

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

KINGSETT MORTGAGE CORPORATION and DORR CAPITAL CORPORATION

Applicants

- and -

VANDYK – UPTOWNS LIMITED, VANDYK – HEART LAKE LIMITED, 2402871  
ONTARIO INC., VANDYK – THE RAVINE LIMITED and VANDYK – LAKEVIEW-  
DXE-WEST LIMITED

Respondents

IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE  
*BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND  
SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

**FACTUM OF THE RECEIVER**

**(MOTION SEEKING APPROVAL OF A FINANCING AGREEMENT AND OTHER  
RELIEF RELATED TO THE CONSTRUCTION OF THE LAKEVIEW PROJECT)**

June 11, 2024

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## PART I - NATURE OF THE APPLICATION

1. On November 14, 2023, the Ontario Superior Court of Justice (the “**Court**”) issued an order (the “**Receivership Order**”) appointing KSV Restructuring Inc. (“**KSV**”) as the receiver and manager (the “**Receiver**”) of certain real property (the “**Real Property**”), and all present and future assets, undertakings and personal property belonging to Vandyk – Uptowns Limited (“**Uptowns**”), Vandyk – Lakeview-DXE-West Limited (“**Lakeview**”), Vandyk – Heart Lake Limited (“**Heart Lake**”), 2402871 Ontario Inc. (“**240**”) and Vandyk – The Ravine Limited (“**Ravine**” and collectively with Uptowns, Lakeview, Heart Lake and 240, the “**Debtors**” and each a “**Debtor**”) located at, related to, used in connection with or arising from or out of the Real Property (collectively, the “**Property**”).

2. Prior to these receivership proceedings, Lakeview was engaged in developing a residential condominium complex on certain Real Property located in Mississauga, Ontario (the “**Lakeview Project**”). The Receiver, after discussions with key stakeholders, has determined that the Lakeview Project should be completed during these receivership proceedings in order to maximize the potential benefits to stakeholders, including secured creditors and existing pre-sale purchasers.

3. In order to facilitate the completion of the Lakeview Project, the Receiver seeks an Amended and Restated Receivership Order (the “**Amended and Restated Receivership Order**”) which will, among other things:

- (a) authorize the Receiver to borrow up to \$255,250,000 pursuant to the Commitment Letter (as defined below) in order to fund the completion of the Lakeview Project, and grant a charge to secure amounts borrowed under the Commitment Letter;
- (b) add Lakeview-DXE-East Limited (“**Lakeview 2**”), an affiliated company of the Debtors, as a Respondent in these proceedings and expand the scope of “Property”

subject to the receivership to include all agreements of purchase and sale executed by Lakeview 2 related to any of the Real Property;

- (c) authorizing and directly that deposits held in trust pursuant to deposit trust agreements related to the Lakeview Project and the Uptowns project be transferred to such law firm as the Applicants and the Receiver may agree, in trust;
- (d) increase the amount the Receiver is entitled to borrow under the Receiver's General Borrowing Charge (as defined below);
- (e) approve the CM Contract (as defined below) entered into between the Receiver and PCL Contractors Canada Inc. ("PCL") pursuant to which PCL will act as construction manager in respect of the Lakeview Project; and
- (f) permit the Receiver to pay, with the consent of the Applicants, pre-filing amounts owing to creditors where those amounts are reasonably required for the preservation of the Property.

4. The requested relief is required for the Receiver to be able to complete the Lakeview Project. This will maximize benefits to stakeholders, including secured creditors and homebuyers who have already executed pre-sale contracts in respect of the Lakeview Project, and may not otherwise be able to obtain their homes. The requested relief should therefore be approved.

