

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**

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"

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**

JOINT FACTUM OF THE RECEIVERS IN THE ABOVE NOTED MATTERS
(Sale Approval and Ancillary Matters)
Returnable May 24, 2022

May 21, 2022

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

TO: **THE SERVICE LIST**

SCHEDULE "A"

| Individuals |
|---|
| 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 |
| Trusts |
| 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) |
| Corporations / Partnerships |
| 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 |

PART I - INTRODUCTION

1. This factum is filed in support of motions by KPMG Inc., as receiver and manager without security of, among other things, all of the assets, undertakings and properties of (i) Victoria Avenue North Holdings Inc. (“**Victoria**”), and (ii) 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 Penetanguish Holdings Inc. (collectively, the “**Southmount Legal Owners**” and together with Victoria, the “**Legal Owners**”), for or used in relation to their businesses (collectively, the “**Legal Owners’ Property**”) and all right, title and interest of any beneficial owners in and to the Legal Owners’ Property and all proceeds thereof (together with the Legal Owner’s Property, the “**Property**”), seeking orders:¹

- a) approving certain asset purchase agreements entered into by the Southmount Receiver or the Victoria Receiver and certain purchasers (each a “**Purchaser**”), and each of the transactions contemplated thereby;
- b) vesting title in and to the Real Property Assets in the applicable Purchaser, free and clear of all liens, charges, security interests and encumbrances, except for permitted encumbrances;
- c) authorizing the Receivers to pay certain commissions to CBRE Limited;
- d) authorizing the Receivers to make the repayment of the Receiver’s Borrowings and distributions to the Applicants from the net proceeds of sale of certain of the Real Property Assets and other available cash on hand (the “**Proposed Distribution**”);

¹ Capitalized terms used in this paragraph and not otherwise defined shall have the meanings given to them further below, in this Factum.

- e) approving the activities of the Southmount Receiver and Victoria Receiver as set out in certain reports filed in the Southmount Proceedings and the Victoria Proceedings;
 - f) dispensing with the requirement that the Victoria Receiver and its counsel obtain Court approval of their fees and disbursements with respect to the Victoria Proceedings;
 - g) authorizing the Southmount Receiver to make an assignment in bankruptcy on behalf of 180 Vine Purchaser Inc. (the “**Vine Assignment**”);
 - h) authorizing the procedural consolidation of the proposed bankruptcy estates of 180 Vine Purchaser Inc. and certain Legal Owners (the “**Procedural Consolidation**”);
and
 - i) sealing certain confidential appendices.
2. This Factum is filed jointly by the Receivers (defined below) in support of the motions in the proceedings under Court File No. CV-21-00664273-00CL (the “**Southmount Proceedings**”) and in the proceedings under Court File No. CV-21-00665375-00CL (the “**Victoria Proceedings**”), which motions will be heard jointly.
3. This Factum will address (i) the Proposed Distributions, (ii) the Vine Assignment, and (iii) the Procedural Consolidation, which are collectively referred to as (the “**Distribution Motion**”). The other relief sought by the Receivers (defined below) will be addressed in a separate factum filed by the Receivers’ counsel, Blake, Cassels & Graydon LLP.

PART II - FACTS

Background

4. The background facts in the Receivers' motions are set out in the Second Report of the Receiver, dated May 13, 2022, filed in the Southmount Proceedings (the "**Southmount Report**") and the Third Report of the Receiver, dated May 13, 2022, filed in the Victoria Proceedings (the "**Victoria Report**").
5. Pursuant to the order of Mr. Justice Dunphy, dated June 29, 2021 in the Southmount Proceedings (the "**Southmount Appointment Order**"), KPMG Inc. was appointed as receiver in the Southmount Proceedings (in such capacity, the "**Southmount Receiver**"). Pursuant to the order of Mr. Justice Koehnen dated August 3, 2021 in the Victoria Proceedings (the "**Victoria Appointment Order**", together with the Southmount Appointment Order, the "**Appointment Orders**"), KPMG Inc. was appointed as receiver in the Victoria Proceedings (in such capacity, the "**Victoria Receiver**", together with the Southmount Receiver, the "**Receivers**").² The Property over which the Southmount Receiver and the Victoria Receiver were appointed includes the legal and beneficial ownership interests in eight medical office buildings (the "**Buildings**") and one associated parking lot, located across Ontario (the parking lot, together with the Buildings and

² Southmount Report at para 1 and Victoria Report at para 1.

associated lands, their related real property leases and the interests of the beneficial owners therein, the “**Real Property Assets**”).³

