

Court File No. CV-13-10365-00CL

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

BETWEEN:

THE TORONTO-DOMINION BANK

Applicant

- and -

FAIRVIEW NURSING HOME LIMITED

Respondent

**APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY*
ACT, R.S.C. 1985, c. B-3, AS AMENDED**

**THE THIRD REPORT OF BDO CANADA LIMITED,
IN ITS CAPACITY AS COURT-APPOINTED RECEIVER OF
FAIRVIEW NURSING HOME LIMITED**

September 10, 2018

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BDO Canada Limited (“BDO”), in its capacity as Receiver of Fairview Nursing Home Limited (“Fairview”), hereby reports to the Court as follows:

1.0 INTRODUCTION AND BACKGROUND

- 1.1 Fairview is a corporation incorporated pursuant to the *Business Corporations Act* (Ontario) in 1968. Privately owned by Mrs. Violet Agatha Chambers (“Agatha”) and her now deceased husband, Herbert Washington Chambers (the “Herbert Estate” or the “Guarantor”), the company operated a 108-bed Class “C” long-term care facility located at the address municipally known as 14 Cross Street in the City of Toronto, Ontario (the “Premises”).
- 1.2 Fairview was regulated and funded by the Ontario Ministry of Health and Long-Term Care (“MOHLTC”), the provincial governmental and regulatory body that oversees the public health care system in Ontario, which includes long-term care facilities pursuant to the *Long-Term Care Home Act* (Ontario) and Ontario Regulation 79/10 (collectively, the “LTCHA”). Assisting the MOHLTC in this endeavor are the 14 Local Health Integration Networks (“LHINs”), which were established to facilitate, on a local level, the planning, integration, and funding of local health care service providers pursuant to the *Local Health System Integration Act* (Ontario).
- 1.3 Fairview’s business and cash flows were funded, in large part, by monthly installment payments from the MOHLTC/LHINs (the “MOHLTC Funding”). The MOHLTC/LHINs annually reconcile the funding provided, taking into account such factors as actual occupancy levels, co-payment revenues collected, the eligibility of the expenditures and the extent to which designated funds have been spent in the designated service areas (the “Reconciliations”). Based on the completed Reconciliations, an overpayment of funding (the “Reconciliation Amounts”) may be determined and the MOHLTC will seek to recover Reconciliation Amounts

in accordance with established policies. In the case of an underpayment, additional funding is provided to the operator.

- 1.4 Fairview was indebted to The Toronto-Dominion Bank (the “Bank”) with respect to certain credit facilities made to it by the Bank pursuant to and under the terms of a Letter Agreement dated July 7, 2010 and accepted by Fairview on July 8, 2010, as amended by Letter Agreement dated April 23, 2012 (collectively and as amended, restated, renewed, and replaced, the “Credit Agreement”).
- 1.5 Following one or more defaults under the terms of the Credit Agreement, and at the request of Fairview and the Guarantor, the Bank entered into certain forbearance agreements with Fairview. In particular, Fairview, the Guarantor, Agatha, and the Bank entered into the Second Forbearance Agreement, dated December 5, 2013, and as later amended by letter agreements (collectively and as amended, the “Second Forbearance Agreement”), which among other things, provided for the appointment of a receiver with the limited powers to commence and complete a sale of the business, property, assets, and undertakings of Fairview.
- 1.6 Following an application made by the Bank and pursuant to an Order dated December 20, 2013 (the “Receivership Order”) granted by the Honourable Mr. Justice D. Brown of the Ontario Superior Court of Justice (Commercial List) (as he then was), BDO Canada Limited was appointed as receiver, without security, to market and sell the assets, undertakings, and properties of Fairview acquired for, or used in relation to the business carried on by Fairview (collectively, the “Property”). Under the Receivership Order, Fairview and its management remained in possession and control of Fairview's assets and operations. A copy of the Receivership Order is attached hereto this Report as Appendix “A”.
- 1.7 Following a sale process conducted with the assistance of a real estate broker experienced in the sale and purchase of long-term care homes, on September 15, 2014 the Receiver served a motion record returnable on

September 25, 2014 seeking, among other things, approval of the Agreement of Purchase and Sale entered into between the Receiver, Fairview and Schlegel Villages Inc. (“SVI”) (the “SVI APS”). In support of this application, the Receiver filed with the Court a report dated September 15, 2014 (the “First Report”). A copy of the First Report is attached hereto, without appendices, as **Appendix “B”**.

