

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

THE HONOURABLE MR.  
JUSTICE NEWBOULD

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)  
)

FRIDAY, THE 7<sup>TH</sup> DAY  
OF OCTOBER, 2016

**B E T W E E N:**

**BDO CANADA LIMITED, IN ITS CAPACITY AS COURT-APPOINTED RECEIVER  
OF B. GOTTARDO CONSTRUCTION LTD. and B. GOTTARDO SITE SERVICING  
LIMITED**



Applicant

-and-

**BRUNO GOTTARDO, DAVID GOTTARDO, KLEINRIDGE INVESTMENTS INC.,  
615146 ONTARIO LIMITED, 2191673 ONTARIO LIMITED, FALCONRIDGE  
CORPORATION, 2303663 ONTARIO LTD. and 2346193 ONTARIO LIMITED**

Respondents

**ORDER**

**THIS APPLICATION** made by BDO Canada Limited in its capacity as the court-appointed receiver of B. Gottardo Construction Ltd. and B. Gottardo Site Servicing Limited (the “Receiver”) was heard this day at 330 University Avenue, Toronto, Ontario.

**ON READING** the Receiver’s Fourth Report to the Court dated March 11, 2016, the Receiver’s Supplemental Report to the Court dated May 17, 2016, Affidavits of David Gottardo sworn April 22, 2016 and September 29, 2016 and Affidavit of Lino Toncic sworn April 20, 2016, and on hearing the submissions of counsel for the parties,

1. **THIS COURT ORDERS** that Kleinridge Investments Inc. shall pay to the Receiver the sum of \$2,884,584.74, together with interest thereon pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C43 at the rate of 1.0% from September 21, 2015 to October 7, 2016 in the amount of \$30,268.38 for a total of \$2,914,853.12.
2. **THIS COURT ORDERS** that Falconridge Corporation shall pay to the Receiver the sum of \$398,000, together with interest thereon pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C43 at the rate of 0.8% from March 1, 2016 to October 7, 2016 in the amount of \$1,927.85 for a total of \$399,927.85.
3. **THIS COURT ORDERS** that 615146 Ontario Ltd. shall pay to the Receiver the sum of \$107,484.80, together with interest thereon pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C43 at the rate of 1.0% from September 21, 2015 to October 7, 2016 in the amount of \$1,127.85 for a total of \$108,612.65.
4. **THIS COURT ORDERS** that David Gottardo shall pay to the Receiver the sum of \$362,191.47, together with interest thereon pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C43 at the rate of 1.0% from September 21, 2015 to October 7, 2016 in the amount of \$3,800.53 for a total of \$365,992.00.
5. **THIS COURT ORDERS** that 2346193 Ontario Ltd. shall pay to the Receiver the sum of \$1,477,786.65, together with interest thereon pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C43 at the rate of 1.0% from October 27, 2015 to October 7, 2016 in the amount of \$14,049.10 for a total of \$1,491,835.75.
6. **THIS COURT ORDERS** that 2303663 Ontario Ltd. shall pay to the Receiver the sum of \$434,805.00, together with interest thereon pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C43 at the rate of 0.8% from March 1, 2016 to October 7, 2016 in the amount of \$2,106.12 for a total of \$436,911.12.
7. **THIS COURT ORDERS** that 2191673 Ontario Ltd. shall pay to the Receiver the sum of \$45,000.00, together with interest thereon pursuant to the *Courts of Justice Act*, R.S.O. 1990, c.

C43 at the rate of 0.8% from March 1, 2016 to October 7, 2016 in the amount of \$217.97 for a total of \$45,217.97.

8. THIS COURT ORDERS that Bruno Gottardo shall pay to the Receiver the sum of \$110,242.52, together with interest thereon pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C43 at the rate of 0.8% from March 8, 2016 to October 7, 2016 in the amount of \$517.08 for a total of \$110,759.60.

~~THIS ORDER bears interest at the rate of 2.00% per annum on the costs from its date.~~ - 25

9. THIS COURT ORDERS that there shall be a trial of an issue in respect of the balance of the Receiver's claim against 2346193 Ontario Ltd. 25

*2016*

ENTERED AT / INSCRIT À TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO:

OCT 21 2016

PER / PAR: *4*

**BDO CANADA LIMITED**

Applicant

- and -

**B. GOTTARDO CONSTRUCTION LTD. ET AL.**

Respondents

Court File No. CV-16-11330-00CL

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

Proceedings commenced at TORONTO

**ORDER**

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COUNSEL SLIP

COURT FILE NO CV-16-011330-EL :

DATE Oct 7, 2016 :

NO ON LIST (5)

TITLE OF PROCEEDING

BDO CANADA LIMITED ET AL  
VS.  
GOTTARDO ET AL

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APPLICANT(S)  
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THE TORONTO-DOMINION BANK  
Applicant

- and -

B. GOTTARDO CONSTRUCTION LTD. et al  
Respondents  
March 22, 2016  
Court File No. CV15-11054-00CL

March 22/16 as per counsel slip -  
Receivers seeking judgment receivables.  
Parties have agreed to proceed by way of  
Application. Settlement of court  
Hearing scheduled for 1 day on June 21/16

Conway J.