6. The Distribution Motion is proceeding together with the Receivers’ motion for Court approval of the proposed sales of certain of the Real Property Assets consisting of the following properties, together with certain ancillary real property leases, contracts and assets:

| Legal Owner | Location | Address |
|------------------------------------|-----------------|---|
| 2478658 Ontario Ltd. | Peterborough | 849 Alexander Court |
| 2009 Long Lake Holdings Inc. | Sudbury | 2009 Long Lake Road |
| 65 Larch Holdings Inc. | Sudbury | 65 Larch Street |
| 100 Colborne Holdings Inc. | Orillia | 100 Colborne Street West and 77 Wyandotte Street |
| 240 Old Penetanguish Holdings Inc. | Midland | 240 Penetanguishene Road |

(collectively, the “**Southmount Properties**”).⁴

| Legal Owner | Location | Address |
|-------------------------------------|-----------------|--|
| Victoria Avenue North Holdings Inc. | Hamilton | 304 Victoria Avenue North 414 Victoria Avenue North |

(collectively, the “**Victoria Properties**”).⁵

7. The Receivers seek to distribute to the Applicants in the Southmount Proceedings and the Victoria Proceedings, in partial satisfaction of their secured claims, the anticipated net

³ *Ibid.*

⁴ Southmount Report at para. 14.

⁵ Victoria Report at para. 16.

proceeds of the sale of the above assets (the “**Net Proceeds**”) and available cash on hand, excluding a holdback determined to be required by the Receivers for: (i) the completion of its mandate, including the sale of the remaining Real Property Assets; (ii) a known potential construction lien claim in respect of the 65 Larch Street property; and (iii) the proposed bankruptcies of the Legal Owners.⁶

8. Norton Rose Fulbright Canada LLP (“**NRFC**”), independent counsel to the Receivers has provided independent legal opinions to the Receivers with respect to the validity and enforceability of the security granted by each Legal Owner in favour of the Applicants in the Victoria Proceedings and the Southmount Proceedings 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 Property. NRFC has noted that first in time mortgage registrations have been made by the Applicants against each of the Southmount Properties and Victoria Properties, and in addition that first in time registrations have been made under the *Personal Property Security Act* (Ontario) against each of the Legal Owners selling their interests in the Southmount Properties and the Victoria Properties.⁷
9. The Net Proceeds of the Victoria Properties and the Southmount Properties and cash on hand are not sufficient to satisfy the secured obligations owing to the applicable Applicants.⁸

⁶ Southmount Report at paras. 17, 63 and 67; Victoria Report at para. 53.

⁷ Southmount Report at para. 55;

⁸ Southmount Report at para. 58; Victoria Report at 46; and Victoria Report at para. 43.

10. Upon completion of each proposed sale transaction, and prior to the distribution of any of the Net Proceeds or cash on hand to the Applicants, the applicable Receiver intends to assign into bankruptcy each Legal Owner that has sold its interest in the Southmount Properties or the Victoria Properties, being all of the Legal Owners other than Southmount Healthcare Centre Inc. and 180 Vine Inc. (and also excluding 180 Vine Purchaser Inc.). The Receivers propose that such bankruptcies be procedurally consolidated.⁹

PART III - ISSUES

11. The issues to be addressed in the Distribution Motion are: (i) whether the Court should approve the repayment of the Receivers' borrowings from the Net Proceeds and cash on hand; (ii) whether the Court should approve the proposed distribution to the Applicants in partial satisfaction of their secured claims; and (iii) whether the Court should approve the procedural consolidation of certain of the Legal Owners' and 180 Vine Purchaser Inc.'s bankruptcies.

PART IV - LAW AND ANALYSIS

A. Repayment of Receivers' Borrowings

12. Pursuant to the Appointment Orders:
- (a) the Receivers were authorized to borrow from the Applicants in each such proceeding principal amounts not exceeding \$750,000 (in the case of the Southmount Proceedings) and \$500,000 (in the case of the Victoria Proceedings) (each, "**Receiver's Borrowings**"); and

⁹ Southmount Report at para. 62 and 68; Victoria Report at para. 50 and 56.