- 1.8 On September 25, 2014, the Honourable Mr. Justice Newbould of the Ontario Superior Court of Justice (Commercial List) granted orders (together, the “**Approval and Vesting Order**”), approving and authorizing, among other things, the SVI APS and sealing the Confidential Supplement pending a further Order of the Court. Attached hereto as **Appendix “C”** is a copy of the Approval and Vesting Order.
- 1.9 The sale to SVI, or more specifically, its assignee, Fairview LTC, closed on March 31, 2015. On April 17, 2015 the Receiver served a motion record returnable on April 23, 2015 seeking, among other things, an order authorizing and directing the Receiver to make a distribution to the Bank from the sale proceeds. In support of this application, the Receiver filed with the Court a report dated April 17, 2014 (the “**Second Report**”). A copy of the Second Report is attached hereto, without appendices, as **Appendix “D”**.
- 1.10 Following the motion heard on April 23, 2015, the Honourable Mr. Justice McEwen of the Ontario Superior Court of Justice (Commercial List) granted an order (the “**Interim Distribution Order**”), approving and authorizing, among other things, the distribution/repayment in full of the indebtedness owing to the Bank. Attached hereto as **Appendix “E”** is a copy of the Interim Distribution Order.
- 1.11 As noted in Paragraph 4.1.1 of the First Report, the Receiver originally retained Gowling WLG (Canada) LLP (“**Gowlings**”) as its independent legal counsel in connection with this matter. Fogler, Rubinoff LLP (“**Foglers**”) was subsequently retained by the Receiver as its independent legal counsel in this matter.

1.12 As noted in Paragraph 4.2.2 of the First Report, the Herbert Estate is or was administered by The Bank of Nova Scotia Trust Company (“BNS”) as estate trustee. BNS’s legal counsel is or was Dentons Canada LLP.

1.13 All capitalized terms not otherwise defined herein shall have the meaning as defined in the First Report and the Receivership Order.

2.0 PURPOSE

2.1 The purpose of this Report is to:

- (a) Advise this Court of the activities of the Receiver since the Second Report and outline next steps; and
- (b) Seek an Order:
 - (i) approving this Third Report to the Court of the Receiver and the conduct, actions and activities of the Receiver described therein;
 - (ii) approving the Receiver’s Interim Statement of Receipts and Disbursements included in the Third Report;
 - (iii) approving, authorizing and directing the proposed second distribution by the Receiver as described in this Third Report to the Herbert Estate as a partial repayment of the Receiver’s Borrowing Certificates;
 - (iv) authorizing the Receiver to file an assignment in bankruptcy on behalf of Fairview;
 - (v) approving the interim professional fees and disbursements of the Receiver;
 - (vi) approving the interim professional fees and disbursements of Foglers;
 - (vii) approving the final professional fees and disbursements of Gowlings; and

- (viii) such further and other related relief as the Receiver may advise and this Court permit.

3.0 DISCLAIMER

- 3.1 In preparing this Third Report, the Receiver has relied upon unaudited financial information from Fairview, Fairview's books and records, and discussions with Fairview's management and staff. The Receiver has not audited, reviewed, or otherwise attempted to verify the accuracy or completeness of that information in a manner that would comply with Generally Accepted Assurance Standards pursuant to the requirements of the Canadian Institute of Chartered Accountants' Handbook and, accordingly, the Receiver cannot express any opinion or other form of assurance in respect of that information.
- 3.2 The Receiver has prepared this Third Report in its capacity as a court-appointed officer solely for the purposes as set out in Paragraph 2.1 of this Third Report. Parties using this Third Report, other than for the purposes set out in Paragraph 2.1 above, are cautioned that this Third Report may not be appropriate for their purposes.

