

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

EMMANUEL VILLAGE RESIDENCE INC.

Applicant

- and -

ATTORNEY GENERAL OF ONTARIO

Applicant

- and -

1250 WEBER STREET EAST, KITCHENER, ONTARIO OR
THE PROCEEDS OF THE SALE THEREOF (IN REM)

Respondent

**FACTUM OF THE PLAINTIFFS IN THE ACTION
BEARING COURT FILE NO. CV-10-8597-00CL
(Motion Returnable September 6, 2016)**

August 26, 2016

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PART I – OVERVIEW

1. On May 17, 2013, following a judicially mediated settlement, the Honourable Justice Campbell made an Order unequivocally requiring that \$1.2 million be paid to the victims of fraud in settlement of their Fraud Action (as defined below) immediately upon a sale of the Emmanuel Village Retirement Residence located at 1250 Weber St., Kitchener, Ontario (the "**Residence**"). The Order was the culmination of seven years of hard fought litigation over the victims' proprietary claims in the Residence.
2. This is a motion to enforce that Order so that the group of 79 elderly individuals who fell victim to the massive fraudulent investment scheme nearly 15 years ago finally receive the

compensation to which they are entitled, and which they require given their advanced age, declining health, and depleted financial situation.

PART II – FACTS

Background to the Fraud Action

3. The action bearing court file number CV-10-8597-00CL (the "**Fraud Action**") was commenced in Toronto in 2005 against 22 defendants, including Bryan Hunking ("**Hunking**"), his wife Judy Hunking ("**Judy**") and other related individuals and entities.¹

4. The plaintiffs in the Fraud Action (the "**Plaintiffs**") are a group of 79 individual investors who fell victim to a fraud perpetrated by the defendants between 2000 and 2003.² In the Fraud Action, the plaintiffs alleged that they invested over \$8.5 million in the defendants' fraudulent investment scheme, and that this money was improperly funneled into the Residence owned by the defendant, Emmanuel Village Residence Inc. (**EVR**).³

5. In addition to having sought damages of over \$8.5 million in the Fraud Action, the Plaintiffs also sought, among other things, the issuance and registration of certificates of pending litigation against title to the Residence. The Plaintiffs claimed a proprietary interest in the Residence given that a substantial portion of their invested funds were diverted toward its construction.⁴

¹ Affidavit of Alan P. Gardner, sworn August 25, 2016 (the "**Gardner Affidavit**") at para. 3 and Exhibits A and B, Motion Record of the Plaintiffs in the Action Bearing Court File No. CV-10-8597-00CL (the "**Plaintiffs' Motion Record**"), Tab 2, p. 13, Tab 2A, pp. 26-33 and Tab 2B, pp. 34-52.

² Gardner Affidavit, at para. 4 and Exhibit B, Plaintiffs' Motion Record, Tab 2, p. 13, and Tab 2B, pp. 34-52.

³ Gardner Affidavit, at para. 4 and Exhibit B, Plaintiffs' Motion Record, Tab 2, p. 13, and Tab 2B, pp. 34-52.

⁴ Gardner Affidavit, at para. 5 and Exhibit B, Plaintiffs' Motion Record, Tab 2, p. 13, Tab 2B, pp. 34-52.

Registration of Certificates of Pending Litigation

6. As an initial step in the Fraud Action, the Plaintiffs caused certificates of pending litigation to be registered against title to the Residence on September 9, 2005 and January 23, 2006.⁵ The Plaintiffs' certificates of litigation respectively remained on title to the Residence until April 19 and April 26, 2013, when they were discharged for the express and exclusive purpose of allowing EVR to obtain a re-financing in relation to the Residence in connection with the settlement of the Fraud Action.⁶

The Conduct of the Fraud Action

7. Following the registration of the certificates of pending litigation in 2005 and 2006, the litigation continued in a highly acrimonious and contentious manner. The Plaintiffs diligently prosecuted the Fraud Action and the defendants vigorously defended it, employing numerous tactics to impede the prompt resolution of the matter on the merits.⁷

8. Bennett Jones prepared and delivered affidavits of documents on behalf of each of the 79 plaintiffs, as well as, in some cases, supplementary affidavits, further supplementary affidavits and second further supplementary affidavits of documents.⁸

9. The parties also engaged in an ongoing process of examinations for discovery under a procedure agreed to by the parties and approved by Justice Strathy of the Superior Court of Justice for Ontario. Ultimately, written and/or oral examinations for discovery of all 79 plaintiffs were conducted. Examinations of all seven individual defendants, and examinations of most of the 15 corporate defendants' representatives, were conducted as well.⁹

⁵ Gardner Affidavit, at paras. 9-10 and Exhibits C and D, Plaintiffs' Motion Record, Tab 2, pp. 14-15, Tab 2C, pp. 53-58 and Tab 2D, pp. 59-64.