October 7, 2016

For written reasons, judgment is  
so in accordance with the reasons.  
Conway J.

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

Proceedings commenced at Toronto

MOTION RECORD

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Court-appointed Receiver



Court File Number: CV-16-011330-CL

Superior Court of Justice  
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FILE/DIRECTION/ORDER

BDO Cavale Ltd et al

Plaintiff(s)

AND

GOTTARDO et al

Defendant(s)

Case Management  Yes  No by Judge: \_\_\_\_\_

Counsel	Telephone No:	Facsimile No:
<u>See attached counsel slip</u>		

- Order  Direction for Registrar (No formal order need be taken out)  
 Above action transferred to the Commercial List at Toronto (No formal order need be taken out)

- Adjourned to: \_\_\_\_\_  
 Time Table approved (as follows):

<u>October 7, 2016</u>
The receiver of the two debts, B. Gottardo Construction Ltd ("Construction") and B. Gottardo Site Servicing Ltd ("Site Servicing") moves for judgment against a number of entities and persons. The parties agreed to proceed by way of application. See endorsement of Conway J of March 22, 2016.

Date

Judge's Signature

Additional Pages 1 of 18

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Superior Court of Justice  
Commercial List

**FILE/DIRECTION/ORDER**

Judges Endorsment Continued

It is agreed that judgment should go  
in favour of Construction against (i) Falconridge  
for \$398,000, (ii) 615146 Ontario Ltd for  
\$107,484.80, (iii) 2191673 Ontario Ltd  
for \$45,000, and (iv) 2303663 Ontario Ltd  
for \$434,805.

Claims against 2346193 Ontario Ltd ("234")

(a) 608,393.65

234 acknowledges receiving this money.  
Lino Torcia, the sole officer, director and  
shareholder of 234 stated in his affidavit  
that prior to this proceeding he did not  
know that the bank transfers for this  
money came from Construction. He says until  
he became involved in the litigation he "believed  
that the money was loaned to 234 by  
2303663 Ontario Ltd ("230"). There is  
no evidence provided to support such a



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## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

belief. Moreover, it is no evidence that the money was in fact advanced to 234 by 230.

The audited financial statements of Construction state that the money was advanced ~~to~~ to 234.

That amount, along with other amounts identified in the receiver's 4<sup>th</sup> report, are shown in a

~~total~~ invoice of \$1,882,298.65 plus HST

for a total of \$2,126,997.47 from Construction to 234 described as Various Property Management

Projects and in a second invoice of the

same date from Construction to 234 of \$1,882,298.65

with HST described as "To Transfer Billings"

from sundry receivables for a total of \$2,126,997.47.

These invoices were sent to Mr. David Sotomero

on an exemption under S. 163(1) of the BIA.

He could not recall them. If HST was properly added to the amount owing on the invoice, if the amount owing could not be in loan.

In any event, 234 admits receiving the money.

Mr. Touche stated in his affidavit that the

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## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

\$608,000 was repaid to 230 during the first week of February, 2016. He said in his affidavit to. sworn April 20, 2016 that he was still trying to get some confirmation of the payment. He has not to date produced any cheque, bank transfer record or any other record of such payment. It is his company and he would have ready access to its banking records. I do not accept his bald assertion that the loan was repaid. I draw an inference from his lack of any record of 234 showing payment to 230 that in fact no payment was made to 230.

In a written interrogatory agreed to be held better than a viva voce ~~or~~ examination of Mr. David Gottardo on his affidavit, Mr. S. Stardo, an officer of 230, was asked if 230 received \$608,000 from 234 in the first week of February, 2016 or at any time. The response from counsel for Mr. S. Stardo was that Mr. S. Stardo confirms that

Superior Court of Justice  
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## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

230 received \$608,000 from 234. A further question by counsel for the receiver was that Mr. Sottardo produce the cheque, wire transfer and/or bank statements evidencing receipt of the money. There has been no response.