4.0 THE RECEIVER'S ACTIVITIES SINCE THE SECOND REPORT

- 4.1 Sale to Schlegel Villages Inc. (as assigned to Fairview LTC Inc.) (together, referred to as "SVI")
 - 4.1.1 Under the SVI APS, the purchase price of \$4.5 million was paid through a combination of cash on closing, an assumption of up to \$1 million of the indebtedness owing to the MOHLTC and a vendor-take-back mortgage ("VTB") in the amount of \$1.5 million.
 - 4.1.2 Pursuant to the terms of the SVI APS, Gowlings was required, out of the cash paid on closing, to hold in trust a reserve of \$100,000.00 for a period of 45 days following the closing of the sale, in order to address any necessary adjustments that were not captured in the Statement of Adjustments delivered at closing.

Accordingly and following the expiry of the 45-day period, such reserve of funds were released and delivered to the Receiver.

4.1.3 In connection with the VTB, the Receiver has received seven semi-annual interest payments due under the VTB from SVI, totaling \$210,000. Under the VTB, there will be no payments of principal until the expiry of the term, which is 5 years after the closing date, at which time the full principal sum with any interest and other amounts owing, shall be immediately due and payable, in full. Given that the VTB does not become fully due and payable until 2020, the Receiver has made efforts to assign the VTB. To date, the Receiver has been unable to assign the VTB. The Receiver therefore continues to monitor SVI's compliance with the VTB.

4.1.4 As noted in paragraph 4.1.1 of this Third Report and pursuant to the SVI APS, SVI assumed \$1 million of the indebtedness owing to MOHLTC. The Receiver has been working with Fairview, SVI and MOHLTC to determine the actual Reconciliation Amounts for the 2013 and 2014 calendar years, as well as the stub period up to March 31, 2015 (the "Outstanding Reconciliation Period"). This process was recently completed, as discussed subsequently in this Third Report. With the determination of the actual Reconciliation Amounts for the Outstanding Reconciliation Period, the SVI APS includes an adjustment mechanism to adjust the Purchase Price for the assumed MOHLTC debt actually assumed, as elaborated below.

4.2 Receiver's Borrowing Certificates

4.2.1 Pursuant to Paragraph 21 of the Receivership Order, the Receiver is empowered to borrow by way of revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable (provided the outstanding principal amount does not exceed \$750,000), for the purpose of funding the exercise of its

powers under the Receivership Order, making advances to Fairview to fund its operations, and to make payments to the Bank, as contemplated in the Second Forbearance Agreement.

4.2.2 As per paragraph 5.4(a)(xii)(C) of the Second Forbearance Agreement, the Receiver received the principal sum of \$358,000.00 and \$141,160.25 from the Herbert Estate and issued Receiver's Certificates No.'s 1 and 2, respectively.

4.2.3 As per paragraph 5.4(a)(xii)(C) of the Second Forbearance Agreement and in connection with funding the costs of a phase II environmental investigation, on December 15, 2014, the Receiver received a principal sum of \$2,436.28 from the Herbert Estate and then issued to the Herbert Estate, Receiver's Certificate No. 003 in same amount.

4.2.4 As per paragraph 5.4(a)(xii)(B) of the Second Forbearance Agreement, to the extent that the Borrower Operating Deficits Advances were not required to fund operating losses during the sale process, the balance of such monies would become payable to the Bank (via the Receiver and the issuance of a Receiver's Borrowing Certificate). Such amount was calculated to be \$248,403.47. On April 16, 2015, the Receiver received a principal sum of \$248,403.47 from the Herbert Estate and then issued to the Herbert Estate, Receiver's Certificate No. 004 in same amount.

4.2.5 The aggregate total of the four Receiver's Borrowing Certificates issued amount to \$750,000 (the "Borrowing Certificates").

4.3 Distribution to the Bank

4.3.1 Following the receipt of funds from the Herbert Estate (as reported above), on April 23, 2015 and pursuant to the Interim Distribution Order, the Receiver distributed to the Bank, the sum of \$563,343.43, in full satisfaction the indebtedness it was owed.