⁶ Gardner Affidavit, at paras. 11-12 and Exhibits E, Plaintiffs' Motion Record, Tab 2, p. 15, and Tab 2E, pp. 65-72.

⁷ Gardner Affidavit, at para. 13, Plaintiffs' Motion Record, Tab 2, p. 15.

⁸ Gardner Affidavit, at para. 14, Plaintiffs' Motion Record, Tab 2, pp. 15-16.

⁹ Gardner Affidavit, at paras. 15-16, Plaintiffs' Motion Record, Tab 2, p. 16.

10. There were several significant interlocutory motions argued throughout the seven years following the commencement of the Fraud Action, including various motions brought by both sides to amend pleadings, strike out paragraphs of affidavits, address issues pertaining to the discovery procedure, and compel answers to undertakings and refusals.¹⁰ In addition, on June 17, 2010, the plaintiffs unsuccessfully brought a motion to have a receiver appointed over the assets and business of EVR. Certain defendants also unsuccessfully brought a motion in 2011 to have the certificates of pending litigation lifted and/or deleted from title to allow for a re-financing in relation to the Residence.¹¹

11. Substantial time and resources were expended by Bennett Jones LLP and the Plaintiffs to advance the litigation toward a just disposition on the merits.¹² The litigation took a tremendous toll on the Plaintiffs, both mentally and emotionally.¹³

The Settlement of the Fraud Action

12. In July 2012, and again in October 2012, the parties attended a pre-trial to address, among other things, procedural issues regarding the upcoming trial and the settlement positions of the parties.¹⁴

13. At the July 2012 pre-trial, the plaintiffs and Hunking, Judy and the corporate defendants they controlled, including EVR (the "**Hunking Defendants**") attempted to work towards a negotiated settlement of the matter. However, there were a number of obstacles impeding a negotiated resolution, most of which related to the Plaintiffs' concerns about the money that the Hunking Defendants would ultimately have available to fund a settlement.¹⁵

¹⁰ Gardner Affidavit, at paras. 17-18, Plaintiffs' Motion Record, Tab 2, pp. 16-17.

¹¹ Gardner Affidavit, at para. 18, Plaintiffs' Motion Record, Tab 2, pp. 16-17.

¹² Gardner Affidavit, at para. 19, Plaintiffs' Motion Record, Tab 2, p. 17; Affidavit of Dr. Robert Blake Gibb, sworn August 25, 2016 (the "**Gibb Affidavit**") at para. 10, Plaintiffs' Motion Record, Tab 3, p. 199.

¹³ Gibb Affidavit, at para. 10, Plaintiffs' Motion Record, Tab 3, p. 199.

¹⁴ Gardner Affidavit, at para. 20, Plaintiffs' Motion Record, Tab 2, p. 17.

¹⁵ Gardner Affidavit, at para. 21, Plaintiffs' Motion Record, Tab 2, p. 17.

14. Although significant progress was made at the pre-trial toward achieving a negotiated resolution of the matter, a settlement was not achieved.¹⁶

15. As a final effort to avoid a lengthy trial, on November 30, 2012, the parties appeared before the Honourable Justice Campbell for a judicial mediation. After a lengthy mediation on that date, the plaintiffs and the Hunking Defendants settled the matter and signed a handwritten settlement agreement entitled "Terms of Agreement", which was appended to Justice Campbell's endorsement.¹⁷

16. The Plaintiffs and the Hunking Defendants formalized the Terms of Agreement into Minutes of Settlement that were executed by the parties (the "**Minutes**").¹⁸ Pursuant to the Minutes, the Plaintiffs agreed to dismiss the Fraud Action as against the Hunking Defendants and discharge the certificates of pending litigation they had registered on title to the Residence in consideration for, among other things, three sets of payments by the Hunking Defendants (collectively, the "**Settlement Payments**"), all of which were directly tied to the Plaintiffs' equitable interest in the Residence (and triggered on a re-financing or sale) given that the Plaintiffs were settling their proprietary claims in the Residence, namely:

- (a) an initial payment of \$1.3 million upon the Hunking Defendants obtaining funds through an initial re-financing of the Residence (the "**Initial Payment**");

¹⁶ Gardner Affidavit, at para. 22, Plaintiffs' Motion Record, Tab 2, p. 17.