I do not accept this statement provided by counsel to Mr. Sottardo that he confirms 230's receipt of the money from ~~234~~ 234. I draw an inference from the lack of any supporting documentation that 230 did not receive \$608,000 from 234.

I find \$608,393.65 is owed by 234 to Construction and a judgment for that amount plus pre-judgment and post-judgment interest is to go.

(b) \$17,000

There is evidence of a wire transfer of \$17,000 to a law firm that did work for 234 from Construction. It does not indicate that the funds

Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

were to be used by the law firm on behalf of 234. There is evidence that the law firm also did work for 230. Mr. Tomic in his affidavit said the person in the law firm who could tell him if the transfer was for some advance for which 234 is liable was away but he expected to get an answer before the matter went to court. Five months later the lawyer took the position that he was not at liberty to disclose information because he needed instructions from all of his clients, not just 234. That is certainly a very questionable position to take.

However, on this record, I cannot find that \$17,000 was advanced to the law firm for the benefit of 234. This claim is directed to be dealt with by way of a trial of the issue.

(C) 869,393

Superior Court of Justice  
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## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

The audited financial statements of Construction in the year ended November 30, 2013 show \$869,393.65 owing to Construction by 234. This amount is contained in the journal entry of the books of Construction. It was certified by David Sottardo to the auditors as being an outstanding loan receivable from 234. Bruno Sottardo an officer and director of Construction signed the audited statements on behalf of Construction to confirm their validity.

Mr. Tomic stated in his affidavit that with respect to the \$869,393.01 supposedly advanced to 234 he has no knowledge of how or why the sum came to be created, recorded or in any way referenced in the books and records of Construction. This is a curious statement. Mr. Tomic does not state that the money was not advanced to 234. Nor has he produced financial statements or bank records

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## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

that would list or at least receipt of  
his money.

234 has an obligation to put its best  
evidence in an application. A vague reference  
by Mr. Tomic of having no knowledge of how  
a sum in the records of Sthardo is not  
sufficient evidence to require a trial of an  
issue. It is a statement that the money  
was not advanced to 234. Even if it could  
be said that the statement means he ~~does~~  
does not recall receiving the money, which  
it really does not, without more such  
as the company's records, it is of no  
cofent value. I draw an inference  
from the lack of any cofent evidence from  
234 that it cannot deny the receipt  
of the money or an obligation to repay it.  
I accept the audited statement of Construction  
certified by both David and Bruno Gotthardt  
that the money was and is a receivable

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FILE/DIRECTION/ORDER

Judges Endorsment Continued

payable by 234 to Construction.

A judgment is to go in the amount of \$869,393 plus pre and post-judgment interest against 234 in favour of Construction.

(d) The balance of the invoices of \$2,126,997

There is simply not enough evidence for the balance of the invoices after deducting the claims in (a), (b) and (c) to hold

234 liable. A trial of our issue is directed for this ~~to~~ <sup>surplus</sup> amount.

Claims against Kleinridge Investments Inc

It is not disputed that Kleinridge owes \$2,756,346.60 to Construction and \$128,238.14 to Site Servicing.

Kleinridge takes the position, however, that it is entitled to set off rents said to be

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## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

owing by Construction to Kleinberg.

The allegation is raised in the affidavit of David Gottardo, also an officer of Kleinridge. He says a lease agreement of Construction for premises owned by 1043280 ("104") Outwin Limited dated December 1, 2009 required payments of for occupation rent to 104. However he says that inasmuch as 104 gave a mortgage to Kleinridge, 104 directed Construction on <sup>December 1, 2009</sup> to make the occupation rent payments to Kleinridge. He said no rent was paid by Construction from December 1, 2009 to July 31, 2015 for a total of \$1,147,500 plus HST of \$149,175.

He also said in his affidavit that prior to December 1, 2009 rent had not been paid by Construction for 13 years, when the agreed rent was \$11,250 per month plus HST, for a total of \$1,755,000 plus HST of \$228,150. In the there is no suggestion that this rent



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## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

was directed to be paid by 104 to Kleinridge,  
yet Kleinridge claims it should be entitled  
to set it off as well against Construction.

The direction of December 1, 2005 to Construction  
~~was~~ signed by David Sottard on behalf  
of 104. It was not signed by Construction  
to acknowledge its receipt. Mr. Sottard in  
his affidavit did not state that the direction  
was given to Construction. His explanation  
that the direction was made because  
104 gave a mortgage to Kleinridge is clearly  
not true. The parcel register for the  
104 properties from the time 104  
acquired the property on September 9, 1993  
shows that there has never been a mortgage  
to Kleinridge.

