

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

**BRYTON CAPITAL CORP. GP LTD. and BAYVIEW CREEK
RESIDENCES INC. (formerly known as BRYTON CREEK
RESIDENCES INC.)**

Applicants (Appellants)

– and –

**CIM BAYVIEW CREEK INC., GRANT THORNTON LIMITED IN ITS CAPACITY AS
THE BANKRUPTCY TRUSTEE OF CIM BAYVIEW CREEK INC., BAYVIEW CREEK
(CIM) LP, 10502715 CANADA INC., MNP LTD. IN ITS CAPACITY AS THE
BANKRUPTCY TRUSTEE OF BAYVIEW CREEK (CIM) LP AND 10502715 CANADA
INC., GR (CAN) INVESTMENT CO. LTD., MONEST FINANCIAL INC., TRACY HUI,
JOJO HUI, CARDINAL ADVISORY LTD., and THE CORPORATION OF THE CITY
OF RICHMOND HILL**

Respondents (Respondents)

**COMPENDIUM OF THE RESPONDENTS
(GRANT THORNTON LIMITED IN ITS CAPACITY AS FORMER PROPOSAL TRUSTEE AND
CURRENT BANKRUPTCY TRUSTEE OF CIM BAYVIEW CREEK INC.)**

August 10, 2022

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current capacity as Trustee in Bankruptcy of
CIM Bayview Creek Inc.

TO THE SERVICE LIST

COURT OF APPEAL FOR ONTARIO

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Respondents (Respondents)

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Tab 1

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

B E T W E E N:

**BRYTON CAPITAL CORP. GP LTD. and BAYVIEW CREEK RESIDENCES
INC. (formerly known as BRYTON CREEK RESIDENCES INC.)**

Applicants

- and -

**CIM BAYVIEW CREEK INC., GRANT THORNTON LIMITED IN ITS CAPACITY AS
THE BANKRUPTCY TRUSTEE OF CIM BAYVIEW CREEK INC., BAYVIEW CREEK
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INC., GR (CAN) INVESTMENT CO. LTD., MONEST FINANCIAL INC., TRACY HUI,
JOJO HUI, CARDINAL ADVISORY LTD., and THE CORPORATION OF THE CITY
OF RICHMOND HILL**

Respondents

**AFFIDAVIT OF JEREMY BORNSTEIN
(SWORN JULY 12, 2021)**

I, Jeremy Bornstein, of the City of Toronto, in the Province of Ontario, MAKE
OATH AND SAY:

1. I am a lawyer with the law firm of Cassels Brock & Blackwell LLP ("**Cassels**"),
counsel to the Grant Thornton Limited, in its former capacity as Proposal Trustee (the
"**Proposal Trustee**") and current capacity as Trustee in Bankruptcy (the "**Trustee**") of
CIM Bayview Creek Inc. ("**CIM Bayview**"). I have been involved as counsel for the
Trustee since November 2020 and have reviewed our file for the purposes of swearing
this affidavit and, as such, I have knowledge of the matters contained in this affidavit.

Where I do not have personal knowledge of the matters set out herein, I have stated the source of my information and, in all such cases, believe it to be true.

2. On October 29, 2020, CIM Bayview filed a Notice of Intention to Make a Proposal (“**NOI Proceeding**”) under section 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (“**BIA**”). Grant Thornton Limited was appointed as Proposal Trustee.

3. Pursuant to an Order dated November 27, 2020 (the “**November 27 Order**”), the court extended the time to make a proposal to December 22, 2020 and approved a \$200,000 interim financing loan (the “**DIP Loan**”) and related interim financing charge (the “**DIP Charge**”). The DIP Loan was intended to fund the fees of the Proposal Trustee, its counsel, and counsel for CIM Bayview relating to work performed up to a motion scheduled for December 21, 2020 (the “**December 21 Motion**”). A copy of the November 27 Order and related endorsement is attached hereto as **Exhibit “A”**.

4. On December 7, 2020, Bryton Capital Corp. GP Ltd. and Bayview Creek Residences Inc. (collectively, “**Bryton**”) served

a. a notice of motion seeking leave to appeal the November 27 Order (the “**Leave Motion**”) and

b. a notice of appeal to appeal the November 27 Order.

5. Copies of the notice of motion and notice of appeal are attached hereto as **Exhibits “B” and “C”**.

6. On December 22, 2020, the day after hearing of the December 21 Motion, the court extended the time to make a proposal to February 5, 2021. A copy of the endorsement is attached hereto as **Exhibit “D”**.

7. CIM Bayview did not file a proposal or seek an extension of the time to file a proposal on or before February 5, 2021 and was deemed bankrupt as of February 8, 2021. A copy of the amended certificate of assignment of CIM Bayview is attached hereto as **Exhibit “E”**.