## PART II - SUMMARY OF FACTS

5. The facts are more fully set out in the Third Report of the Receiver.<sup>1</sup>

### A. The Lakeview Project

6. The Debtors are part of a broader group of development companies known as the “**Vandyk Group**,” a real estate developer that mainly developed low, mid and high-rise residential projects in the Greater Toronto Area. Each of the Debtors is a single-purpose real estate development company that owns a specific project that it was developing on its respective Real Property.<sup>2</sup>

7. As part of the Vandyk Group, Lakeview owns real property located in Mississauga, Ontario on which it is developing the Lakeview Project. The Lakeview Project is a residential condominium project consisting of two mid-rise towers with a combined 478 residential units (“**East Tower**” and “**West Tower**,” respectively). No construction has begun on the Lakeview Project.<sup>3</sup>

8. Lakeview 2 is an affiliated company of Lakeview which is not currently subject to these Receivership proceedings. Lakeview 2 is the vendor in respect of agreements of purchase and sale with respect to the East Tower (the “**East APSs**”), notwithstanding that Lakeview is the owner of the Real Property on which the East Tower is being built. Of the 478 residential units located within the East Tower and West Tower, 390 are subject to agreements of purchase and sale, including the East APSs, representing approximately 82% of total units. The East APSs, along with deposits provided in connection with the East APSs, are Lakeview 2’s only assets.<sup>4</sup>

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<sup>1</sup> Third Report of the Receiver dated June 6, 2024 [Third Report]. Capitalized terms not otherwise defined have the same meaning as in the Third Report. Dollar amounts are given in Canadian dollars unless otherwise specified.

<sup>2</sup> Third Report at paras. 2.1.1, 2.1.4.

<sup>3</sup> Third Report at para. 2.2.1.

<sup>4</sup> Third Report at paras. 2.1.2, 2.2.2. 6.0.2.

**B. The Funding of the Lakeview Project**

9. KingSett has committed to providing a construction financing facility pursuant to the Commitment Letter in order to finance the construction project. Under the terms of the Commitment Letter, KingSett will provide a non-revolving construction loan, in the following amounts:<sup>5</sup>

- (a) a \$243,750,000 construction facility, at an interest rate equal to the prime rate plus 2.40% per annum and a floor rate of 8.85% per annum;
- (b) a \$10,000,000 overrun facility, at an interest rate equal to the prime rate plus 5% per annum; and
- (c) a \$1,500,000 cash in lieu of letters of credit facility, at an interest rate equal to the prime rate plus 1.75% per annum and a floor rate of 8.2% per annum.

10. Advances under the Commitment Letter are subject to various conditions, including that the Amended and Restated Receivership Order be granted.

11. The facilities under the Commitment Letter have a maturity date of 42 months after the first calendar day of the month following the date of the initial advance on the loan, which can be extended on the request of the Receiver, with the consent of KingSett.<sup>6</sup>

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<sup>5</sup> Third Report at paras. 5.2.1(c), (e). See Third Report at para. 5.2.1 for a full summary of the terms of the Commitment Letter.

<sup>6</sup> Third Report at para. 5.2.1(d).

## C. The Engagement of PCL as Construction Manager

### (a) The RFP Process

12. The Receiver solicited proposals from two potential construction managers (collectively, the “**Proponents**”) for the purpose of facilitating the completion of the Lakeview Project. The two Proponents included PCL, which had previously been engaged as the construction manager for the Lakeview Project prior to the commencement of these proceedings. The Receiver requested that each Proponent provide, among other things, an overview of its qualifications, a work plan, a construction schedule, and a fee structure. Following the execution of a confidentiality agreement, the Receiver provided each Proponent with access to an electronic data room.<sup>7</sup>

13. Each of the Proponents submitted final proposals on or prior to the deadline set by the Receiver. Following the receipt of the proposals, the Receiver and KingSett Mortgage Corporation (“**KingSett**”), the primary financial stakeholder of the Debtors, corresponded with the Proponents to clarify the details of their proposals.<sup>8</sup> Following careful consideration, the Receiver selected PCL as construction manager for the Lakeview Project. PCL was notified of this selection on April 1, 2024.<sup>9</sup>

### (b) The CM Contract

14. Shortly after PCL’s selection, the Receiver and PCL began negotiating the terms on which PCL would serve as construction manager. As PCL had an existing construction manager contract with Lakeview from prior the commencement of the receivership proceedings (the “**Original CM Contract**”), these terms took the form of amendments to the Original CM Contract, including

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<sup>7</sup> Third Report at paras. 3.0.1-3.0.6.

<sup>8</sup> Third Report at para. 3.0.7.

