

**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
(Repayment Motion)
returnable October 14, 2022**

October 11, 2022

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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:

(a) approving the Asset Purchase Agreement entered into between the Receiver and 1000301029 Ontario Limited (the “**Purchaser**”) dated September 1, 2022 (the “**APA**”) for a sale transaction involving the building located at 304 Victoria Avenue North, Hamilton (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, free and clear of all liens, claims, and encumbrances, except certain permitted encumbrances, upon the Receiver filing a certificate confirming among other things, completion of the Proposed Transaction;

(c) authorizing and directing the Receiver to pay the applicable broker commissions from the net proceeds of the Proposed Transaction (the “**Net Proceeds**”) upon closing of the Proposed Transaction;

- (d) approving the extension of the term of the Receiver’s term sheet dated as of July 9, 2021 (the “**Receiver Term Sheet**”) to December 31, 2022 (the “**Term Sheet Amendment**”);
 - (e) authorizing the Receiver repay the Receiver’s borrowings (including accrued interest thereon) pursuant to the Receiver Term Sheet from the Net Proceeds (the “**Proposed Repayment**”);
 - (f) approving the activities of the Receiver as set out in the Supplement to the Third Report of the Receiver, dated May 20, 2022 (the “**Supplemental Report**”) and the Fourth Report of the Receiver dated October 4, 2022 (the “**Fourth Report**”); and
 - (g) sealing the confidential appendices to the Fourth Report.
2. This Factum will address (i) the Proposed Repayment, and (ii) the Term Sheet Amendment, which are collectively referred to as the “**Repayment 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 Third Report of the Receiver, dated May 13, 2022, the Supplemental Report and the Fourth Report.
- 4. On August 3, 2021, KPMG Inc. was appointed as Receiver, pursuant to an order (the “**Appointment Order**”) of the Ontario Superior Court of Justice (Commercial List) (the

“**Court**”). The property over which the Receiver was appointed included the legal and beneficial ownership interests in the medical office building located at 304 Victoria Avenue North, Hamilton (the “**304 Victoria Building**”) (the 304 Victoria Building and associated lands, their related real property leases and the interests of the beneficial owners therein, the “**304 Victoria Real Property Assets**”).²

5. Pursuant to the terms of the Appointment Order, the Receiver was authorized to borrow up to \$500,000 from the Applicants pursuant to the Receiver Term Sheet, and the Applicants were granted a Receiver’s Borrowings Charge (as defined in the Appointment Order) as security for such borrowings, which charge has customary priority over other liens and encumbrances, as set out in the Appointment Order. The parties have agreed to extend the term of the Receiver Term Sheet most recently to December 31, 2022 (the “**Receiver Term Sheet Extension Agreements**”), subject to court approval.³
6. In the Receiver’s view, extending the term of the Receiver Term Sheet is appropriate in the circumstances, as it preserves liquidity and provides additional stability to the operations of these Proceedings and access to funding (if necessary) while the Receiver pursues the closing of the Proposed Transaction and continues to market the additional unsold building over which the Receiver was appointed, being a building located at 414 Victoria Avenue, Hamilton. Provided that the Proposed Transaction is approved by the Court and closes as

² Fourth Report of KPMG Inc., in its capacity as Receiver, dated October 4, 2022 (“**Fourth Report**”), paras 1-2, Motion Record of the Receiver dated October 4, 2022 (“**MR**”), Tab 2, p 16.

³ Fourth Report, paras 44, 46, MR, Tab 2, pp 29-30.

anticipated, the Receiver does not expect that it will be required to draw on the balance of the facility made available by the Receiver Term Sheet (as amended).⁴

7. The Receiver is also seeking the Court's approval to fully repay the indebtedness outstanding under the Receiver Term Sheet, as amended, following the closing of the Proposed Transaction, which closing is expected to occur before the December 31, 2022 expiry of the Receiver Term Sheet, as amended, using a portion of the anticipated Net Proceeds.⁵
8. The Repayment Motion is proceeding together with the Receiver's motion for Court approval of the proposed sale of the 304 Victoria Real Property Assets.

PART III - ISSUES

9. The issues to be addressed in the Repayment Motion are: (i) whether the Court should approve the Receiver's entry into the Receiver Term Sheet Extension Agreements; and (ii) whether the Court should approve the Proposed Repayment to the Applicants in satisfaction of the obligations under the Receiver Term Sheet.

PART IV - LAW AND ANALYSIS

A. Receiver Term Sheet Extension Agreements

10. The Appointment Order empowered the Receiver to borrow from the Applicants pursuant to the Receiver Term Sheet such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed \$500,000 (or

⁴ Fourth Report, para 47, MR, Tab 2, p 30.

⁵ Fourth Report, para 48, MR, Tab 2, p 30.

such greater amount as the Court may authorize). These funds were to be available for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by the Appointment Order.⁶

11. The Receiver Term Sheet provided that:

The Facility will be available to the Receiver for an initial six (6) month period ending February 3, 2022 (the “Initial Term”). Prior to the expiry of the Initial Term, the Lenders shall determine, at their sole discretion in consultation with the Receiver, the need to provide additional availability under the Facility for the purposes of continuing to pursue a Court-approved sale process for the Property (or any portion thereof) and/or consummating any successful bid(s) for the Property (or any portion thereof).