¹⁷ Gardner Affidavit, at para. 23 and Exhibit F, Plaintiffs' Motion Record, Tab 2, pp. 17-18, and Tab 2F, pp. 73.84.

¹⁸ Gardner Affidavit, at para. 24, and Exhibit G, Plaintiffs' Motion Record, Tab 2, p. 18, and Tab 2G, pp. 85-123.

- (b) a second payment of \$1.2 million (the "**Second Payment**") to be made:
 - (i) immediately upon the sale of the Residence, whether it takes the form of a sale or transfer of assets or a share purchase transaction involving EVR or its parent companies; and/or
 - (ii) if the Residence were not sold, 40% of any subsequent re-financing on the Residence would be required to be paid to the plaintiffs until the \$1.2 million is fully paid, with the Hunking Defendants being obliged to make best efforts to seek re-financing five years from the Initial Payment; and
- (c) a third payment to be made upon the sale of the Residence, consisting of 15% of the amount that the sale price exceeds \$21 million (the "**Third Payment**").¹⁹

17. As a condition of the settlement, the Hunking Defendants' counsel was also required to provide the Plaintiffs with a lawyer's undertaking that it would continue to act on the Hunking Defendants' behalf in connection with the initial re-financing, any subsequent re-financing, and the sale of the Property in order to ensure that the Plaintiffs would receive notice of, and be paid in connection with, any re-financing or sale of the Property.²⁰ To provide further assurances in that regard, a further term was built into the Minutes irrevocably authorizing and directing the Hunking Defendants' counsel to immediately pay the Initial Payment, the Second Payment and the Third Payment directly to Bennett Jones in trust out of any net proceeds received from any re-financing or sale of the Property, prior to any funds flowing to EVR or any of the other Hunking Defendants.²¹

¹⁹ Gardner Affidavit, at para. 25 and Exhibit G, Plaintiffs' Motion Record, Tab 2, pp. 18-19, and Tab 2G, pp. 85-123.

²⁰ Gardner Affidavit, at paras. 26-29 and Exhibit H, Plaintiffs' Motion Record, Tab 2, pp. 19-20, and Tab 2H, pp. 124-129.

²¹ Gardner Affidavit, at para. 27 and Exhibit G, Plaintiffs' Motion Record, Tab 2, p. 19, and Tab 2G, pp. 85-123.

Justice Campbell's Order

18. On May 17, 2013, the essential terms of the Minutes, including all the terms relating to the Settlement Payments, were formalized in an Order made by the Honourable Justice Campbell who presided over the judicial mediation, facilitated the settlement and structured it on terms that provided the Plaintiffs with the equitable interest in the Residence they needed to protect the compromise of their proprietary claims.²²

19. Paragraph 4(a) of Justice Campbell's Order provides that EVR "shall" pay the Plaintiffs "\$1.2 million *immediately* upon the sale of the Residence, whether it takes the form of a sale or transfer of assets or a share purchase transaction involving Emmanuel Village Residence Inc. or its parent companies" (emphasis added).²³

The Receivership and Forfeiture Application

20. On June 10, 2016, over 10 years after the Fraud Action was commenced and over three years after it was resolved, EVR commenced the within receivership application bearing court file number CV-16-11424-00CL (the "**Receivership Application**").²⁴ The Residence is the principle asset of the Receivership Application.²⁵

21. The Residence is also the principle asset captured by the Attorney General's civil forfeiture application initially commenced in Kitchener on the same day as the Receivership Application under court file number C-636-16 (the "**Forfeiture Application**").^{26, 27}

²² Gardner Affidavit, at para. 32 and Exhibit I, Plaintiffs' Motion Record, Tab 2, p. 21, and Tab 2I, pp. 130-135.

²³ Gardner Affidavit, at Exhibit I, Plaintiffs' Motion Record, Tab 2I, pp. 130-135.

²⁴ Gardner Affidavit, at para. 6, Plaintiffs' Motion Record, Tab 2, p. 14.