8. I am advised by John N. Birch, a Partner at Cassels, that the Proposal Trustee and Cassels relied on the availability of the DIP Loan and DIP Charge when they provided their services to prepare for and attend the December 21 Motion and to carry out other work in respect of the NOI Proceeding.

9. On April 23, 2021, the Proposal Trustee served a motion initially returnable on May 4, 2021 seeking approval of its fees and the fees of Cassels relating to the entire period of the NOI Proceeding (i.e., up to February 7, 2021) (the **“Fee Approval Motion”**). On May 4, 2021, when counsel for Bryton advised that it was opposing the Fee Approval Motion, the court adjourned the Fee Approval Motion to a one hour hearing on May 25, 2021.

10. The court heard the Fee Approval Motion on May 25, 2021 and reserved its decision. Up to the date of this affidavit, the court’s decision remains under reserve and has not been released.

11. In our firm’s capacity as counsel for the Proposal Trustee, we have exchanged various email correspondence with counsel for Bryton over the last several months

regarding the Leave Motion, which are referred to below and attached as exhibits to this affidavit:

- a. Attached hereto as **Exhibit “F”** is an email dated February 12, 2021 from counsel for Bryton to Cassels, where counsel for Bryton states, “[w]e desire to book the motion date [for leave to appeal] between March 8, 2021, to March 19, 2021, so kindly advise me if you are unavailable on any of these dates”;
- b. Attached hereto as **Exhibit “G”** are emails dated February 17 and 18, 2021, which include, among other things, the following correspondence:

- i. On February 17, 2021 at 3:04 pm, Cassels wrote to counsel for Bryton as follows:

[N]othing relating to the leave motion apart from the notice of motion for leave to appeal has been served on us. We have not been provided with the court file number for the leave motion (to indicate that it was filed) and we have not received any of the other appeal materials that are required to be served and filed, such as the factum, motion record, and book of authorities. Further, the deadline for serving and filing those materials has long passed.

- ii. On February 17, 2021 at 3:48 pm, counsel for the Bryton responded (part of Exhibit “H”) as follows:

Our office simply requests from your office and David Ward’s office is your availability, so that we can canvass the availability for such a motion date with the Court of Appeal. Please provide us your availability in early to mid-March 2021.

iii. In an email sent at 5:17 pm on February 18, 2021 (part of Exhibit “H”), Cassels proposed a timetable for the motion for leave to appeal and provided a list of dates in March 2021 on which it was available for the Leave Motion, without prejudice to various objections the Trustee intends to raise regarding the motion (including that it is out of time). Counsel for Bryton did not schedule the Leave Motion at that time or anytime thereafter and has not served any court materials for the Leave Motion apart from the Notice of Motion for Leave to Appeal that was served on December 7, 2020;

c. Attached hereto as **Exhibit “H”** is an email dated May 12, 2021 from Cassels to counsel for Bryton, which states

[Y]our notice of application [for sale approval to be heard on August 11, 2021] refers to the DIP charge but does not properly set out how the optionee intends to deal with that. The DIP charge takes priority over all other encumbrances against the Property and thus the amount of the charge (plus applicable interest) will need to be paid in full if the optionee wishes to take title to the property free and clear of the DIP charge. Your notice of application states that the order approving the DIP charge is under appeal. That statement is not correct. Although Bryton initially provided some appeal materials, it has taken no steps to proceed with either an appeal or a motion for leave to appeal and the deadline for doing so has long passed. As such, the DIP charge is valid and enforceable and cannot be vested out unless paid in full. I am available to discuss the DIP charge with you at your convenience. Feel free to propose time for a call tomorrow or on Friday.

d. Attached hereto as **Exhibit “I”** are emails dated June 29, 2021, which, among other things, include the following correspondence:

i. On June 29 at 12:06pm, counsel for Bryton wrote

With respect to the DIP financing, we had served the Notice of Motion pertaining to the DIP financing, and we are presently waiting for Cavanagh J.'s decision. If the Court does not allow for fees to the Proposal Trustee, then the appeal re: DIP financing will be moot and it will not be necessary for the appeal to proceed (and also provided that the Debtor does not seek any payment of the fees). If the Court does allow for fees, then the DIP Financing will be subject to challenge. Any vesting order that we seek will deal with the DIP Financing by either providing for escrowed funds on a without-prejudice basis or an adjudication of the above-noted issues.

- ii. On June 29, 2021 at 12:24pm, Cassels wrote an email (part of Exhibit “J”) to counsel for Bryton as follows:

Any attempt by your client to seek leave to appeal the DIP Charge order has long been out of time.