<sup>9</sup> Third Report at para. 3.0.9.

amendments required to make the Original CM Contract appropriate for a receivership proceeding. These amendments were accomplished by means of the First Amending Agreement dated May 27, 2024 (the “**First Amendment**,” and together with the Original CM Contract, the “**CM Contract**”).<sup>10</sup>

15. Under the terms of the CM Contract, PCL will act as construction manager and will provide services relating to the construction and post-construction phases of the Lakeview Project. The CM Contract includes a revised estimate of the cost and schedule required to complete the Lakeview Project, which is currently anticipated to cost \$185.7 million (exclusive of soft costs, financing costs and contingencies) and to be completed by May 2027. PCL will be paid a construction management fee of 3% of the actual construction costs, a reimbursement for the actual expenses that it incurs performing the Services (as defined in the CM Contract), and an administrative charge of 3% added to the cost of reimbursable expenses.<sup>11</sup>

### **PART III - THE ISSUES AND THE LAW**

16. This Factum addresses the following issues:

- (a) The Commitment Letter and the Receiver’s Lakeview Borrowings Charge should be approved;
- (b) Lakeview 2 should be added as a respondent, and the East APSs should be added to the “Property” subject to the Receivership Order;
- (c) Deposits related to the Lakeview Project and Uptowns project should be transferred in trust to another law firm agreed upon by the Receiver and the Applicants;

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<sup>10</sup> Third Report at paras. 1.1.1(c), 3.0.9.

<sup>11</sup> See Third Report at para. 4.0.1 for a full summary of the terms of the CM Contract.

- (d) The Receiver's General Borrowing Charge should be increased;
- (e) The CM Contract should be approved; and
- (f) The Receiver should be authorized to make certain pre-filing payments.

**A. The Commitment Letter and the Receiver's Lakeview Borrowing Charge Should be Approved**

17. The obligations of the Receiver under the Commitment Letter are to be secured by a priority charge on all the Property of Lakeview and Lakeview 2 (the "**Receiver's Lakeview Borrowings Charge**"), which will rank subordinate to the Receiver's Charge and *pari passu* with the Receiver's General Borrowings Charge (each as defined in the proposed Amended and Restated Receivership Order).<sup>12</sup> Advances will not be available under the Commitment Letter if the Receiver's Lakeview Borrowings Charge is not approved.

18. Section 31(1) of the BIA authorizes a receiver to borrow in order to fund the duties of the receiver, and further permits a receiver to give security on the debtor's property in any amount, on any terms and on any property that may be authorized by the court. The advances obtained must be repaid out of the debtor's property in priority to the creditors' claims.<sup>13</sup> The jurisdiction to authorize such borrowing also arises from the Court's powers under s. 243(1)(c) of the BIA to "take any other action that the court considers advisable."<sup>14</sup>

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<sup>12</sup> Third Report at para. 1.1.1(e)(iii).

<sup>13</sup> BIA, s. 31(1): "With the permission of the court, an interim receiver, a receiver within the meaning of subsection 243(2) or a trustee may make necessary or advisable advances, incur obligations, borrow money and give security on the debtor's property in any amount, on any terms and on any property that may be authorized by the court and those advances, obligations and money borrowed must be repaid out of the debtor's property in priority to the creditors' claims."

<sup>14</sup> See, i.e., *Keb Hana Bank as Trustee v. Misrahi Commercial (The One) LP et al.*, (October 18, 2023), Ont S.C.J. [Commercial List], Court File No. CV-23-00707839-00CL ([Endorsement of Justice Osborne](#)) at paras. 53-55



19. This Court therefore has the jurisdiction and the discretion to approve the Commitment Letter and the Receiver's Lakeview Borrowings Charge, which are essential to the Receiver's ability to fulfill its mandate to maximize value of the Lakeview Project for the benefit of all stakeholders. The Receiver submits that the Commitment Letter and the Receiver's Lakeview Borrowings Charge should be approved for the following reasons:<sup>15</sup>

- (a) **Stakeholder Value:** Financing is required to complete the Lakeview Project and thereby maximize recoveries for all stakeholders. If the Receiver does not receive this funding, it will be unable to complete the Lakeview Project, which will impair value and may result in the termination of existing agreements of purchase and sale.
- (b) **Reasonable Terms:** In the business judgment of the Receiver, the terms of the Commitment Letter are reasonable.
- (c) **Stakeholder Support:** The Commitment Letter is to be provided by KingSett, who is the primary economic stakeholder in these proceedings. Further, KingSett requires the Receiver's Lakeview Borrowings Charge in order to provide the funding under the Commitment Letter.