²⁵ Gardner Affidavit, at para. 6, Plaintiffs' Motion Record, Tab 2, p. 14.

²⁶ Gardner Affidavit, at para. 7, Plaintiffs' Motion Record, Tab 2, p. 14.

²⁷ The forfeiture application was consolidated with the receivership application and transferred to the Commercial List pursuant Court Orders dated July 22, 2016 (the consolidated proceeding is hereinafter referred to as the "**Receivership and Forfeiture Application**").

22. On June 24, 2016, on the consent of all interested parties, including the Plaintiffs, BDO Canada Limited (**BDO**) was appointed as receiver without security over EVR's business, assets, undertakings and property for the purpose of completing a going concern sale of EVR's business and the assets, undertakings and property used in relation to EVR's business.²⁸

The Plaintiffs Seek to Obtain Payment As Quickly As Possible

23. The Plaintiffs are a group of elderly individuals, several of whom have passed away or fallen ill since the Fraud Action was commenced over 10 years ago.²⁹ Their primary goal is to enforce Justice Campbell's Order so that they can recover the funds to which they are entitled as quickly as possible.³⁰

24. The Plaintiffs have all been awaiting payment of the \$1.2 million due under Justice Campbell's Order for the last several years and they are all eager and, in many cases, desperate, to obtain these funds immediately.³¹ Given the advanced age, declining health and financial position of many of the Plaintiffs, it is imperative that they get paid as soon as possible.³²

25. Bennett Jones has an established and effective distribution process in place for delivering the funds directly into the hands of the Plaintiffs.³³

PART III – ISSUE

26. The sole issue to be decided on this motion is whether Justice Campbell's Order ought to be followed so that the Plaintiffs are paid the \$1.2 million to which they are entitled immediately upon the sale of the Residence, in accordance with the Order.

²⁸ Gardner Affidavit, at paras. 45-46, Plaintiffs' Motion Record, Tab 2, p. 24.

²⁹ Gibb Affidavit, at paras. 16-17, Plaintiffs' Motion Record, Tab 3, p. 201; Gardner Affidavit, at para. 47, Plaintiffs' Motion Record, Tab 2, p. 25.

³⁰ Gibb Affidavit, at paras. 16-17, Plaintiffs' Motion Record, Tab 3, p. 201; Gardner Affidavit, at paras. 47-48, Plaintiffs' Motion Record, Tab 2, p. 25.

³¹ Gibb Affidavit, at para. 16, Plaintiffs' Motion Record, Tab 3, p. 201.

³² Gibb Affidavit, at paras. 16-17, Plaintiffs' Motion Record, Tab 3, p. 201.

³³ Gardner Affidavit, at paras. 38-39, Plaintiffs' Motion Record, Tab 2, p. 22; Gibb Affidavit, at para. 15, Plaintiffs' Motion Record, Tab 3, p. 201.

PART IV –LAW AND ARGUMENT

The Court Order Unequivocally Requires the Plaintiffs to be Paid \$1.2 million Immediately Upon Sale

27. There is a binding Court Order, made by Justice Campbell of this Honourable Court, that unequivocally requires the Plaintiffs to be paid \$1.2 million immediately upon a sale of the Residence.

28. It is a fundamental tenant of our legal system that Court Orders are to be followed strictly, and any failure to do so interferes with the orderly administration of justice and impairs the authority and dignity of the Court.³⁴

29. Here, Justice Campbell's Order is plain and clear. Without exception, it requires that \$1.2 million be paid to the Plaintiffs immediately upon a sale of the Residence. There is absolutely no basis upon which it ought not to be followed.

30. While it is true that a forfeiture application has been commenced by the Attorney General, as set out in more detail below, that ought not to affect the immediate enforcement of Justice Campbell's Order. The Order ought to be strictly followed and the Plaintiffs paid immediately in accordance with that Order.

³⁴ *Dimatt Investments Inc. v. Presidio Clothing Inc.* (1993), 48 CPR (3d) 46 (FCTD), at para. 14, Book of Authorities of the Plaintiffs in the Action Bearing Court File No. CV-10-8597-00CL (the "Plaintiffs' BOA"), Tab 1.

