 222(4) of the Act, a prescribed security interest, in relation to an amount deemed under subsection 222(1) of the Act to be held in trust by a person, is that part of a mortgage or hypothec securing the performance of an obligation of the person that encumbers land or a building, but only if the mortgage or hypothec is registered pursuant to the appropriate land registration system before the time the amount is deemed under subsection 222(1) of the Act to be held in trust by the person.

(2) For the purpose of subsection (1), if, at a particular time, an amount deemed to be held in trust by the person referred to in that subsection is not remitted to the Receiver General or withdrawn in the manner and at the time provided under Part IX of the Act, the amount of the prescribed security interest referred to in that subsection may not exceed the amount determined by the following formula until such time as all

amounts deemed under subsection 222(1) of the Act to be held in trust by the person are withdrawn in accordance with subsection 222(2) of the Act or are remitted to the Receiver General:

A – B

where

A

is the amount of the obligation secured by the mortgage or hypothec that is outstanding at the particular time; and

B

is the total of

(a) all amounts, each of which is the value determined at the particular time, having regard to all the circumstances including the existence of any deemed trust for the benefit of Her Majesty pursuant to subsection 222(1) of the Act, of all the rights of the secured creditor securing the obligation, whether granted by the person or not, including guarantees or rights of set-off or of compensation but not including the mortgage or hypothec referred to in subsection (1), and

(b) all amounts applied after the particular time on account of the obligation.

(3) A prescribed security interest under subsection (1) includes the amount of any insurance or expropriation proceeds relating to land or a building that is the subject of a registered mortgage interest or registered hypothecary right, adjusted in accordance with subsection (2), but does not include a lien, a priority or any other security interest created by statute, an assignment or hypothec of rents or leases, or a mortgage interest or hypothecary right in any equipment or fixtures that a mortgagee, hypothecary creditor or any other person has the right absolutely or conditionally to remove or dispose of separately from the land or building.

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- and - VICTORIA AVENUE NORTH
HOLDINGS INC., ET AL.
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Court File No.: CV-21-00665375-00CL

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Proceeding commenced at TORONTO

FACTUM OF THE RECEIVER
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