(b) the Receiver's Borrowings in each proceeding were secured by a court ordered charge over the whole of the Property over which the Receiver was appointed in that proceeding (the "**Receiver's Borrowing Charge**"). In each case, the Receiver's Borrowing Charge ranked in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any person, and subordinate in priority to only the charge securing the Receiver's professional fees and disbursements and certain statutory priority claims under Sections 14.06(7), 81.4(4) and 81.6(2) of the *Bankruptcy and Insolvency Act* (Canada).¹⁰

13. The Receiver's Borrowings were advanced by the Applicants pursuant to term sheets entered into between each Receiver and the Applicants in each of the Southmount Proceedings and the Victoria Proceedings (as amended, the "**Funding Term Sheets**"). The Funding Term Sheets expire on June 30, 2022.¹¹
14. At this time, the Receiver's Borrowings in connection with the Southmount Proceedings are approximately \$500,000 (plus accrued interest) and the Receiver's Borrowings in connection with the Victoria Proceedings are approximately \$300,000 (plus accrued interest).¹²
15. The Receivers are not aware of any claims or security interests that could rank in priority to the Receiver's Borrowings and the Receiver's Borrowing Charge in either of the

¹⁰ Southmount Report at paras. 53 and 54; Victoria Report at paras. 41 and 42; *American General Life Insurance Company et al. and Southmount Healthcare Centre Inc. et al.*, Order (Appointing Receiver), dated June 29, 2021 (Court File No. CV-21-00664273-00CL) ("**Southmount Receivership Order**"); and *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) ("**Victoria Receivership Order**").

¹¹ Southmount Report at para. 53; Victoria Report at para. 41.

¹² Southmount Report at para. 54; Victoria Report at para. 42.

Southmount Proceedings and the Victoria Proceedings.¹³ If the proposed sale transactions are completed, the Receivers will no longer require the funding provided by the Funding Term Sheets. If the proposed sale transactions are completed, the Receivers believe it is appropriate to repay the Receiver's Borrowings in accordance with the court-approved Funding Term Sheets. The estates have sufficient assets to do so, and the Receivers request the Court's authorization to proceed with such repayment.¹⁴

B. Distributions To The Applicants In Partial Satisfaction Of Secured Claims

16. 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.”¹⁵
17. The outstanding principal, accrued interest and other costs owing to the Applicants, as at June 30, 2022 (in each case excluding the Receiver's Borrowings and other amounts that may be claimable in connection therewith), in each of the proceedings are as follows:
 - (a) Southmount Proceedings: approximately \$70 million;¹⁶ and
 - (b) Victoria Proceedings: approximately \$24.1 million.¹⁷
18. The Applicants hold valid and enforceable security interests against all of the Southmount Properties and the Victoria Properties, the leases entered into in connection with those properties, and personal property of the Legal Owners. The Applicants hold first in time

¹³ Southmount Report at para. 64; Victoria Report at para. 51.

¹⁴ Southmount Report at para. 54; Victoria Report at para. 42.

¹⁵ [*GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.* 2014 ONSC 1173 at para 53.](#)

¹⁶ Southmount Report at para. 57.

¹⁷ Victoria Report at para. 45.

real property registrations and registrations under the *Personal Property Security Act* (Ontario) against the Southmount Properties, the Victoria Properties and the Legal Owners of those assets.¹⁸

19. 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.¹⁹ Similarly, under the *Land Titles Act* (Ontario), priorities of security interests in real property are determined by the order of registration.²⁰
20. Notwithstanding the validity and enforceability of the security interests of the Applicants and their first in time registrations, there are three potential issues that could affect priorities that should be evaluated.
21. First, documentation obtained from Canada Revenue Agency and inquiries made to the property manager of the Legal Owners' Property suggest that certain of the Legal Owners have outstanding HST arrears related to the period prior to the commencement of the Southmount Proceedings and the Victoria Proceedings.²¹ There are currently no records available to the Receivers to ascertain if all such HST arrears remain outstanding. In the ordinary course outside of a bankruptcy, unremitted HST may result in a deemed trust

¹⁸ Southmount Report at para. 55; Victoria Report at para. 43.

¹⁹ *Personal Property Security Act*, R.S.O. 1990, c. P.10 at s. 30.

²⁰ *Land Titles Act*, R.S.O. 1990 c. L.5 at s. 78(5).

²¹ Southmount Report at para. 61.

claim by the Crown under Section 222 of the *Excise Tax Act* (Canada). Section 222 of the *Excise Tax Act* (Canada)²² 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 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

22. As a result, in the current case, potential deemed trust claims for unremitted excise taxes may exist. However, such deemed trusts would not survive in bankruptcies and would be resolved upon the proposed bankruptcies of the Legal Owners. The Ontario Court of Appeal has held that a bankruptcy order may be sought with the express purpose of affecting such priorities.²³
23. Even prior to consideration of the effect of the proposed bankruptcies 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:

²² R.S.C. 1985, c E-15

²³ [Grant Forest Products Inc. v. The Toronto-Dominion Bank, 2015 ONCA 570 at para. 118.](#)

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

24. A “prescribed security interest” is defined in Section 2(1) of the *Security Interest (GST/HST) Regulations* as follows²⁴:

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.