There is an Overriding Public Interest in Enforcing Settlements

31. The law is well-established that settlements between parties should be encouraged and supported, and a party's motivation to settle should not be eroded by a concern that a settlement will easily be avoided.³⁵

32. Here, after seven years of hard fought litigation, the Plaintiffs settled the Fraud Action, including their proprietary claims to the Residence. The settlement was achieved at a judicial mediation before the Honourable Justice Campbell, who facilitated the settlement and structured it on terms that provided the Plaintiffs with the equitable interest in the Residence they needed to protect the compromise of their proprietary claims in the Residence.

33. The settlement that was achieved in the Fraud Action, and which Justice Campbell structured and endorsed, ought to be respected and upheld by this Court.

It is Clearly in the Interests of Justice for the Plaintiffs to be Paid \$1.2 million Immediately Upon Sale

34. It is in the interests of justice that the Plaintiffs be paid the \$1.2 million to which they are entitled.

35. Section 3 of the *Civil Remedies Act* provides the Court with authority to make an order forfeiting property that is proceeds of unlawful activity on application by the Attorney General.³⁶ Section 4 gives the Attorney General the right to also apply for any number of interlocutory orders to preserve, manage or dispose of any property that is the subject of a forfeiture proceeding under section 3.³⁷

³⁵ *Whitehall Homes & Construction Ltd. v. Hanson*, 2012 ONSC 3307, at para. 52, Plaintiffs' BOA, Tab 2.

³⁶ *Civil Remedies Act, 2001*, SO 2001, c 28 (the "*Civil Remedies Act*"), section 3(1).

³⁷ *Civil Remedies Act, supra*, section 4(1).

36. Importantly, however, the forfeiture order and interlocutory orders that may be granted under the *Civil Remedies Act* are not automatic. Under section 3(1), there is a built-in exception providing that the court is not to make an order forfeiting the property to the Crown "where it would clearly not be in the interests of justice". An identical exception is found in section 4(2) of the *Civil Remedies Act* regarding any interlocutory orders that may be made prior to the disposition of the forfeiture application.

37. The Court of Appeal in *Ontario (Attorney General) v. 8477 Darlington Crescent*³⁸ recently clarified the built-in exception portion of section 3(1) of the *Civil Remedies Act*, which gives the court discretion to refuse to grant a forfeiture application that has otherwise been established where to grant the application would "clearly not be in the interests of justice." The Court of Appeal held that, to fall under the "clearly not in the interests of justice" exception, it must be demonstrated that forfeiture would otherwise be "manifestly harsh" and result in an "inequitable result".³⁹

38. In *Darlington*, the Court of Appeal explained that the "interests of justice" are broad, and include maintaining public confidence in the civil justice process.⁴⁰ This confidence requires promoting the community's sense of fairness in forfeiture orders and, more generally, in the process under the *Civil Remedies Act*.⁴¹

39. As the Court of Appeal specifically noted in *Darlington*:

A forfeiture order made in circumstances where any reasonable person would regard the order as excessive, while perhaps serving the purposes of the CRA in the narrow sense, would do a real disservice to the administration of justice and thereby undermine rather than promote the "interests of justice".

³⁸ *Ontario (Attorney General) v. 8477 Darlington Crescent*, 2011 ONCA 363 ("*Darlington*"), Plaintiffs' BOA, Tab 3.

³⁹ *Darlington*, *supra*, at para. 85, Plaintiffs' BOA, Tab 3.

⁴⁰ *Darlington*, *supra*, at para. 96, Plaintiffs' BOA, Tab 3.

⁴¹ *Darlington*, *supra*, at para. 96, Plaintiffs' BOA, Tab 3.

40. Accordingly, in exercising its discretionary powers to grant relief from forfeiture, the Court is required to take into consideration "all factors" that are relevant to "the interests of justice".⁴²

41. While the Court of Appeal has acknowledged that these factors will necessarily vary with each case, one important factor that the Court of Appeal considered in *Darlington*, and in subsequent cases, was the interplay between the purposes of the *Civil Remedies Act* and the discretionary relief from forfeiture. In particular, where an owner has no knowledge of the criminal activity, the deterrence purpose of the *Civil Remedies Act* is not furthered, and may in fact be undermined, by a forfeiture order. For instance, if forfeiture falls indiscriminately on the innocent and the complicit, there may seem to be little value in avoiding involvement in criminal activity.⁴³

42. The Court of Appeal's reasoning in *Darlington* as it relates to the built-in exception in section 3(1) is equally applicable to the interests of justice exception under other sections of the *Civil Remedies Act*, such as section 8(1) regarding forfeiture as it relates to instruments of crime, and section 4(2) dealing with interlocutory orders.⁴⁴

43. While the Attorney General certainly has a valid interest in preserving the proceeds of the sale of the Residence to prevent EVR and the other Hunking Defendants from retaining property that was acquired as a result of their unlawful activity, the interests of justice in this case clearly dictate that the Plaintiffs – who are the victims of the fraudulent scheme – be paid

⁴² *Darlington, supra*, at para. 97, Plaintiffs' BOA, Tab 3.