12. To date, the Receiver Term Sheet has been extended with the consent of the Applicants on multiple occasions, including with Court approval on October 29, 2021.⁷
13. The Receiver believes it is appropriate to seek the Court’s confirmation and approval of these extensions. The terms of the Receiver Term Sheet contemplate extensions by the Applicants if determined necessary for the purpose of continuing to pursue a Court-approved sale process for the Property. No amounts beyond the initially approved maximum availability under the Receiver Term Sheet are forecasted to be drawn during the extended term. ⁸

⁶ Appointment Order, para 21, Book of Authorities of the Receiver (“BOA”), Tab 2.

⁷ Order of Justice Koehnen dated October 29, 2021, para 7, BOA, Tab 3.

⁸ Fourth Report, para 47, MR, Tab 2, p 30.

14. No stakeholder is prejudiced by the Receiver Term Sheet Extension Agreements, which facilitate the completion of the sale of the 304 Victoria Real Property Assets and the continued marketing of the remaining assets in the receivership proceedings.⁹

B. Repayments To The Applicants In Satisfaction of Receiver’s Borrowings

15. To date the Receiver has borrowed \$300,000 under the Receiver Term Sheet, secured by the Receiver’s Borrowing Charge (as defined below).¹⁰

16. The Receiver Term Sheet requires that the obligations thereunder shall be repaid to the Applicants upon realization of Net Proceeds from the sale of any Property.

17. Under the Appointment Order, the whole of the Property, including the 304 Victoria Real Property Assets, were charged by way of a fixed and specific charge (the “**Receiver’s Borrowing Charge**”) as security for the obligations under the Receiver Term Sheet. As is customary, the Receiver’s Borrowing Charge ranks in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any person, but subordinate in priority to the Receiver’s Charge (as defined in the Appointment Order) and the charges as set out in sections 14.06(7), 81.4(4) and 81.6(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”).¹¹

18. Many common potential priority claims are not applicable in this case as the Legal Owner did not have any employees and, accordingly, the Receiver is not aware of any potential unpaid wage or pension plan amounts that could have priority under Section 81.4 and 81.6

⁹ Fourth Report, para 47, MR, Tab 2, p 30.

¹⁰ Fourth Report, para 45, MR, Tab 2, p 30.

¹¹ Appointment Order, para 21, BOA, Tab 2.

of the BIA and is not aware of any potential claims that could have priority under Section 14.06(7) of the BIA.¹²

19. The Applicants hold valid and enforceable Court-ordered security interests against the 304 Victoria Real Property Assets and the proceeds thereof, in priority to all other security interests or encumbrances in accordance with the Appointment Order.¹³
20. 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.”¹⁴
21. Expediting repayment of the Receiver’s borrowings under the Receiver Term Sheet will stop the ongoing accrual of interest expenses under the Receiver Term Sheet and return funds to the Applicant in these proceedings in accordance with their legal entitlements.

PART V - ORDER REQUESTED

22. The Receiver respectfully requests that the Court grant the relief requested by the Receiver in the Repayment Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of October, 2022.



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

¹² Fourth Report, para 49, MR, Tab 2, p 30.

¹³ Appointment Order, para 21, BOA, Tab 2.

¹⁴ *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.* [2014 ONSC 1173](#) at para 53, BOA, Tab 1.

**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

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

Priority of claims

14.06 (7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security

(a) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and

(b) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

Security for unpaid wages, etc. — receivership

81.4 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a person who is subject to a receivership for services rendered during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of \$2,000 — less any amount paid for those services by a receiver or trustee — by security on the person’s current assets that are in the possession or under the control of the receiver.

Commissions

(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for during the six-month period referred to in that subsection, are deemed to have been earned in those six months.

Security for disbursements

(3) The claim of a travelling salesperson who is owed money by a person who is subject to a receivership for disbursements properly incurred in and about the person’s business during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of \$1,000 — less any amount paid for those disbursements by a receiver or trustee — by security on the person’s current assets that are in the possession or under the control of the receiver.

Rank of security

(4) A security under this section ranks above every other claim, right, charge or security against the person's current assets — regardless of when that other claim, right, charge or security arose — except rights under [sections 81.1](#) and [81.2](#).

Security for unpaid amounts re prescribed pensions plan — receivership

81.6 (1) If a person who is subject to a receivership is an employer who participated or participates in a prescribed pension plan for the benefit of the person's employees, the following amounts that are unpaid immediately before the first day on which there was a receiver in relation to the person are secured by security on all the person's assets:

- (a) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund;
- (b) if the prescribed pension plan is regulated by an Act of Parliament,
 - (i) an amount equal to the normal cost, within the meaning of [subsection 2\(1\)](#) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and
 - (ii) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of [subsection 2\(1\)](#) of the *Pension Benefits Standards Act, 1985*,
 - (iii) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the *Pooled Registered Pension Plans Act*; and
- (c) in the case of any other prescribed pension plan,
 - (i) an amount equal to the amount that would be the normal cost, within the meaning of [subsection 2\(1\)](#) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament,
 - (ii) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of [subsection 2\(1\)](#) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament, and
 - (iii) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the *Pooled Registered Pension Plans Act*.

Rank of security

(2) A security under this section ranks above every other claim, right, charge or security against the person's assets, regardless of when that other claim, right, charge or security arose, except rights under [sections 81.1](#) and [81.2](#) and securities under [sections 81.3](#) and [81.4](#).

AMERICAN GENERAL LIFE
INSURANCE COMPANY, ET AL.
Applicants

- and -
VICTORIA AVENUE NORTH
HOLDINGS INC., ET AL.
Respondents

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

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

Proceeding commenced at TORONTO

FACTUM OF THE RECEIVER
(Motion returnable October 14, 2022)

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