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[*The One Initial Order Endorsement*], in which the court cited both ss. 31(1) and 243(1)(c) of the BIA for this principle; see also *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, [2021 ABCA 226](#) at para. 20.

<sup>15</sup> Third Report at para. 5.3.1.

**B. Lakeview 2 Should be Added as a Respondent, and the East APSs should be Added to the “Property” Subject to the Receivership Order**

20. This Court has the authority to appoint a Receiver pursuant to s. 243(1) of the BIA and s. 101 of the CJA. Section 101 of the CJA provides that the court may appoint a receiver where it is “just or convenient” to do so:

**Injunctions and receivers**

101 (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.

21. The opening language of s. 243(1) of the BIA is similar in referring to the appointment of a receiver where it is “just or convenient”.

22. It is well established that the court may appoint a receiver over a company which is intricately involved with companies already subject to an existing receivership proceeding, even where the new party is not itself a debtor of the parties that initiated the receivership.<sup>16</sup>

23. For example, in *Rosseau Resort*, the receiver requested that this court extend a receivership order which covered a partially constructed hotel to also include the property of an affiliated company, which property consisted of interests in agreements which had been entered into with individual unit holders of the hotel. The court found that it was just and convenient to extend the receivership order as: (i) the affiliated company was intricately involved with the companies already in receivership; (ii) the affiliated company was a shell company, which was owned by the

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<sup>16</sup> Frank Bennett, Bennett on Receiverships, 4th ed. (Toronto: Thomson Reuters Canada, 2021) at p. 203; *WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.*, [2009 CanLII 55120 \(ON SC\)](#) at para. 37 [*Rosseau Resort*].

same parties as the companies already subject to the receivership; (iii) the obligations of the various companies under the relevant agreements were intricately connected, intertwined, and interdependent, such that the affiliated company owed obligations under the agreements that it could not fulfil on its own; and (iv) without the appointment, the unit holders would be stranded in agreements incapable of performance, which would risk both the money invested by the unit holders, and the residual value of the hotel itself.<sup>17</sup>

24. Similar findings have been made in other cases. For example, in *Romspen Investment Corp. v. Hargate Properties Inc.*, the Alberta court extended the appointment of a receiver over certain real property to also include the property of related companies that operated a hotel on the real property, on the basis that the related companies were “central to effective operation” of the business as a whole.<sup>18</sup>

25. The considerations outlined above support the extension of the Receivership Order to cover Lakeview 2 and the East APSs. As a counterparty to the East APSs, Lakeview 2 is intricately involved in Lakeview’s affairs and is essential to the completion of the Lakeview Project. Lakeview 2 was incorporated for the sole purpose of entering into the East APSs in order to support the Lakeview Project, carries on no other business, and has no assets other than the East APSs and related deposits.<sup>19</sup>

26. Further, as discussed above, the Receiver has determined that it is in the interests of all stakeholders to complete the Lakeview Project and close sales with pre-sale purchasers, including the East APSs. The inclusion of the East APSs within the “Property” subject to the Receivership

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<sup>17</sup> *Rosseau Report*, at paras. 38-41.

<sup>18</sup> [2011 ABQB 759](#) at paras. 16-17. See also *Murphy v. Cahill*, [2012 ABQB 220](#), at para. 13, in which the court extended a receivership to cover affiliated corporations where the affairs of all of the corporations were “intrinsically involved,” and they shared shareholders and directors.

<sup>19</sup> Third Report at para. 6.0.1.