⁴³ *Darlington, supra*, at para. 108, Plaintiffs' BOA, Tab 3.

⁴⁴ *Ontario (Attorney General) v. 20 Strike Avenue*, 2014 ONCA 395, at paras. 52-53, Plaintiffs' BOA, Tab 4.

the \$1.2 million to which they are entitled immediately upon a sale of the Residence given that, among other things:

- (a) The Plaintiffs are the innocent victims of crime who were defrauded of significant sums of money and, in many cases, their life savings, nearly 15 years ago;
- (b) They commenced the Fraud Action against the Hunking Defendants and other related parties in 2005, over 10 years ago, claiming a proprietary interest in the Residence;
- (c) They registered a certificate of pending litigation on title to the Residence in 2005 and again in 2006, and those certificates of pending litigation remained on title to the Residence until 2013 when they were discharged expressly and exclusively for the purpose of facilitating the implementation of the settlement of the Fraud Action and, in particular, the initial re-financing of the Property to fund the Initial Payment;
- (d) The settlement was specifically structured by Justice Campbell in a manner that provided the Plaintiffs with a continuing property interest in the Residence so that they would be paid \$1.2 million immediately upon a sale of the Residence, without the risk that these funds would flow to EVR or to any of the other Hunking Defendants;
- (e) The Plaintiffs' efforts and diligent prosecution of the Fraud Action directly resulted in criminal charges being laid against Hunking and his partners, and Hunking being convicted of fraud and sentenced to five years in prison;

- (f) The Plaintiffs are financially depleted as a result of the fraud. They are largely, if not entirely, dependent on their invested funds being returned to them immediately for their retirement and continued enjoyment of life; and
- (g) The Plaintiffs are all elderly and, in some cases, deceased or ill, such that they are unable to wait any longer than they already have for their funds to be returned.

44. In all the circumstances, it would be a draconian and unjust result that would be highly prejudicial to the Plaintiffs and offensive to the administrative of justice to order that such funds be preserved pending disposition of the forfeiture application, which could take several years at a minimum and likely longer.

45. Rather, the interests of justice clearly dictate that the Plaintiffs be paid immediately, in accordance with Justice Campbell's Order.

46. To date, no parties have indicated that they oppose the Plaintiffs being paid the \$1.2 million that is due and owing to them immediately upon a sale of the Residence.

PART V - ORDER REQUESTED

47. For all of the reasons set out above, the Plaintiffs seek an Order requiring BDO, in its capacity as receiver over EVR's business, to pay \$1.2 million to Bennett Jones LLP in trust on behalf of the Plaintiffs immediately upon the sale of the Residence, in accordance with paragraph 4(a) of the Honourable Justice Campbell's Order dated May 17, 2013.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of August, 2016.



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bearing Court File No. CV-10-8597-00CL

TAB A

SCHEDULE "A" – AUTHORITIES

1. *Dimatt Investments Inc. v. Presidio Clothing Inc.* (1993), 48 CPR (3d) 46 (FCTD)
2. *Whitehall Homes & Construction Ltd. v. Hanson*, 2012 ONSC 3307
3. *Ontario (Attorney General) v. 8477 Darlington Crescent*, 2011 ONCA 363
4. *Ontario (Attorney General) v. 20 Strike Avenue*, 2014 ONCA 395

TAB B

SCHEDULE "B" – STATUTORY REFERENCES

Courts of Justice Act, RSO 1990, c C.43

Rules of law and equity

96. (1) Courts shall administer concurrently all rules of equity and the common law.

Rules of equity to prevail

(2) Where a rule of equity conflicts with a rule of the common law, the rule of equity prevails.

Jurisdiction for equitable relief

(3) Only the Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may grant equitable relief, unless otherwise provided.