Under the *Rules of Civil Procedure*, a prospective appellant does not get to serve a Notice of Motion for Leave to Appeal and then fail to proceed with the motion for leave to appeal outside the deadlines in the *Rules* established for taking such steps.

No other party (including the Proposal Trustee) ever agreed to any extensions of time (nor did Bryton ever ask for any) to proceed with the leave motion.

...

I also note that the order approving the DIP Charge is not stayed because there is has never been any extant “appeal”. There has only been a motion for leave to appeal that has never proceeded. Since no appeal exists (and no appeal can exist until a Court of Appeal judge gives leave under BIA s. 193(e)), there is no stay, and since there is no stay, the DIP Charge remains enforceable.

- e. Attached hereto as **Exhibit “J”** are emails dated July 8, 2021. Counsel for the Trustee stated as follows in its email at 10:33 am:

The DIP Charge created by the order ranks in priority to all of the Bryton mortgage, the Bryton option, and the Duca mortgage. Therefore, if the relief that Bryton seeks is granted, the vesting order will need to require the payment of the amount of the DIP Charge prior to title to the

property being vested in the relevant Bryton entity. This is a matter that needs to be dealt with in the proposed vesting order.

.....

although [counsel for Bryton] disagrees with the position of Cassels and the Proposal Trustee that there is no valid motion for leave to appeal the Order still in existence (given that the timelines for proceeding with a leave motion have long expired and no basic attempt to proceed with the leave motion has even been made), it is indisputable based on the BIA that the [November 27, 2020] Order is not stayed (given that leave has not been granted) and thus the DIP Charge remains fully in effect and enforceable. Thus, payment under the DIP Charge must be made if the vesting order is granted and payment must occur before vesting takes place. In the unlikely event later on that the Court of Appeal (i) allowed the leave motion to proceed, (ii) granted the motion for leave, AND (iii) heard the appeal and then allowed the appeal, Cassels, the Proposal Trustee, and MT could then deal with a request by Bryton for disgorgement of any fees that were paid to them based on the DIP Charge.

12. Bryton has not attempted to proceed with an (alleged) appeal as of right in respect of the November 27 Order, other than to serve the notice of appeal on December 7, 2020.

13. Bryton has also not taken steps to proceed with the Leave Motion, apart from serving the notice of motion for leave to appeal on December 7, 2020 and asking for potential hearing dates on February 17, 2021 (as described above). In particular, no date for a leave motion has been booked, and no motion record for leave, factum, or book of authorities has been served or filed. Bryton has also not proceeded with any motion seeking an extension of time to obtain leave to appeal (apart from mentioning a potential extension of time in the notice of motion for leave to appeal served on December 7, 2020).

14. On February 17, 2021, I spoke with the Court of Appeal for Ontario and was advised that because the notice of motion for the Leave Motion requested an extension of time for the service and filing of materials, the registrar will not administratively dismiss the appeal/leave motion. Instead, it would be up to the judge dealing with the leave motion whether to allow the extension of time.

SWORN BEFORE ME

by videoconference on July 12, 2021 in accordance with O. Reg. 431/20: Administering Oath or Declaration Remotely. The deponent and I were both located in the City of Toronto in the Province of Ontario



Commissioner for Taking Affidavits
(or as may be)
Kieran May (LSO #: 79672P)

Jeremy Bornstein

This is **Exhibit "A"**
to the affidavit of **Jeremy Bornstein** sworn before me by
videoconference in accordance with O.Reg. 431/20. The
deponent and I were both located in the City of Toronto in the
Province of Ontario this 12th day of July, 2021

.....


Commissioner for Taking Affidavits
(or as may be)
Kieran May (LSO# 79672P)

District of Ontario
 Division No. 09-Toronto
 Court File No. 31-2684629
 Estate File No. 31-2684629

**ONTARIO
 SUPERIOR COURT OF JUSTICE
 (Commercial List)**

THE HONOURABLE MR JUSTICE) FRIDAY, THE
 CAVANAGH)
) 27th DAY OF NOVEMBER , 2020



IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
 CIM BAYVIEW CREEK INC.

ORDER

THIS MOTION made by CIM Bayview Creek Inc. ("**CIM Bayview**") for an Order: (i) if necessary, abridging the time for service and filing of this notice of motion and the motion record and dispensing with further service thereof; (ii) approving the sales procedure substantially in the form attached hereto this Order as Appendix "A" and the sales process described therein ("**Sales Process**") and in the first report of Grant Thornton Limited in its capacity as proposal trustee to CIM Bayview ("**Proposal Trustee**") dated November 23, 2020 (the "**First Report**"); (iii) approving a first priority administration charge in the aggregate maximum amount of \$250,000; (iv) approving a debtor-in-possession loan and the authority to borrow the aggregate maximum amount of \$400,000 including the granting of a priority charge over the Property (as defined herein); (v) approving the First Report and the conduct and activities of the Proposal Trustee as described within; (vi) sealing certain appraisals and offers to purchase the Property presented as Confidential Exhibit "A", "B", "C" and "D" to the Affidavit of Jiubin Feng, sworn November 23, 2020; and (vii) extending the time to file a proposal from November 28, 2020 to January 12, 2021, among other relief, was heard this day via ZOOM video-conference.