4.4 Monitoring

4.4.1 This was not a full-blown receivership based on the model receivership order. Under paragraph 2A of the Receivership Order, the "Debtor shall remain in the possession and control of the Property". Unlike the model receivership order, the Receivership Order does not expressly authorize the Receiver to "manage, operate, and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor" (our emphasis). As to its limited monitoring role, pursuant to paragraph 3(b) and 3(j) of the Receivership Order, the Receiver is empowered and authorized to monitor the receipts and disbursements of Fairview and take any steps reasonably incidental to the exercise of these powers, respectively.

4.4.2 As discussed below, there was a diversion of monies by Agatha which the Receiver dealt with in its limited monitoring capacity.

4.5 Reconciliations

4.5.1 As noted in paragraph 4.1.4 of this Third Report, the Receiver worked with Fairview, SVI and MOHLTC to prepare Fairview's Annual Reconciliation Reports ("ARR") for the 2014 calendar year and the stub period of January 1 to March 31, 2015 (as well as address discrepancies in connection with the 2013 calendar year, as filed). Under the SVI APS, SVI assumed Fairview's liability for the repayment of Reconciliation Amounts in respect of the years 2013 and following, up to the closing of sale, to a maximum of \$1.0 million (representing the MOHLTC's maximum estimate of overpayment funding during this period).

4.5.2 In order to quantify actual Reconciliation Amounts for the Outstanding Reconciliation Period, the MOHLTC requires

submission of the ARR to be accompanied with audited financial statements and an external auditor's report. Should the actual Reconciliation Amounts be less than \$1.0 million (as estimated by the MOHLTC and assumed by SVI) the Receiver will be entitled to the difference (for the benefit of Fairview's estate).

4.5.3 The Reconciliation was completed in February, 2018. The actual Reconciliation Amount owing to MOHLTC was \$685,757, less than the estimated \$1.0 million and entitling the Receiver to the difference pursuant to the SVI APS. SVI made arrangements to pay \$685,757 to MOHLTC or the Ministry of Health (Ontario) and \$314,243 to the Receiver in accordance with the SVI APS. The Receiver received the \$314,243 on February 23, 2018.

4.6 Diverted Assets and Payment of Funds

4.6.1 On September 8, 2015, Agatha withdrew \$92,938.00 (the "Funds") from Fairview's corporate bank account and deposited the net monies in her personal bank account at the Bank.

4.6.2 The Receiver was advised by Fairview's management that the Funds were withdrawn by Agatha for no valid or approved obligation associated with Fairview's operations during the receivership sale process.

4.6.3 Notwithstanding that there is a loan indebtedness owing to Agatha, which predates the Receivership Order, such indebtedness would rank behind the Administrative Charge and Receiver's Borrowing Certificates created by the Receivership Order.

4.6.4 On October 21, 2015 and again on October 29, 2015, the Receiver wrote to the Bank in connection with the Funds requesting delivery of same to the Receiver.

4.6.5 The Bank initially froze the Funds, subject to a direction and release from Agatha with the Receiver's approval or consent, or a court order.

4.6.6 On or about October 7, 2016, the Bank was provided with a Direction and Release of the same date from Agatha, with the Receiver's consent, regarding the Funds. A copy of the said Direction and Release is attached hereto as **Appendix "F"** to this Third Report. The Bank subsequently released the net balance of \$89,063.77 to the Receiver.

4.7 Outstanding Accounts Payable from the Receivership Period

4.7.1 During the course of the receivership and as noted above in relation to the Receiver's limited monitoring role, management retained control over the assets and operations, including the power to incur and pay any obligations in the ordinary course. As such, management held responsibility for the Company's banking and accounts payable functions.

4.7.2 Subsequent to the completion of the sale to SVI on or about March 31, 2015, the Receiver learned that the Company had not kept current with its ongoing payment obligations to its suppliers.

4.7.3 The Receiver estimates that the Company owes approximately \$100,000 to suppliers for obligations incurred during the receivership period. The Receiver's efforts to quantify such post-receivership amounts or obligations was hampered by the loss of staff members after the sale was completed. Furthermore, Lisa Chambers, the daughter of the principal and primary management member, provided limited assistance after the fact.