Order is a necessary precondition to this plan, as without this inclusion the Receiver will be unable to convey units pursuant to the East APSs and will be unable to exercise rights under the East APSs.<sup>20</sup>

27. Finally, the extension of the Receivership Order to cover Lakeview 2 and its property is necessary in order to obtain construction financing. The Receiver understands that KingSett will not provide the financing contemplated in the Commitment Letter without the extension of the Receivership Order; further, the Receiver, based on its extensive experience, believes that the failure to include the East APSs in the “Property” would effectively prevent Lakeview from obtaining construction financing generally, as the Receiver understands that construction financing will generally not be available unless a developer has pre-sold 60-75% of units, depending on the nature of the project.<sup>21</sup>

For the reasons outlined above, the Receiver submits it is both just and convenient to extend the Receivership Order to cover Lakeview 2 and the East APSs. This extension is not opposed by any party (including Lakeview 2) and is a necessary step to completing the Lakeview Project for the benefit of stakeholders generally.

**C. Deposits Related to the Lakeview Project and Uptowns Project Should be Transferred**

28. The Amended and Restated Receivership Order authorizes and directs that funds related to deposits held in trust pursuant to deposit trust agreements related to the Lakeview Project and the Uptowns project be transferred to such law firm as the Applicants and the Receiver may agree, where they will be held in trust. Such deposits are and will not be included within the definition of

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<sup>20</sup> Third Report at paras. 6.0.2-6.0.3.

<sup>21</sup> Third Report at para. 6.0.4.

“Property” within the Receivership Order or the Amended and Restated Receivership Order, and will not come under the Receiver’s control.<sup>22</sup>

29. The court is authorized to direct that the deposits be transferred by both s. 101(2) of the CJA, which states that an order under s. 101 may include “such terms as are considered just,” and by s. 243(1)(c) of the BIA, which states that a court may authorize “any other action that the court considers advisable.” The expansive wording of s 243(1)(c) gives judges the “broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that arise.”<sup>23</sup> The transfer of the deposits is a condition precedent of the funding to be provided under the Commitment Letter, and is therefore required in order to ensure that the financing necessary to be able to complete the Lakeview Project is obtained.<sup>24</sup> This will allow the Receiver to maximize the benefits to all stakeholders, including the pre-sale homebuyers in respect of which the deposits were made.

#### **D. The Receiver’s General Borrowings Charge Should be Increased**

30. Under the terms of the Receivership Order, the Receiver was granted a priority charge over the Property for the purpose of funding the exercise of the Receiver’s powers and duties (the “**Receiver’s General Borrowings Charge**”). Amounts borrowed pursuant to the Receiver’s General Borrowings Charge are secured by a priority charge against the Property, including the Property of Lakeview. As of the date of the Third Report, the Receiver has borrowed \$3,321,000

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<sup>22</sup> Third Report at para. 8.0.1.

<sup>23</sup> *Peace River Hydro Partners v. Petrowest Corp.*, [2022 SCC 41](#) at para. 148. See also *The One Initial Order Endorsement*, at paras. 54-55, in which the court found that both s. 101(2) of the CJA and s. 243(1)(c) of the BIA provide the court with a “residual or additional jurisdiction.”

<sup>24</sup> Third Report at para. 8.0.1.

under the Receiver's General Borrowings Charge, of which approximately \$706,073 was used for the Lakeview Project.<sup>25</sup>

31. The Receiver is seeking to increase the Receiver's General Borrowing Charge from \$6 million to \$8 million, as it expects to incur certain costs in connection with the Lakeview Project prior to the conditions being met for the initial advance under the Commitment Letter. This will allow the Lakeview Project to be progressed without further delay and corresponding costs. As discussed above, priority charges in favour of the receiver ensure the integrity, predictability and fairness of the receivership process.

#### **E. The CM Contract Should be Approved**

32. The broad discretion contained in s. 243(1)(c) of the BIA permits the court to authorize a receiver to "take any other action that the court considers advisable," which has been held to include entering into key contracts to facilitate the receivership.<sup>26</sup> The courts have approved the retention of a construction manager on a number of occasions, including most recently in the receivership over the construction project known as "The One".<sup>27</sup>

33. After carefully evaluating the two proposals received, the Receiver has determined that retaining PCL as construction manager is in the best interest of the Lakeview Project going forward. The Receiver submits that the CM Contract should be approved for the following reasons:

- (a) **Experience:** PCL is a highly experienced contractor, is widely recognized as the largest general contractor in Canada, and is intimately familiar with the Lakeview

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<sup>25</sup> Third Report at para. 5.1.1.

<sup>26</sup> *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#) at para. 85.