ON READING the Affidavit of Jiubin Feng sworn November 23, 2020 (the "**Feng Affidavit**"), the Notice of Motion of CIM Bayview dated November 21, 2020, the Notice of Motion of Bayview Creek Residences Inc. and Bryton Capital Corp. GP Ltd. (collectively, "**Bryton**") dated November 24, 2020, the Affidavit of Bryan McWatt sworn November 24, 2020, the Affidavit of Bryan McWatt sworn November 25, 2020, the Supplementary Affidavit of Bryan McWatt sworn November 26, 2020, the Affidavit of Carmen Yuen sworn November 25, 2020, the First Report, and the Supplement to the First Report dated November 25, 2020, and the Facta filed by CIM Bayview and Bryton, and on hearing the submissions of the counsel for CIM Bayview, counsel for the Proposal Trustee, counsel for the Debenture Holders (as defined in the Feng Affidavit), counsel for DUCA Financial Services Credit Union Ltd. and counsel for Bryton, and those other parties appearing as indicated by the counsel slip, no one else appearing although duly served according to the Affidavit of Service of Tamie Dolny, sworn November 25, 2020;

SERVICE

1. THIS COURT ORDERS that the time for service of the notice of motion and the motion record (including service of the First Report) is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

BRYTON OPTION MOTION

2. THIS COURT ORDERS that the motion brought by Bryton in relation to its option agreement ("**Bryton Option**") by notices of motion dated November 24, 2020 and November 25, 2020, is scheduled for a full day hearing on Monday, December 21, 2020 ("**Bryton Option Motion**").

BRYTON OPTION EXTENSIONS

3. THIS COURT ORDERS that the timeline for the exercise of the Bryton Option shall be extended from December 31, 2020, to January 19, 2021, on consent of CIM Bayview.

4. THIS COURT ORDERS that the Closing Date with respect to the Agreement of Purchase and Sale pursuant to the Bryton Option shall be extended from January 15, 2021, to February 19, 2021, on consent of CIM Bayview.

ADMINISTRATION PROFESSIONALS

5. THIS COURT ORDERS that, subject to paragraph 6, 7 and 8 of this order, the Proposal Trustee, counsel to the Proposal Trustee and counsel to CIM Bayview (the “**Administration Professionals**”) shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by CIM Bayview unless otherwise ordered by the Court on the passing of accounts, as part of the costs of these proceedings.

6. THIS COURT ORDERS that the Administration Professionals shall pass their accounts from time to time, and for this purpose these accounts are referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

7. THIS COURT ORDERS that prior to the passing of accounts referenced above, CIM Bayview shall be at liberty from time to time to pay reasonable amounts on account of the accounts of the Administration Professionals and such amounts shall constitute advances against fees and disbursements when and as approved by this Court.

DIP FINANCING

8. THIS COURT ORDERS that CIM Bayview is hereby authorized and empowered to obtain and borrow up to a maximum amount of \$200,000 under a credit facility from Cardinal Advisory Limited (the “**DIP Lender**”) for the purpose of funding the reasonable fees and disbursements of CIM Bayview’s counsel until the return of the Bryton Option Motion and of the Proposal Trustee and its counsel for activities which are necessary for the trustee to fulfill its statutory obligations, bearing in mind that the Sales Process was not approved.

9. THIS COURT ORDERS that, subject to the terms of this Order, such credit facility shall be on the terms and subject to the conditions set forth in the commitment letter between CIM Bayview and the DIP Lender (the “**DIP Term Sheet**”), as annexed as Exhibit “J” to the Feng Affidavit.

10. THIS COURT ORDERS that the DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the “**DIP Lender’s Charge**”) on the Property to the extent of \$200,000.00.

11. THIS COURT ORDERS that the DIP Lender's Charge shall have first priority over the Property against all existing Encumbrances.

12. THIS COURT ORDERS that the DIP Lender's Charge is valid and effective to secure all of the obligations of CIM Bayview to the DIP Lender under the DIP Term Sheet, and so the filing, registration or perfection of the DIP Lender's Charge shall not be required. The DIP Lender's Charge shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the DIP Lender's Charge coming into existence, notwithstanding any such failure to file, register, record or perfect.

