

**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 OF THE PROCEEDS OF  
THE SALE THEREOF (IN REM)

Respondent

**FACTUM OF THE RECEIVER  
(Motion returnable February 8, 2017)**

February 2, 2017

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Lawyers for BDO Canada Limited,  
in its capacity as Court-appointed Receiver

## **PART I - OVERVIEW**

1. BDO Canada Limited, in its capacity as the Court-appointed receiver (the “**Receiver**”) of Emmanuel Village Residence Inc. (“**EVR**”) seeks an order approving its fees and disbursements and the fees and disbursements of its legal counsel for the period from September 10, 2016 to December 31, 2016 (the “**Fee Period**”).
2. The Receiver has incurred fees fulfilling the mandate for which it as appointed. During the Fee Period, the Receiver played an instrumental, value-enhancing role in (i) administering the proceeding; (ii) closing of the sale of EVR’s assets and dealing with the closing adjustments; (iii) facilitating payments to the secured creditors from the sale proceeds; (iv) attempting to ascertain the direct creditors of EVR; and (v) attempting to facilitate a resolution with the Attorney General of Ontario (“**AGO**”). The Receiver performed these activities at the request of the Court or EVR’s stakeholders. At all times, the Receiver acted in accordance with its Court-ordered mandate.

## **PART II - FACTS**

### **Background**

3. Capitalized terms not otherwise defined herein are defined in the Sixth Report.
4. The background of the proceeding and the steps taken by the Receiver to date are summarized in the Sixth Report and are not repeated here. This factum only focuses on the activities of the Receiver and its counsel during the Fee Period that is the subject of court-approval in this motion.
5. During the Fee Period, the Receiver and its counsel:
  - (a) facilitated closing of the Transaction;

- (b) attended three (3) court hearings for motions, three (3) chambers' appointments and a judicial mediation requiring two appearances;
- (c) prepared the Fifth and the Sixth Reports;
- (d) worked with stakeholders, including the AGO, to achieve a resolution of issues surrounding EVH;
- (e) reviewed and opined on the validity of each secured creditor's security for distribution purposes;
- (f) engaged with stakeholders to resolve issues surrounding the AGO's objections to the fees of certain secured creditors and EVR's counsel;
- (g) at the court's direction, investigated known creditors of EVR as set out in the Fifth Report;
- (h) corresponded with stakeholders on the status of the proceeding;
- (i) distributed the proceeds of the Transaction to the secured creditors; and
- (j) attempted to negotiate a claims procedure mutually agreeable to the stakeholders and the AGO.<sup>1</sup>

### **PART III - ISSUE**

6. The issue is whether this Court should approve the Receiver's and its counsel's fees and disbursements incurred during the Fee Period.

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<sup>1</sup> Sixth Report of the Receiver dated January 4, 2017 (the "**Sixth Report**").

## PART IV - LAW AND ARGUMENT

### The Fees Should Be Approved

7. In considering whether fees and disbursements are reasonable in the context of a receivership, the Ontario Court of Appeal in *Bank of Nova Scotia v. Diemer*<sup>2</sup> cited with approval the following factors from *Confectionately Yours Inc. (Re)*<sup>3</sup> (collectively, the “**Bakemates Factors**”): (i) nature and extent of the value of the assets; (ii) complications and difficulties encountered; (iii) time spent; (iv) knowledge, experience and skill of the professionals involved; (v) diligence and thoroughness displayed by the Receiver; (vi) degree of responsibility assumed; (vii) results of the Receiver’s efforts; and (viii) the cost of comparable services.<sup>4</sup>
  
8. In this case, the Receiver’s and its counsel’s fees during the Fee Period should be approved taking into account the Bakemates Factors:
  - (a) *nature and extent of the value of the assets* – the Transaction generated significant proceeds. As at the date of the Sixth Report, the Receiver was in possession of approximately \$3.4 million;<sup>5</sup>
  
  - (b) *complications and difficulties encountered* – the Receiver encountered complex issues surrounding the closing of the Transaction, EVH and distribution of the sale proceeds;

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<sup>2</sup> 2014 ONCA 851 (“*Diemer*”).

<sup>3</sup> *Confectionately Yours Inc. (Re)*, 2002 CarswellOnt 3002.

<sup>4</sup> *Diemer*, at para. 33.

<sup>5</sup> Sixth Report at para. 2.1.1.

- (c) *time spent* – given the complexities created by the Preservation Order and EVH, the AGO’s objections throughout these proceedings and the need for multiple court appearances<sup>6</sup>, the time spent in these circumstances was appropriate;
- (d) *knowledge, experience and skill of the professionals involved* – the Receiver is local to the Kitchener-Waterloo Region and an experienced trustee in bankruptcy. The Receiver’s counsel are experienced insolvency practitioners. Given the complexities of this proceeding, as described above, the level of knowledge, experience and skill of the professionals involved was necessary and appropriate;
- (e) *diligence and thoroughness displayed by the Receiver* – the Receiver was diligent, thorough and pragmatic in its administration of this proceeding;
- (f) *degree of responsibility assumed* – the Receiver and its counsel were instrumental in the closing of the Transaction and have been central in attempting to resolve the issues surrounding the distribution of the Transaction proceeds;
- (g) *results of the Receiver’s efforts* – after closing the Transaction and dealing with post-closing issues, the time spent during the Fee Period was largely in an attempt to resolve the outstanding issues between the AGO, the victims and the creditors of EVR using the 3 Cs of the Commercial List: Cooperation, Communication and Common Sense;<sup>7</sup> and

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<sup>6</sup> See Sixth Report, at para. 5.2; See also Fee Affidavit of Michael Hanson sworn January 4, 2017, Appendix I to Sixth Report; Fee Affidavit Asim Iqbal sworn January 4, 2016, Appendix J to Sixth Report (collectively, the “**Fee Affidavits**”).

<sup>7</sup> See Fee Affidavits.

(h) *the cost of comparable services* – the rates charged and time spent by the Receiver and its counsel are comparable to similar services provided in other proceedings of this complexity.<sup>8</sup>

9. For the foregoing reasons, the Receiver respectfully submits that this Court should approve the Receiver's and its counsel's fees and disbursements incurred during the Fee Period.

**PART V – RELIEF REQUESTED**

10. The Receiver respectfully requests an Order approving its fees and disbursements and its legal counsel's fees and disbursements for the Fee Period.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 2nd day of February, 2017.



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**THORNTON GROUT FINNIGAN LLP**  
Lawyers for the Court-appointed Receiver

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<sup>8</sup> Ibid.

## SCHEDULE "A"

### Authorities

No.	Case
1.	<i>Bank of Nova Scotia v. Diemer</i> , 2014 ONCA 851
2.	<i>Confectionately Yours Inc. (Re)</i> , 2002 CarswellOnt 3002

**SCHEDULE "B"**

**Relevant Statutes**

N/A



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Applicant

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**ATTORNEY GENERAL OF  
ONTARIO**

Applicant

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**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)**

Proceedings commenced at Toronto

**FACTUM OF THE RECEIVER  
(Motion returnable February 8, 2017)**

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