

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

THE TORONTO DOMINION BANK

Applicant

- and -

B. GOTTARDO CONSTRUCTION LTD. AND
B. GOTTARDO SITE SERVICING LIMITED

Respondent

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

**NINTH REPORT OF BDO CANADA LIMITED, IN ITS CAPACITY
AS COURT APPOINTED RECEIVER**

May 27, 2018

TABLE OF CONTENTS

INTRODUCTION AND PURPOSE OF THIS REPORT	3
DISCLAIMER	4
DISPUTE WITH THE CITY	4
SETTLEMENT WITH THE CITY	7
SUMMARY AND RECOMMENDATIONS	9

APPENDICES

- A Receivership Order dated August 10, 2015
- B Bankruptcy Orders
- C City's Statement of Claim
- D Construction's Statement of Defence
- E City's Reply and Defence to Counterclaim
- F Statement of Claim in Lien Action
- G City's Statement of Defence
- H Minutes of Settlement

INTRODUCTION AND PURPOSE OF THIS REPORT

1. B. Gottardo Construction Ltd. ("**Construction**") and B. Gottardo Site Servicing Limited ("**Site Servicing**") (collectively, the "**Debtors**") are corporations incorporated pursuant to the *Business Corporations Act* (Ontario). The Debtors are privately owned directly or indirectly by members of the Gottardo family. Bruno Gottardo was the founder and president of Construction and Site Servicing ("**Bruno**"). David Gottardo ("**David**"), Bruno's son, was the general manager of the Debtors.
2. The Debtors provided large scale construction services, frequently being infrastructure projects for municipalities and other government entities as well as site servicing for developers.
3. On application by the Toronto Dominion Bank (the "**TD Bank**"), the Debtors' senior secured lender, BDO Canada Limited was appointed as the Receiver (the "**Receiver**") without security, of all of the assets, undertakings and properties of the Debtors, pursuant to the order of Justice Newbould made August 10, 2015 (the "**Receivership Order**"). Attached hereto as **Appendix "A"** is a copy of the Receivership Order.
4. On August 28, 2015, the Debtors were adjudged bankrupt and BDO Canada Limited was appointed as trustee in bankruptcy. Copies of the bankruptcy orders are attached as **Appendix "B"**.
5. All court materials filed, including previous reports, and court orders and endorsements issued in these proceedings are available on the Receiver's website at <http://extranets.bdo.ca/BGottardo>.

6. This report (the "**Ninth Report**") is prepared in support of the Receiver's motion for an order approving the Minutes of Settlement between the Corporation of the City of Mississauga (the "**City**") and the Receiver for the settlement of all claims, counterclaims and crossclaims brought by the City, Construction and the Receiver against each other in the settled Actions (as defined below).

DISCLAIMER

7. Except as otherwise described in this Ninth Report, the Receiver has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the information in a manner that would wholly or partially comply with Canadian Auditing Standards pursuant to the Chartered Professional Accountants of Canada Handbook.

8. Unless otherwise stated, all monetary amounts contained in this Ninth Report are expressed in Canadian dollars.

DISPUTE WITH THE CITY

9. In or around 2010, the City undertook a transit construction project referred to as the Mississauga Bus Rapid Transit Construction Tender - Segment 1 Hurontario Street to Fieldgate Drive Civil Works and Stations, Procurement No. FA. 49.193-10 (the "**Project**").

10. On or about September 9, 2010, following a competitive tender process, the City retained Construction by written agreement dated September 9, 2010 with respect to the provision by Construction of construction services to the Project as general contractor (the "**Contract**"). The value of the Contract was in excess of \$100 million.

11. Aviva Insurance Company of Canada ("**Aviva**") issued a performance bond with respect to the Contract as security for Construction's performance of the Contract.

12. Construction engaged various subcontractors and suppliers to supply certain portions of services and materials required pursuant to the Contract (the "**Subcontractors**").

13. In or around February 18, 2015, the City terminated the Contract and subsequently commenced an action against Construction in the Ontario Superior Court of Justice at Brampton (the "**City Action**"), in which the City sought damages in the amount of \$10 million for costs, losses and expenses allegedly suffered and incurred as a result of Construction's alleged delays in completing the Project, incomplete and deficient work, and other alleged defaults by Construction under the Contract. A copy of the City's Statement of Claim is attached hereto as **Appendix "C"**.

14. Construction defended the City Action and counterclaimed against the City in the City Action for payment of the balance of the Contract amount and damages in the aggregate amount of approximately \$25 million for alleged breaches of the Contract by the City, negligence and unjust enrichment (the "**Counterclaim**"). A copy of Construction's Statement of Defence and Counterclaim is attached hereto as **Appendix "D"**.