13. THIS COURT ORDERS that the granting of the DIP Lender's Charge and all other documents executed and delivered to the DIP Lender as contemplated in the DIP Term Sheet, including, without limitation, all actions taken to perfect, record and register the DIP Lender's Charge, do not constitute conduct meriting an oppression remedy, settlement, fraudulent preference, fraudulent conveyance or other challengeable or reviewable transaction under any applicable federal or provincial legislation.

14. THIS COURT ORDERS that CIM Bayview shall not grant any further encumbrances over any of the Property that ranks in priority to or *pari passu* with the DIP Lender's Charge, unless CIM Bayview obtains further Order of this Court.

SEALING ORDER

15. THIS COURT ORDERS that Confidential Exhibits "A", "B", "C" and "D" to the Feng Affidavit are hereby sealed and shall not form part of the public record, but rather shall be placed separate and apart from all other contents of the Court file, in a sealed envelope attached to a notice that sets out the title of proceedings and a statement that the contents are subject to a sealing order and shall only be opened upon further order of the Court.

EXTENSION OF TIME TO MAKE A PROPOSAL

16. THIS COURT ORDERS that the time to make a proposal is extended to December 22, 2020.

COSTS

17. THIS COURT ORDERS that cost submissions relating to this motion be reserved to the December 21, 2020 hearing date.

SERVICE AND NOTICE

18. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "Protocol") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: <https://www.grantthornton.ca/service/advisory/creditor-updates/#CIM-Bayview-Creek-Inc>.

19. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, CIM Bayview is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the applicable creditors of CIM Bayview or other interested parties at their respective addresses as last shown on the records of CIM Bayview and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

18. **THIS COURT ORDERS that this Order is effective from today's date and it is not required to be entered.**



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IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF CIM BAYVIEW
CREEK INC.

District of Ontario
Division No. 09-Toronto
Court File No. 31-2684629
Estate File No. 31-2684629

ONTARIO

Proceeding commenced at TORONTO

SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

ORDER

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Lawyers for CIM Bayview Creek Inc.

This is **Exhibit "B"**
to the affidavit of **Jeremy Bornstein** sworn before me by
videoconference in accordance with O.Reg. 431/20. The
deponent and I were both located in the City of Toronto in the
Province of Ontario this 12th day of July, 2021

.....


Commissioner for Taking Affidavits
(or as may be)
Kieran May (LSO# 79672P)

Court of Appeal File No.: _____

Court File No.: 31-2684629

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C., 1985, c. B-3
AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
CIM BAYVIEW CREEK INC.

NOTICE OF MOTION

**THE RESPONDENTS/MOVING PARTIES, BAYVIEW CREEK RESIDENCES
INC. AND BRYTON CAPITAL CORP. GP LTD.**, will make a motion to a Judge on a date to
be fixed by the Registrar at 330 University Avenue, Toronto, ON M5G 1R8.

PROPOSED METHOD OF HEARING:

The motion is to be heard:

- in writing under subrule 61.03.1(1);
- in writing as an opposed motion under subrule 37.12.1(4);
- orally.

THE MOTION IS FOR:

- (a) An order granting leave to appeal the order (“**Order**”) of the Honourable Justice Peter J. Cavanagh dated November 27, 2020, or in the alternative, a declaration that leave is not required;
- (b) If necessary, an order extending or abridging the time for the service and filing of appeal and motion materials;
- (c) Costs; and

- (d) Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE:

THE RELIEF GRANTED IS PROHIBITED BY A MAREVA INJUNCTION

- a) The bankruptcy proceeding from which this appeal arises is a related proceeding to a civil action (“**Civil Action**”) in the Superior Court of Justice bearing Court File No.: CV-20-000647366-0000.
- b) Pursuant to the Order of the Honourable Justice Schabas dated September 18, 2020 in the Civil Action, as continued by further orders of the Superior Court of Justice, there was a *Mareva* injunction (“**Injunction**”) whereby CIM, *inter alia*, was enjoined from dealing with its property.
- c) Pursuant to the endorsement and order of the Honourable Justice Koehnen dated October 13, 2020, issued in the Civil Action, all affected parties were to maintain the *status quo* until December 3, 2020, the return date of an omnibus motion in the Civil Action to determine, *inter alia*, whether the secured creditors may take steps to enforce their security and whether the *Mareva* injunction should continue.
- d) CIM breached the Injunction and the endorsement of Koehnen J. by, *inter alia*, offering to pay \$200,000 of forbearance fee to the first lender and taking steps to obtain the DIP Financing and the First Priority Charge, to materially prejudice the secured creditors.
- e) The motion judge erred, in fact and law, by approving the DIP Financing and the First Priority Charge. The motion judge improperly authorized litigation financing for CIM to challenge the *bona fide* interest of the secured creditors. In effect, CIM was permitted to utilize the security belonging to the secured creditors to wage litigation against them.