The evidence is clear that Construction  
owes nothing. It is contained in the Supplemental  
report of the receiver to the 4th report of the  
receiver. The audited statements of

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**FILE/DIRECTION/ORDER**

Judges Endorsment Continued

Construction for the year ended November 30, 2013 do not disclose any liabilities to 104 or to Kleinridge. David Gifford confirmed in a representation letter to the auditors that all related transactions had been disclosed and accounted for in the audited statements. It is now not open for him to assert otherwise in his affidavit.

Apart from the 2013 audited statements, the trial balance and ~~audit~~ re-audited financial statements of Construction included in the auditor's working paper files for the November 30, 2014 year end do not show 3.2 million is owed to 104. They do show that Kleinridge was indebted to Construction.

If any money was owed for rent, it would be owed to 104 for all rent owed before the direction of December 31, 2009, and perhaps after as well if the direction

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## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

was not binding on Construction, as appears to be the case. If the direction was binding, the failure to pay it would be a breach of a rental agreement between Construction and 104. There is no evidence of an agreement by Construction to pay rent to Kleinridge.

In the circumstances, there could be no legal set-off. Kleinridge in its factum claims equitable set-off.

The test for equitable set-off is discussed fully in Telford v Hoti, [1987] 2 S.C.R. 193. In my view, whether the rent was owed to 104 or to Kleinridge, assuming it was owed, equitable set-off is not available to Kleinridge. The claim for rent did not arise out of the ~~same~~ same transaction as the outstanding loans and it is not closely connected to it. It would not be manifestly unjust

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**FILE/DIRECTION/ORDER**

Judges Endorsment Continued

to enforce payment of the loans without taking into account the cross-claim for rent of the premises from 104. In the language of Brown J. (as he then was) in CIBC World Markets v Burgess [2009] O.J. No. 1724, the claim on the loans was not brought about, or contributed to by, or otherwise closely bound up with the rights relied on for payment of occupational rent.

In the circumstances, there is no basis to set off any alleged rent owing by Construction to 104 or to Kleinridge.

There will be judgment of \$2,756,346.80 against Kleinridge in favour of Construction and \$128,238.14 against Kleinridge in favour of Site Services, both with pre- and post-judgment interest.

Claims against Bruno Sottardo and David Sottardo

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## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

Construction claims = 110,242.52 against  
Bruno Goffardo. Site Services claims  
= 212,400 against David Goffardo.

The Goffardo's do not deny the money  
is owing. They say, however, that they were  
terminated by the receiver and that  
they can set-off claims for damages  
for wrongful dismissal equal to salary  
and benefits for one and a half years.

In his affidavit David Goffardo said  
that what he owes <sup>Site Services</sup> ~~Construction~~ is not for  
loans but "a deferral of salary which  
were booked on the shareholder loan account  
because I took out the money without book[ing]  
it to wages". He says his father told  
him the same thing about the money owed  
to Construction by him. This makes no  
sense. If they took the money out "as  
a deferral of salary", i.e. they did not  
draw the salary they were entitled to,

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## FILE/DIRECTION/ORDER

## Judges Endorsment Continued

They would not owe money to the company.

In any event, it is conceded that David Gottardo signed a representation letter to the auditors and that Bruno Gottardo signed the audited statements that listed the accounts outstanding as loans.

They cannot now try to change the character of the loans in order to try to shoehorn into an equitable set-off argument.

Any claim for damages for wrongful dismissal is not so closely connected to the accounts payable by David + Bruno Gottardo to give rise to an equitable set-off. Moreover, because a claim for wrongful dismissal is a claim for unliquidated damages <sup>against the employer,</sup> it is not a debt permitting legal set-off and the Gottardos in their factum do not seek legal set-off.

There will therefore be judgment.

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Judges Endorsment Continued

against David Sottardo in the amount of \$212,400 plus pre- and post-judgment interest in favour of Site Servicing and against Bruno Sottardo in the amount of \$110,242.52 plus pre- and post-judgment interest in favour of Construction.

A further claim is made by Construction against David Sottardo on a loan of \$149,791.43. The suretyship of Sel-off for this obligation is made by David as for the Site Servicing obligation of \$212,400. For the same reasons, a judgment is to go in favour of Construction against David Sottardo in the amount of \$149,791.43 plus pre- and post-judgment interest.

The receiver is entitled to its costs against the defendants who are ordered

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**FILE/DIRECTION/ORDER**

Judges Endorsment Continued

To make payments under the judgments.  
If not speed, a brief written argument  
may be made by the receiver within 10  
days along with a cost outline and  
brief reply, submissions may be made  
within a further 10 days.

JSD J.