<sup>27</sup> See, e.g., *Keb Hana Bank as Trustee v. Mizrahi Commercial (The One) LP et al.*, (March 7, 2024), Ont S.C.J. [Commercial List], Court File No. CV-23-00707839-00CL ([Endorsement of Justice Osborne](#)) at para. 20.

Project in particular, owing to its previous engagement as construction manager prior to these receivership proceedings.<sup>28</sup>

- (b) **Superior Proposal:** The terms of PCL's proposal were superior to the proposal received from the other Proponent. PCL's fees were similar to those of the other Proponent, while PCL's timelines to complete the Lakeview Project were shorter than those proposed by the other Proponent. This is expected to result in significantly lower interest costs.<sup>29</sup>
- (c) **Avoiding Unnecessary Cost and Delay:** If the CM Contract is not approved, the Receiver would be required to negotiate a new construction management contract with another party, which would delay the re-commencement of construction and would likely be on terms less favourable to the Receiver. Further, the costs incurred negotiating an amendment to the Original CM Contract were materially less than the costs that would have been incurred in negotiating a new construction management contract, including with the non-PCL Proponent.<sup>30</sup>
- (d) **Stakeholder Benefits:** The retention of PCL as construction manager is essential to the completion of the Lakeview Project, which will in turn create significant value for Lakeview's stakeholders, including the pre-sale purchasers that have entered into agreements of purchase and sale with Lakeview and Lakeview 2.<sup>31</sup>
- (e) **Stakeholder Support:** The engagement of PCL and the terms of the CM Contract are supported by KingSett, who is the primary economic stakeholder and will be

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<sup>28</sup> Third Report, at para. 3.0.8(a)-(b), 4.1.1(c)-(d).

<sup>29</sup> Third Report, at paras. 3.0.8(c)-(d), 4.1.1(a).

<sup>30</sup> Third Report, at paras. 3.0.8(e), 4.1.1(b).

<sup>31</sup> Third Report, at para. 4.1.1(e).

funding construction costs incurred during these receivership proceedings. Further, the support provided by KingSett under the Commitment Letter is predicated on the approval of the Amended and Restated Receivership Order, including the CM Contract.<sup>32</sup>

**F. The Receiver should be Authorized to Pay Certain Pre-Filing Obligations**

34. The Receiver seeks permission to make payments in respect of pre-filing obligations, where those payments are reasonably required for the preservation of the Property. Such payments will be made with the consent of the Applicants and will be subject to review by the Receiver in order to ensure that such payments are limited to those that are absolutely necessary.<sup>33</sup>

35. Courts have authorized Receivers to make pre-filing payments where such payments are critical to the debtor's continued operation.<sup>34</sup> Such authorization is necessary in order preserve the value of the Property and should be approved.

**PART IV - NATURE OF THE ORDER SOUGHT**

36. For the reasons set out above, the Receiver requests that this Court grant the proposed Amended and Restated Receivership Order.

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<sup>32</sup> Third Report, at paras. 3.0.8(f). 4.1.1(f)

<sup>33</sup> Third Report, at paras. 9.0.1-9.0.2.

<sup>34</sup> See, i.e., *KingSett Mortgage Corp. v. Mapleview Developments Ltd. et al.*, (March 21, 2024), Ont S.C.J. [Commercial List], CV-24-00716511-00CL ([Endorsement of Justice Osborne](#)) at para 30; *BCMIC Construction Fund Corporation and Otera Capital Inc. v. 33 Yorkville Residences Inc. and 33 Yorkville Residences Limited Partnership*, (March 27, 2020), Ont S.C.J. [Commercial List], CV-20-00637297-00CL ([Order Appointing Receiver](#)) at para 28.