25. Therefore, the deemed trust under Section 222(1) of the *Excise Tax Act* (Canada) that would otherwise be applicable outside of a bankruptcy in this case may not apply to the proceeds of sale of the Southmount Properties or the Victoria 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 the deemed trust.
26. Second, a number of the Legal Owners are the subject of registrations under the *Personal Property Security Act* (Ontario) against certain lighting equipment and lighting 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 applicable purchaser of the Real Property Assets.

²⁴ SOR/2011-55.

27. Third, the Southmount Receiver has been contacted by counsel for a potential lien claimant, who registered a construction lien against the 65 Larch Street property in June 2021. The registration is in the amount of \$160,252. Section 78 of the *Construction Act* (Ontario) governs priority ranking as between a real property mortgage, such as those held by the Applicants in this case, and a subsequent construction lien claimant. Section 78 states, in relevant part, as follows:

Priority over mortgages, etc.

78 (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.

...

Prior mortgages, prior advances

(3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

(a) the actual value of the premises at the time when the first lien arose; and

(b) the total of all amounts that prior to that time were,

(i) advanced in the case of a mortgage, and

(ii) advanced or secured in the case of a conveyance or other agreement.

28. The Southmount Receiver has not been able to assess the validity or priority of the lien claim at this time and is not seeking a determination of the validity or priority of such lien

claim. The Southmount Receiver is proposing to maintain a holdback from the Net Proceeds sufficient to satisfy this potential priority lien claim.²⁵

C. PROCEDURAL CONSOLIDATION OF BANKRUPTCY ESTATES

29. The Receivers currently have authorization pursuant to the Appointment Orders to proceed with assignments in bankruptcy of the Legal Owners, but not 180 Vine Purchaser Inc., a beneficial owner under the appointment order in the Southmount Proceedings.²⁶ The Southmount Receiver now seeks authorization to similarly assign 180 Vine Purchaser Inc. into bankruptcy. The Southmount Receiver is not aware of 180 Vine Purchaser Inc. owning any assets other than the 180 Vine Street South property.²⁷

30. The Receivers further request that the estates of the Legal Owners that will be assigned into bankruptcy and 180 Vine Purchaser Inc. be consolidated for procedural and administrative purposes (and not substantively) in the bankruptcy proceedings.

31. Courts in Canada have inherent jurisdiction to authorize the consolidation of bankruptcy estates for procedural and/or substantive purposes. In *Electro Sonic Inc. (Re)*, Justice Brown held that courts in bankruptcy proceedings operate subject to the general principle that the litigation process should secure the just, most expeditious and least expensive determination of every proceeding on its merits.²⁸

32. Consolidation for procedural purposes is appropriate where such consolidation will provide greater administrative efficiency and prevent unnecessary duplication in the administration

²⁵ Southmount Report at para. 63.

²⁶ Southmount Receivership Order at para. 3(1); Victoria Receivership Order at para. 3(1).

²⁷ Southmount Report at para. 69.

²⁸ [2014 ONSC 942 at paras. 4 and 6.](#)

of the bankruptcy estates.²⁹ Such consolidation does not merge or substantively consolidate the proposed bankruptcy proceedings or the respective estates but is akin to bringing multiple civil actions under common case management. The court's jurisdiction to grant such relief stems from Rule 1.04(1) of the *Rules of Civil Procedure*, which is incorporated into the bankruptcy context through section 3 of the *Bankruptcy and Insolvency General Rules*.³⁰

33. The purpose of the proposed consolidation in the current case is to avoid duplicative steps across multiple estates, including in relation to notices and creditors' meetings. The Receiver believes such consolidation for procedural and administrative purposes is in the best interests of the Legal Owners, and their respective stakeholders in a circumstance where creditors of the various estates are likely to have many common or overlapping issues and questions to resolve, and where information relevant to one of the bankruptcy estates is likely to be relevant to the other bankruptcy estates as well. This will add efficiency to the proceedings, conserve resources, and will not prejudice any stakeholder.³¹

PART V - ORDER REQUESTED

34. The Receivers respectfully request that the Court grant the relief requested by the Receivers in the Distribution Motion.

²⁹ [*Ornge Global GP Inc. \(Re\)*, 2013 ONSC 4518 at paras. 14 and 15](#); *In the Matter of the Bankruptcy of Walter Energy Canada Holdings, Inc.* (Court File No. B-160976) (B.C.S.C.), Bankruptcy Procedure Order dated December 16, 2016.