4.7.4 The Receiver has considered whether a portion of the sale proceeds should be held back and used to pay these alleged outstanding, post-receivership obligations; that is, the alleged post-receivership, unpaid suppliers. The Receiver does not

recommend this course of action as it would require the Receiver to administer some form of claims process to properly identify and quantify the outstanding receivership obligations. The cost of administering a claims process and the related payout amounts could be significant and at the expense of the Company's secured creditors.

4.7.5 The Receiver notes that more than 3 years have passed since the completion of the sale. At this point, the Receiver receives very few, if any, inquiries from suppliers regarding payment of the outstanding liabilities. Furthermore, generally, under Ontario's *Limitations Act*, the period for recovery of such a debt is within 2 years after the cause of action or claim arose. The expiry of a limitation period can effectively or potentially extinguish the rights of unpaid suppliers.

4.7.6 As such, the Receiver believes the best course of action is to permit the Receiver to assign the Company into bankruptcy. The Receiver requests an amount of \$15,000 be set aside from the receivership administration to fund the costs of a bankruptcy filing.

4.8 Receiver's Efforts to Sell the VTB

4.8.1 As previously stated, the principal balance under the VTB is not payable until March 2020.

4.8.2 Now that the Receiver has finalized the Reconciliation Amounts and fully collected the amounts due, there are no material matters to look after other than the collection of semi-annual interest payments under the VTB and the eventual principal balance.

4.8.3 Certain secured creditors expressed their desire to be paid out sooner rather than later. As such, the Receiver explored the

possibility of finding an investor to purchase an assignment of the Receiver's interest in the VTB.

4.8.4 Responsive Health Management Inc. (“**Responsive**”) knows many of the key players and investors in the long-term care industry and offered to assist the Receiver in identifying potential parties who may be willing to purchase the VTB.

4.8.5 The Receiver held discussions with three different parties regarding the possible sale and assignment of the VTB. Ultimately, the Receiver was not successful in negotiating an acceptable sale for various reasons, including the following:

- (i) The Receiver's security for the VTB consists of a charge registered against title to the real property only. Traditional lenders to the long-term care industry usually require an assignment of rents and financial reporting from the nursing home operator which are not available here;
- (ii) The suggested purchase price was substantially lower than what the Receiver considered reasonable in the circumstances.

4.8.6 The Receiver also contacted SVI and inquired whether it would be willing to repay the VTB balance sooner but with a negotiated discount. SVI was not receptive and no formal discussions ensued.

4.9 Change of Receiver's Counsel

4.9.1 On or about June 21, 2016, the Receiver retained new counsel in this receivership, Foglers, replacing Gowlings as former counsel of record.

5.0 STATEMENT OF RECEIPTS AND DISBURSEMENTS

5.1 Attached hereto as Appendix “G” to this Third Report is the Receiver's interim statement of receipts and disbursements (“**Interim R&D**”) as at September 10, 2018.

5.2 As shown in the Interim R & D, the Receiver currently has \$904,315.45 in its trust account as at that date.

6.0 RECEIVER'S INTERIM FEES AND DISBURSEMENTS

6.1 Pursuant to the Receivership Order, the Receiver has provided services and incurred disbursements which are more particularly described in the affidavit and detailed invoices attached hereto as **Appendix "H"**.

6.2 The detailed time descriptions contained in the invoices provide a fair and accurate description of the services provided and the amounts charged to date by BDO as Receiver. Included with the invoices is a summary of the time charges of partners and staff, whose services are reflected in the invoices, including the total interim fees and hours billed.

6.3 The Receiver requests that the Court approve its accounts for the period from September 2, 2014 to August 24, 2018 in the amount of \$223,893.17 for fees and disbursements including HST of \$29,106.11, for a total of \$252,999.28.

7.0 RECEIVER'S CURRENT COUNSEL'S INTERIM FEES AND DISBURSEMENTS

7.1 Additionally, the Receiver has incurred legal fees of its current counsel, Foglers, in respect of these proceedings, as more particularly set out in the fee affidavit and exhibits attached hereto as **Appendix "I"**.