THE COURT DID NOT HAVE JURISDICTION TO AUTHORIZE THE FINANCING

- f) Pursuant to the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (“**BIA**”), a court may authorize DIP Financing only upon a review of the financial documents filed by a debtor,

which are to be reviewed for reasonableness. The court cannot permit DIP Financing, unless it is satisfied that the DIP Financing is limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business for the specified period.

- g) There was no evidence before the court regarding the purported litigation costs, for which the DIP Financing was ultimately authorized. DIP Financing cannot be authorized to fund CIM's litigation costs against secured creditors' *bona fide* interests, as the costs are not "what is reasonably necessary for the continued operations of the debtor company in the ordinary course of its business."
- h) On the return date of the motion, CIM failed to even establish that it had a *prima facie* case with respect to the *bona fides* of the secured creditors' interest. Yet, the Order permitted DIP Financing to fund CIM's litigation costs.
- i) The DIP Financing granted in the circumstances of this case constitutes a fundamental attack against secured creditors' rights, with significant implications for the lending industry in general. It is of utmost importance that the appeal be heard by the Ontario Court of Appeal.

NO REASONS GIVEN IN THE MOTION JUDGE'S DECISION

- j) In his brief endorsement, the motion judge failed to provide any reasons for the decision to grant the exceptional DIP Financing and the First Priority Charge, notwithstanding that the *Mareva* Injunction enjoined this very relief. The lack of the motion judge's reasons in this regard constitutes, in and of itself, sufficient grounds to set aside or vary the Order.

OTHER GROUNDS

- k) Sections 193 of the Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3.
- l) Rules 61.03.1 and 3.02 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194
- m) Such further or other grounds as counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) The Affidavit of Bryan McWatt;
- (b) Such further and other evidence as counsel may advise and this Honourable Court may permit.

December 7, 2020

OWENS WRIGHT LLP
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Lawyers for the Respondents/Moving Parties,
Bayview Creek Residences Inc. and Bryton
Capital Corp. GP Ltd.

TO: THE SERVICE LIST

SERVICE LIST"

"

<p>TO: MILLER THOMSON LLP 40 King Street West Suite 5800, P.O. Box 101 Toronto ON M5H 3S1</p> <p>Lawyers for the Applicant</p>	<p>David Ward LSO#33541W Tel: 416.595.8625 Fax: 416.595.8695 dward@millerthomson.com</p> <p>Larry Ellis LSO#49313K Tel: 416.595.8639 Fax: 416.595.8695 lellis@millerthomson.com</p> <p>Tamie Dolny LSO#77958U Tel: 416.597.6076 Fax: 416.595.8695 tdolny@millerthomson.com</p>
<p>AND TO: GRANT THORNTON LIMITED 11th Floor, 200 King Street West" Toronto, ON M5H 3T4"</p> <p>Proposal Trustee</p>	<p>Dan Wootton, CIRP, LIT Tel: 416.360.3063 Fax: 416.360.4949 dan.wootton@ca.gt.com</p>
<p>AND TO: CASSELS BROCK & BLACKWELL LLP Scotia Plaza 40 King Street West, Suite 2100 Toronto, ON M5H 3C2</p> <p>Counsel for the Proposal Trustee</p>	<p>John Birch Tel: 416.860.5225 Fax: 416.360.8877 jbirch@cassels.com</p> <p>Jeremy Bornstein Tel: 416.869.5386 Fax: 416.360.8877 jbornstein@cassels.com</p>
<p>AND TO: HUMMINGBIRD LAWYERS LLP 80 Bloor Street West, Suite 1401 Toronto, ON M5S 2V1</p> <p>Counsel for the Debenture Holders</p>	<p>Jonathan Barr Tel: 905.731.1911 Fax: 905.731.1913 jonathan@hummingbirdlaw.com</p>
<p>AND TO: HIMELFARB PROSZANSKI 480 University Avenue, Suite 1401 Toronto, ON M5G 1V2</p> <p>Counsel for Bayview Creek (CIM) LP</p> <p>Secured Creditors</p>	<p>Ronald Lachmansingh Tel: 416.599.8080 Fax: 416.599.3131 rlachmansingh@himprolaw.com</p>

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AND **Monest Financial Inc.**
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IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
CIM BAYVIEW CREEK INC.

Court of Appeal File No.:
Court File No.: 31-2684629

COURT OF APPEAL FOR ONTARIO

NOTICE OF MOTION

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Lawyers for the Respondents (Appellants in Appeal),
Bayview Creek Residences Inc. and Bryton Capital
Corp. GP Ltd.