15. The City defended the Counterclaim. A copy of the City's Reply and Defence to Counterclaim is attached hereto as **Appendix "E"**.

16. On April 1, 2015, Construction preserved a claim for lien against the Project under the *Construction Lien Act* and on May 11, 2015 commenced an action against the City and others in the Ontario Superior Court of Justice at Brampton (the "**Lien Action**")

claiming payment of the approximate amount of \$10 million for unpaid work or services provided on the Project and a further amount of approximately \$15 million against the City only for damages. A copy of the Statement of Claim in the Lien Action is attached as **Appendix "F"**.

17. The City defended the Lien Action. A copy of the Statement of Defence is attached as **Appendix "G"**.

18. In addition to the City Action, the Counterclaim and the Lien Action, various Subcontractors to the Project preserved and perfected lien claims against the Project (the "**Lien Claimants**") for holdback and other unpaid amounts.

19. Following its appointment, the Receiver obtained orders authorizing it to continue the Counterclaim and the Lien Action. Lien claimants also sought and obtained leave to continue their actions in order to access holdback amounts. The Receiver is currently a party to two lien actions; one commenced by Omico Mechanical Limited (the "**Omico Action**") and another by Gage Aluminum & Glass Ltd. (the "**Gage Action**").

20. The City and Omico have now reached the settlement of the Omico Action and discussions are ongoing between the City and Gage to settle the Gage Action.

21. The Receiver and its legal counsel met with the City and/or its lawyers on multiple occasions in an effort to settle the City Action, the Counterclaim and the Lien Action (collectively, the "**Actions**"). During these meetings, the City maintained its position that its damages for breach of the Contract by Construction was substantially higher than any award of damages that the Receiver could be awarded under the Contract. The City also advised the Receiver that it was determined to proceed to trial, if necessary.

22. The Receiver obtained an estimate of legal costs from its construction lien lawyers at Goodmans LLP to bring these Actions to conclusion. TD Bank, which continues to be owed in excess of \$12 million despite interim distributions approved by this Court, is likely the sole party with an economic interest in any proceeds recovered by the Receiver in the Counterclaim and the Lien Action. The Bank has advised the Receiver that it is not prepared to fund the continuation of these Actions with the proceeds of its collateral.

23. The Receiver has sought but was not able to obtain third party litigation funding for the continuation of the Actions.

24. In January 2018, the Receiver again met with representatives of the City to continue settlement discussions. Although a settlement agreement was not reached at that meeting, shortly thereafter, the City made a settlement offer to the Receiver.

25. Prior to accepting the City's offer to settle, the Receiver approached David's counsel to inquire if David has an interest in acquiring Construction's rights in the Actions. Although David made an offer to purchase Construction's rights, such offer was inadequate as to amount and on terms not acceptable to the Receiver or TD Bank. A copy of David's offer is included in **Confidential Appendix 1** to be filed separately with the Court.

SETTLEMENT WITH THE CITY

26. The City and the Receiver, following consultation with TD Bank, have entered into Minutes of Settlement to settle the Actions on the following terms:

- (a) payment by the City to the Receiver of \$150,000 by way of a partial reimbursement of the Receiver's costs incurred in connection with the Actions;
- (b) the Actions will be dismissed on a without cost basis; and
- (c) the City and the Receiver will execute a full and final mutual release.

A copy of the Minutes of Settlement is attached hereto as **Appendix "H"**.

27. The Minutes of Settlement are subject to approval by City Council and this Court. The Receiver was advised by the City's lawyers that City Council has approved the Minutes of Settlement.

28. The Receiver is of the view that the settlement contemplated by the Minutes of Settlement is fair and reasonable for the following reasons:

- (a) TD Bank objects to the Receiver using the proceeds of its collateral to continue to fund the Actions;
- (b) The Receiver sought but was unable to obtain third party litigation funding to enable it to continue the Actions;
- (c) Pursuant to the Minutes of Settlement, the Receiver will be able to recover a portion of the costs incurred by the Receiver in connection with the Actions;
- (d) The Minutes of Settlement will provide a cost effective resolution of the Actions; and

(e) TD Bank which is the only party with an economic interest in the proceeds from the Actions likely consents to the settlement pursuant to the Minutes of Settlement and supports the relief sought by the Receiver.

29. As a result of the foregoing, the Receiver recommends that the Court approve the Minutes of Settlement.

SUMMARY AND RECOMMENDATIONS

30. The Receiver respectfully requests an order approving the Minutes of Settlement.

All of which is respectfully submitted this 27th day of May, 2018.

**BDO CANADA LIMITED Court Appointed Receiver of B.
Gottardo Construction Ltd. and B. Gottardo Site
Servicing Limited**



Per: _____
Name: Josie Parisi, CPA, CA, CBV, CIRP, LIT
Title: Senior Vice President