7.2 The Receiver has reviewed Fogler's fee affidavit and believes same to be fair and reasonable in the circumstances.

7.3 The Receiver also requests that the Court approve the interim accounts of its current legal counsel, Foglers, for the period from April 28, 2016 to September 6, 2018 in the amount of \$56,959.81 for fees and disbursements including HST of \$7,404.80, for a total of \$64,364.61.

8.0 RECEIVER'S FORMER COUNSEL'S FINAL FEES AND DISBURSEMENTS

- 8.1 Additionally, the Receiver has incurred legal fees of its former counsel, Gowlings, in respect of these proceedings, as more particularly set out in the fee affidavit and exhibits attached hereto as **Appendix "J"**.
- 8.2 The Receiver has reviewed Gowlings' fee affidavit and believes same to be fair and reasonable in the circumstances.
- 8.3 The Receiver also requests that the Court approve the final accounts of its former legal counsel, Gowlings, for the period from July 30, 2014 to March 2, 2016 in the amount of \$146,435.92 for fees and disbursements including HST of \$19,001.59, for a total of \$165,437.51.

9.0 CONTEMPLATED SECOND DISTRIBUTION

- 9.1 Following the payment of the Bank's senior secured claims, the remaining claims against the Fairview estate, in order of their priority, are summarized below:
- firstly, the professional fees and disbursements owed to the Receiver and its' legal counsel (collectively, the **"Professional Fees"**);
 - secondly, the Herbert Estate with respect to the Receiver's borrowings under various Receiver's Certificates; and
 - thirdly, on a pari passu basis and subject to Fogler's review and legal opinion of the supporting documents: Responsive and Agatha Chambers.
- 9.2 The Professional Fees are payable in priority to all other claims, including claims under the Borrowing Certificates; however, without prejudice to the Court-ordered charge to secure the payments (the **"Receiver's Charge"**).
- 9.3 As previously noted, the Receiver borrowed funds from the Herbert Estate under four separate Receiver's Certificates. The particulars of each

borrowing, along with the calculated outstanding interest owing to August 31, 2018, are as follows:

Receiver's Certificate	Date issued	Principal amount	Interest rate	Accrued interest to August 31, 2018
No. 1	30-Jan-14	\$ 358,000.00	TD prime rate plus 3.0 percent	\$ 109,177.27
No. 2	7-Jul-14	141,160.25	TD prime rate plus 1.5 percent	28,407.75
No. 3	15-Dec-14	2,436.28	TD prime rate plus 1.5 percent	432.84
No. 4	16-Apr-15	<u>248,403.47</u>	TD prime rate plus 1.5 percent	<u>39,840.15</u>
		<u>\$ 750,000.00</u>		<u>\$ 177,858.01</u>

9.4 Following the payment of professional costs as set out above, the Receiver is recommending a second distribution in the amount of \$620,000.00, representing the full repayment of Receiver's Certificate No. 1 including accrued interest with a partial repayment of amounts due under Receiver's Certificate No. 2.

10.0 CONCLUSION AND RECOMMENDATIONS

10.1 Based on the foregoing and as outlined in the body of this Third Report, the Receiver requests that this Court issue an Order:

- (a) approving this Third Report to the Court of the Receiver and the conduct, actions and activities of the Receiver described therein;
- (b) approving the Receiver's Interim Statement of Receipts and Disbursements included in the Third Report;
- (c) approving, authorizing and directing the proposed second distribution by the Receiver as described in this Third Report to

the Herbert Estate as a partial repayment of the Receiver's Borrowing Certificates;

- (d) authorizing the Receiver to file an assignment in bankruptcy on behalf of Fairview;
- (e) approving the interim professional fees and disbursements of the Receiver;
- (f) approving the interim professional fees and disbursements of Foglers;
- (g) approving the final professional fees and disbursements of Gowlings.

All of which is respectfully submitted this 10th day of September, 2018.

BDO CANADA LIMITED,
in its capacity as the Court-appointed
Receiver of Fairview Nursing Home Limited
and not in its personal or corporate capacity

Per:



Eugene Migus, CPA, CA, CRRP, LIT
Partner/Senior Vice President