This is **Exhibit "C"**
to the affidavit of **Jeremy Bornstein** sworn before me by
videoconference in accordance with O.Reg. 431/20. The
deponent and I were both located in the City of Toronto in the
Province of Ontario this 12th day of July, 2021

A handwritten signature in black ink, appearing to read 'Kieran May', is written over a horizontal dotted line.

Commissioner for Taking Affidavits
(or as may be)
Kieran May (LSO# 79672P)

Court of Appeal File No.: _____

Court File No.: 31-2684629

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C., 1985, c. B-3
AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
CIM BAYVIEW CREEK INC.

NOTICE OF APPEAL

THE RESPONDENTS (APPELLANTS IN APPEAL), BAYVIEW CREEK RESIDENCES INC. AND BRYTON CAPITAL CORP. GP LTD., APPEAL to the Ontario Court of Appeal from the Order (“**Order**”) of the Honourable Justice Peter J. Cavanagh dated November 27, 2020, made at Toronto.

THE APPELLANTS ASK that the Order be set aside or varied, with the new order to be issued as follows:

- a) A declaration that the *Mareva* injunction granted by the Honourable Justice Schabas on September 18, 2020 as continued by order of the Honourable Justice Koehnen dated October 13, 2020 in the proceeding of the Superior Court of Justice bearing Court File No.: CV-20-000647366-0000 remained in full force and effect at the time of the issuance of the Order;
- b) A declaration that the debtor-in-possession credit facility (“**DIP Financing**”) sought by CIM Bayview Creek Inc. (“**CIM**”) is not approved and that there shall be no first priority charge (“**First Priority Charge**”) granted in favour of Cardinal Advisory Limited (“**DIP Lender**”), together with an order that paragraphs 8 through 14 of the Order be set aside.

- c) A declaration that CIM shall not be entitled an extension of time to make a proposal to its creditors, together with an order that paragraph 16 of the Order be set aside;
- d) If necessary, granting leave to appeal pursuant to Section 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 and permitting the extension or abridgment of time for the service and filing of materials, on terms as are just;
- e) Costs; and
- f) Such further and other relief as counsel may advise and the Court of Appeal may deem just.

THE GROUNDS OF APPEAL are as follows:

THE RELIEF GRANTED IS PROHIBITED BY A MAREVA INJUNCTION

- a) The bankruptcy proceeding from which this appeal arises is a related proceeding to a civil action (“**Civil Action**”) in the Superior Court of Justice bearing Court File No.: CV-20-000647366-0000.
- b) Pursuant to the Order of the Honourable Justice Schabas dated September 18, 2020 in the Civil Action, as continued by further orders of the Superior Court of Justice, there was a *Mareva* injunction (“**Injunction**”) whereby CIM, *inter alia*, was enjoined from dealing with its property.
- c) Pursuant to the endorsement and order of the Honourable Justice Koehnen dated October 13, 2020, issued in the Civil Action, all affected parties were to maintain the *status quo* until December 3, 2020, the return date of an omnibus motion in the Civil Action to determine, *inter alia*, whether the secured creditors may take steps to enforce their security and whether the *Mareva* injunction should continue.
- d) CIM breached the Injunction and the endorsement of Koehnen J. by, *inter alia*, offering to pay \$200,000 of forbearance fee to the first lender and taking steps to obtain the DIP Financing and the First Priority Charge, to materially prejudice the secured creditors.

- e) The motion judge erred, in fact and law, by approving the DIP Financing and the First Priority Charge. The motion judge improperly authorized litigation financing for CIM to challenge the *bona fide* interest of the secured creditors. In effect, CIM was permitted to utilize the security belonging to the secured creditors to wage litigation against them.

THE COURT DID NOT HAVE JURISDICTION TO AUTHORIZE THE FINANCING

- f) Pursuant to the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (“*BIA*”), a court may authorize DIP Financing only upon a review of the financial documents filed by a debtor, which are to be reviewed for reasonableness. The court cannot permit DIP Financing, unless it is satisfied that the DIP Financing is limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business for the specified period.
- g) There was no evidence before the court regarding the purported litigation costs, for which the DIP Financing was ultimately authorized. DIP Financing cannot be authorized to fund CIM’s litigation costs against secured creditors’ *bona fide* interests, as the costs are not “what is reasonably necessary for the continued operations of the debtor company in the ordinary course of its business.”
- h) On the return date of the motion, CIM failed to even establish that it had a *prima facie* case with respect to the *bona fides* of the secured creditors’ interest. Yet, the Order permitted DIP Financing to fund CIM’s litigation costs.
- i) The DIP Financing granted in the circumstances of this case constitutes a fundamental attack against secured creditors’ rights, with significant implications for the lending industry in general. It is of utmost importance that the appeal be heard by the Ontario Court of Appeal.

