

**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

**RESPONDING FACTUM OF THE RECEIVER
(Responding to Attorney General of Ontario's
Motion to Discharge the Receiver, returnable February 8, 2017)**

February 6, 2017

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

PART I - OVERVIEW

1. The Attorney General of Ontario (the “**AGO**”) seeks the discharge of BDO Canada Limited in its capacity as Court-appointed receiver of the Applicant (the “**Receiver**”). The AGO brings this motion without prior consultation of the parties, including the Receiver. It is the Receiver’s position that the discharge is premature. One important aspect of the receivership has not yet been resolved, namely the priority dispute between the AGO and the creditors of the Applicant and the application of the funds in the Receiver’s possession. As a result, the Receiver respectfully requests that this Court dismiss or adjourn the AGO’s motion to discharge the Receiver.

PART II - FACTS

2. Capitalized terms not otherwise defined herein are defined in the Receiver’s Sixth Report dated January 4, 2017 (the “**Sixth Report**”).
3. The Receiver was appointed pursuant to the Order of Justice Penny dated June 24, 2016 (the “**Appointment Order**”) to, *inter alia*, (i) seek court-approval of a pending sale transaction, (ii) close the sale transaction, if approved, and (iii) hold the sale proceeds pending further order of this Court.¹
4. The Receiver is currently holding approximately \$2.3 million which constitutes the remainder of the sale proceeds after satisfying the claims of secured creditors (with the exception of the HMT Disputed Amount which has not yet been resolved), professional fees approved to date and the payment to the Investor Plaintiffs (the “**Remaining Proceeds**”).² The Receiver identified third-party arms’-length unsecured creditors with

¹ Appointment Order, Affidavit of Lori Blaskavitch sworn January 30, 2017 (the “**Blaskavitch Affidavit**”) at Exhibit “A”.

² The Receiver reported holding \$3.47 million of remaining proceeds in the Sixth Report (Sixth Report, at para. 2.1.1). Since then, the Receiver paid \$1.2 million to the Investor Plaintiffs in accordance with the Order of Justice Newbould dated January 11, 2017 (the “**January Order**”).

claims against the Remaining Proceeds, which the AGO argues are not entitled to any payment from the Remaining Proceeds under the *Civil Remedies Act*.³

5. The Receiver sought this Court's advice and directions with respect to the payment of the Remaining Proceeds in the Notice of Motion originally returnable on January 11, 2017 (the "**January Motion**"). The relief sought in respect of the approval of the Receiver's and its counsel's fees was adjourned until February 8, 2017. The advice and directions motion has not been re-scheduled.

PART III - ISSUE

6. The issue is whether the Receiver should be discharged before the final resolution of the priorities dispute over the Remaining Proceeds.

PART IV - LAW AND ARGUMENT

The Discharge Motion is Premature

7. The party seeking to remove the Receiver bears a heavy onus.⁴ Typically, when a party requests to remove a receiver, it asserts that the receiver has failed to meet its common-law obligations in the circumstances.⁵ Here, the AGO does not allege misconduct by the Receiver; rather, the AGO asserts that the Receiver's mandate is complete.
8. *Metropolitan Trust Co. of Canada v. Dancorp Developments Ltd.*⁶ is an analogous situation. In both cases:
 - (a) a receiver was appointed to sell, and sold, real property;⁷

³ Sixth Report, at para. 2.1.3; Blaskavitch Affidavit, at para. 8.

⁴ *Kraner v. Kraner*, 2012 ONSC 4900 at para. 25.

⁵ *Crofton v. H.M.E. Evans & Co.*, 2011 ABQB 158 at paras. 17-20.

⁶ 1993 CarswellBC 125 ("**Dancorp**").

⁷ *Dancorp*, at para. 3.

- (b) certain activities of the receiver remained outstanding;⁸
 - (c) a party other than the receiver sought its discharge;⁹ and
 - (d) the moving party argued that the continuation of the receivership will unnecessarily add to the costs.¹⁰
9. The court in *Dancorp* dismissed the moving party's motion because it was premature.¹¹ The court in *Dancorp* found that certain activities remained outstanding,¹² and the receiver should not be discharged until its final activities were complete.¹³
10. Here, the Receiver's mandate is not complete. The Receiver reported in the Sixth Report that third-party unsecured creditors remain unpaid and that it has a pending motion for advice and directions before this Court. This remains an open issue in this proceeding.
11. The Appointment Order requires the Receiver to hold the Remaining Proceeds until further Order of this Court, which has not yet been obtained.¹⁴
12. In *Dancorp*, the court reasoned that it "...would be most appropriate for there to be someone other than [the moving party] to collect and hold funds until *all the various priorities have been sorted out*".¹⁵ Similarly, the Receiver in this proceeding should not be discharged until such time as the priority dispute has been resolved by the parties or upon further Order of the Court.
13. There is no prejudice to the passage of time if the Receiver continues to hold the Remaining Proceeds as the AGO has not yet obtained a forfeiture order whereby it would be in a position to commence a claims process.

⁸ *Dancorp*, at para. 27.

⁹ *Dancorp*, at para. 23.

¹⁰ *Ibid.*

¹¹ *Dancorp*, at para. 27.

¹² *Dancorp*, at para. 27.

¹³ *Ibid.*

¹⁴ Appointment Order, at para. 19.

¹⁵ *Ibid.* (emphasis added).

PART V – RELIEF REQUESTED

14. The Receiver respectfully requests an Order dismissing the AGO's motion to discharge the Receiver or, in the alternative, adjourning such motion until after the resolution of the priority dispute.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of February, 2017.



THORNTON GROUT FINNIGAN LLP
Lawyers for the Court-appointed Receiver

SCHEDULE "A"

Authorities

No.	Case
1.	<i>Crofton v. H.M.E. Evans & Co.</i> , 2011 ABQB 158
2.	<i>Kraner v. Kraner</i> , 2012 ONSC 4900
3.	<i>Metropolitan Trust Co. of Canada v. Dancorp Developments Ltd.</i> , 1993 CarswellBC 125

SCHEDULE "B"

Relevant Statutes

N/A

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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

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