**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 11th day of June, 2024:



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**OSLER, HOSKIN & HARCOURT, LLP per Marleigh Dick**  
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Toronto, ON M5X 1B8

Lawyers for the Applicants

**TO: THE ATTACHED SERVICE LIST**

## SCHEDULE “A”: LIST OF AUTHORITIES

### Cases

1. *BCMIC Construction Fund Corporation and Otera Capital Inc. v. 33 Yorkville Residences Inc. and 33 Yorkville Residences Limited Partnership*, (March 27, 2020), Ont S.C.J. [Commercial List], CV-20-00637297-00CL ([Order Appointing Receiver](#))
2. *CCM Master Qualified Fund v. blutip Power Technologies*, [2012 ONSC 1750](#)
3. *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, [2021 ABCA 226](#)
4. *Edmonton (City) v. Alvarez & Marsal Canada Inc.*, [2019 ABCA 109](#)
5. *Keb Hana Bank as Trustee v. Misrahi Commercial (The One) LP et al.*, (October 18, 2023), Ont S.C.J. [Commercial List], Court File No. CV-23-00707839-00CL ([Endorsement of Justice Osborne](#))
6. *Keb Hana Bank as Trustee v. Misrahi Commercial (The One) LP et al.*, (March 7, 2024), Ont S.C.J. [Commercial List], Court File No. CV-23-00707839-00CL ([Endorsement of Justice Osborne](#))
7. *KingSett Mortgage Corp v. Mapleview Developments Ltd. et al* (March 21, 2024), Ont S.C.J. [Commercial List], Court File No. CV-24-00716511-00CL ([Order Appointing Receiver](#))
8. *KingSett Mortgage Corp. v. Mapleview Developments Ltd. et al*, (March 21, 2024), Ont S.C.J. [Commercial List], CV-24-00716511-00CL ([Endorsement of Justice Osborne](#))
9. *KingSett Mortgage Corp and Dorr Capital Corporation v. VanDyk – Uptown Limited et al* (November 14, 2023), Ont S.C.J. [Commercial List], Court File No. CV- 23-00709180-00CL ([Order Appointing Receiver](#))
10. *Murphy v. Cahill*, [2012 ABQB 220](#)
11. *Peace River Hydro Partners v. Petrowest Corp.*, [2022 SCC 41](#)
12. *Romspen Investment Corporation v Hargate Properties Inc.*, [2011 ABQB 759](#)
13. *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#)
14. *WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.*, [2009 CanLII 55120 \(ON SC\)](#)

### Secondary Sources

1. Frank Bennett, *Bennett on Receiverships*, 4th ed. (Toronto: Thomson Reuters Canada, 2021)

**SCHEDULE “B”  
TEXT OF STATUTES, REGULATIONS & BY-LAWS**

***BANKRUPTCY AND INSOLVENCY ACT***

R.S.C., 1985, c. B-3, as amended

**Borrowing powers with permission of court**

**31 (1)** With the permission of the court, an interim receiver, a receiver within the meaning of subsection 243(2) or a trustee may make necessary or advisable advances, incur obligations, borrow money and give security on the debtor’s property in any amount, on any terms and on any property that may be authorized by the court and those advances, obligations and money borrowed must be repaid out of the debtor’s property in priority to the creditors’ claims.

**Security under Bank Act**

**(2)** For the purpose of giving security under section 427 of the Bank Act, the interim receiver, receiver or trustee, when carrying on the business of the bankrupt, is deemed to be a person engaged in the class of business previously carried on by the bankrupt.

**Limit of obligations and carrying on of business**

**(3)** The creditors or inspectors may by resolution limit the amount of the obligations that may be incurred, the advances that may be made or moneys that may be borrowed by the trustee and may limit the period of time during which the business of the bankrupt may be carried on by the trustee.

**Debts deemed to be debts of estate**

**(4)** All debts incurred and credit received in carrying on the business of a bankrupt are deemed to be debts incurred and credit received by the estate of the bankrupt.

[...]

**Court may appoint receiver**

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

- (a)** take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b)** exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or

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

### **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, as amended

### **Injunctions and receivers**

**101 (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.

**IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*,  
R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED**

**KINGSETT MORTGAGE CORPORATION and  
DORR CAPITAL CORPORATION**

**and VANDYK – UPTOWNS LIMITED, VANDYK – HEART LAKE  
LIMITED, 2402871 ONTARIO INC., VANDYK – THE RAVINE  
LIMITED AND VANDYK – LAKEVIEW-DXE-WEST LIMITED**

**Applicants**

**Respondents**

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

PROCEEDING COMMENCED AT TORONTO

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**FACTUM OF THE APPLICANTS**

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