Declaratory orders

97. The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed.

Rules of Civil Procedure, RRO 1990, Reg 194

RULE 1 – CITATION, APPLICATION AND INTERPRETATION

...

INTERPRETATION

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.

Proportionality

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

...

ORDERS ON TERMS

1.05 When making an order under these rules the court may impose such terms and give such directions as are just.

...

RULE 59 – ORDERS

EFFECTIVE DATE

59.01 An order is effective from the date on which it is made, unless it provides otherwise.

...

Civil Remedies Act, 2001, SO 2001, c 28

PART I - PURPOSE

Purpose

1. The purpose of this Act is to provide civil remedies that will assist in,

- (a) compensating persons who suffer pecuniary or non-pecuniary losses as a result of unlawful activities;
- (b) preventing persons who engage in unlawful activities and others from keeping property that was acquired as a result of unlawful activities;
- (c) preventing property, including vehicles as defined in Part III.1, from being used to engage in certain unlawful activities; and
- (d) preventing injury to the public that may result from conspiracies to engage in unlawful activities.

PART II - PROCEEDS OF UNLAWFUL ACTIVITY

...

Forfeiture order

3. (1) In a proceeding commenced by the Attorney General, the Superior Court of Justice shall, subject to subsection (3) and except where it would clearly not be in the interests of justice, make an order forfeiting property that is in Ontario to the Crown in right of Ontario if the court finds that the property is proceeds of unlawful activity.

Action or application

(2) The proceeding may be by action or application.

Legitimate owners

(3) If the court finds that property is proceeds of unlawful activity and a party to the proceeding proves that he, she or it is a legitimate owner of the property, the court, except where it would clearly not be in the interests of justice, shall make such order as it considers necessary to protect the legitimate owner's interest in the property.

Same

(4) Without limiting the generality of subsection (3), an order made under subsection (3) may,

(a) sever or partition any interest in the property or require any interest in the property to be sold or otherwise disposed of, to protect the legitimate owner's interest in the property; or

(b) provide that the Crown in right of Ontario takes the property subject to the interest of the legitimate owner.

Limitation period

(5) A proceeding under this section shall not be commenced after the 15th anniversary of the date proceeds of unlawful activity were first acquired as a result of the unlawful activity that is alleged to have resulted in the acquisition of the property that is the subject of the proceeding.

Interlocutory order for preservation, management or disposition of property

4. (1) On motion by the Attorney General in a proceeding or intended proceeding under section 3, the Superior Court of Justice may make any or all of the following interlocutory orders for the preservation, management or disposition of any property that is the subject of the proceeding:

1. An order restraining the disposition or encumbrance of the property or its use as collateral under the Personal Property Security Act or otherwise.

2. An order for the possession, delivery or safekeeping of the property.

3. An order appointing a receiver or receiver and manager for the property.

4. An order for the sale or other disposition of the property if it is perishable or of a rapidly depreciating nature.

4.1 An order that any proceeds of sale or other disposition of the property be paid into court pending the conclusion of a proceeding under section 3.

5. An order to sever or partition any interest in the property or to require any interest in the property to be sold or otherwise disposed of, and for all or part of the proceeds of the severance, partition, sale or other disposition to be paid to the Crown in right of Ontario as compensation for its costs incurred in preserving, managing or disposing of the property and in enforcing or complying with any other order made under this subsection in respect of the property.

6. An order giving the Crown in right of Ontario a lien for an amount fixed by the court on the property or on other property specified in the order to secure performance of an obligation imposed by another order made under this subsection.

7. An order that notice of the proceeding or of any order made under this subsection be registered in a land registry office against the property or any other property specified in the order.

8. Any other order for the preservation, management or disposition of the property that the court considers just.

Same

(2) Except where it would clearly not be in the interests of justice, the court shall make an order under subsection (1) if the court is satisfied that there are reasonable grounds to believe that the property is proceeds of unlawful activity.

...

EMMANUEL VILLAGE RESIDENCE
INC.
Applicant

-and- ATTORNEY GENERAL OF
ONTARIO
Applicant

-and- 1250 WEBER STREET EAST, KITCHENER,
ONTARIO OR THE PROCEEDS OF THE SALE
THEREOF (IN REM) Respondent

Court File No.: CV-16-11424-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF THE PLAINTIFFS IN THE ACTION
BEARING COURT FILE NO. CV-10-8597-00CL
(Motion Returnable September 6, 2016)**

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