³⁰ *Rules of Civil Procedure*, RRO 1990, Reg 194 at Rule 1.04; *Bankruptcy and Insolvency General Rules*, CRC c 368 at section 3.

³¹ Southmount Report at

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of May, 2022.



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

**SCHEDULE “B”
LIST OF AUTHORITIES**

Case Law

1. *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.* [2014 ONSC 1173](#)
2. *Grant Forest Products Inc. v. The Toronto-Dominion Bank*, [2015 ONCA 570](#)
3. *Electro Sonic Inc. (Re)*, [2014 ONSC 942](#)
4. *Ornge Global GP Inc. (Re)*, [2013 ONSC 4518](#)

Unreported Orders

5. *American General Life Insurance Company et al. and Southmount Healthcare Centre Inc. et al.*, Order (Appointing Receiver), dated June 29, 2021 (Court File No. CV-21-00664273-00CL)
6. *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)
7. *In the Matter of the Bankruptcy of Walter Energy Canada Holdings, Inc.* (B.C.S.C.), Bankruptcy Procedure Order dated December 16, 2016 (Court File No. B-160976)

**SCHEDULE “C”
RELEVANT STATUTES**

BANKRUPTCY AND INSOLVENCY ACT
R.S.C., 1985, c. B-3

PART I – ADMINISTRATIVE OFFICIALS

Appointment and Substitution of Trustees

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.

PART IV – PROPERTY OF THE BANKRUPT

General Provisions

Security for unpaid wages, etc. – receivership

Rank of Security

81.4(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

Rank of Security

81.6(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.

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.
- 7.1 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.
8. 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.

CONSTRUCTION ACT
R.S.C. 1985, c. E-15

PART XI – PRIORITIES

Priorities over mortgages, etc.

78 (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.

Building mortgage

(2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.

Prior mortgages, prior advances

(3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

- (a) the actual value of the premises at the time when the first lien arose; and
- (b) the total of all amounts that prior to that time were,
 - (i) advanced in the case of a mortgage, and
 - (ii) advanced or secured in the case of a conveyance or other agreement.

Prior mortgages, subsequent advances

(4) Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled under subsection (3), over the liens arising from the improvement, to the extent of any advance made in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

Special priority against subsequent mortgages

(5) Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV.

General priority against subsequent mortgages

(6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

Advances to trustee under Part IX

(7) Despite anything in this Act, where an amount is advanced to a trustee appointed under Part IX as a result of the exercise of any powers conferred upon the trustee under that Part,

- (a) the interest in the premises acquired by the person making the advance takes priority, to the extent of the advance, over every lien existing at the date of the trustee's appointment; and
- (b) the amount received is not subject to any lien existing at the date of the trustee's appointment.

Where postponement

(8) Despite subsections (4) and (6), where a preserved or perfected lien is postponed in favour of the interest of some other person in the premises, that person shall enjoy priority in accordance with the postponement over,

- (a) the postponed lien; and

- (b) where an advance is made, any unreserved lien in respect of which no written notice has been received by the person in whose favour the postponement is made at the time of the advance,

but nothing in this subsection affects the priority of the liens under subsections (2) and (5).

Saving

(9) Subsections (2) and (5) do not apply in respect of a mortgage that was registered prior to the 2nd day of April, 1983.

Financial guarantee bond

(10) A purchaser who takes title from a mortgagee takes title to the premises free of the priority of the liens created by subsections (2) and (5) where,

- (a) a bond of an insurer licensed under the *Insurance Act* to write surety and fidelity insurance;
or
(b) a letter of credit or a guarantee from a bank listed in Schedule I or II to the *Bank Act* (Canada),

in the prescribed form is registered on the title to the premises, and, upon registration, the security of the bond, letter of credit or the guarantee takes the place of the priority created by those subsections, and persons who have proved liens have a right of action against the surety on the bond or guarantee or the issuer of the letter of credit.

Home buyer's mortgage

(11) Subsections (2) and (5) do not apply to a mortgage given or assumed by a home buyer.

RULES OF CIVIL PROCEDURE

R.R.O. 1990, REGULATION 194

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. R.R.O. 1990, Reg. 194, [r. 1.04 \(1\)](#).

BANKRUPTCY AND INSOLVENCY GENERAL RULES

C.R.C., C. 368

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.

AMERICAN GENERAL LIFE
INSURANCE COMPANY, ET AL.
Applicants

- and -

SOUTHMOUNT HEALTHCARE
CENTRE INC., ET AL.
Respondents

Court File No.: CV-21-00664273-00CL

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

JOINT FACTUM OF THE RECEIVERS
(Motion ret. May 24, 2022)

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