NO REASONS GIVEN IN THE MOTION JUDGE’S DECISION

- j) In his brief endorsement, the motion judge failed to provide any reasons for the decision to grant the exceptional DIP Financing and the First Priority Charge, notwithstanding that the *Mareva* Injunction enjoined this very relief. The lack of the motion judge’s reasons in this

regard constitutes, in and of itself, sufficient grounds to set aside or vary the Order.

OTHER GROUNDS

- k) Such further or other grounds as counsel may advise.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

- a) Section 193(e) of the *BIA* or, in the alternative, sections 193(b) and (c) of the *BIA*;
- b) Section 31 of the *Bankruptcy and Insolvency General Rules, C.R.C., c. 368* ("***BIA Rules***");
- c) The Order is an order of a judge in a bankruptcy proceeding;
- d) Leave to appeal may be required for the appeal of the Order. If leave to appeal is required, it ought to be granted under s. 193(e) of the *BIA*. The appeal is *prima facie* meritorious, and the proposed appeal raises issues that are of significant importance in insolvency law. The Appellants have included a motion for leave to appeal at "**Schedule A**" to this Notice of Appeal pursuant to the requirements provided for in Section 31(2) of the *BIA Rules*;
- e) In the alternative, if leave to appeal the Order is not required, the appeal lies as of right to the Court of Appeal pursuant to ss. 193(b) and (c) of the *BIA*.

December 7, 2020

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Lawyers for the Appellants, Bayview Creek
Residences Inc. and Bryton Capital Corp. GP
Ltd.

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<p>TO: MILLER THOMSON LLP 40 King Street West Suite 5800, P.O. Box 101 Toronto ON M5H 3S1</p> <p>Lawyers for the Applicant</p>	<p>David Ward LSO#33541W Tel: 416.595.8625 Fax: 416.595.8695 dward@millerthomson.com</p> <p>Larry Ellis LSO#49313K Tel: 416.595.8639 Fax: 416.595.8695 lellis@millerthomson.com</p> <p>Tamie Dolny LSO#77958U Tel: 416.597.6076 Fax: 416.595.8695 tdolny@millerthomson.com</p>
<p>AND TO: GRANT THORNTON LIMITED 11th Floor, 200 King Street West" Toronto, ON M5H 3T4"</p> <p>Proposal Trustee</p>	<p>Dan Wootton, CIRP, LIT Tel: 416.360.3063 Fax: 416.360.4949 dan.wootton@ca.gt.com</p>
<p>AND TO: CASSELS BROCK & BLACKWELL LLP Scotia Plaza 40 King Street West, Suite 2100 Toronto, ON M5H 3C2</p> <p>Counsel for the Proposal Trustee</p>	<p>John Birch Tel: 416.860.5225 Fax: 416.360.8877 jbirch@cassels.com</p> <p>Jeremy Bornstein Tel: 416.869.5386 Fax: 416.360.8877 jbornstein@cassels.com</p>
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SCHEDULE “A”

[Notice of Motion for leave to appeal attached hereto]

Court of Appeal File No.: _____

Court File No.: 31-2684629

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C., 1985, c. B-3
AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
CIM BAYVIEW CREEK INC.

NOTICE OF MOTION

**THE RESPONDENTS/MOVING PARTIES, BAYVIEW CREEK RESIDENCES
INC. AND BRYTON CAPITAL CORP. GP LTD.**, will make a motion to a Judge on a date to
be fixed by the Registrar at 330 University Avenue, Toronto, ON M5G 1R8.

PROPOSED METHOD OF HEARING:

The motion is to be heard:

- in writing under subrule 61.03.1(1);
- in writing as an opposed motion under subrule 37.12.1(4);
- orally.

THE MOTION IS FOR:

- (a) An order granting leave to appeal the order (“**Order**”) of the Honourable Justice Peter J. Cavanagh dated November 27, 2020, or in the alternative, a declaration that leave is not required;
- (b) If necessary, an order extending or abridging the time for the service and filing of appeal and motion materials;
- (c) Costs; and

- (d) Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE:

THE RELIEF GRANTED IS PROHIBITED BY A MAREVA INJUNCTION

- a) The bankruptcy proceeding from which this appeal arises is a related proceeding to a civil action (“**Civil Action**”) in the Superior Court of Justice bearing Court File No.: CV-20-000647366-0000.
- b) Pursuant to the Order of the Honourable Justice Schabas dated September 18, 2020 in the Civil Action, as continued by further orders of the Superior Court of Justice, there was a *Mareva* injunction (“**Injunction**”) whereby CIM, *inter alia*, was enjoined from dealing with its property.
- c) Pursuant to the endorsement and order of the Honourable Justice Koehnen dated October 13, 2020, issued in the Civil Action, all affected parties were to maintain the *status quo* until December 3, 2020, the return date of an omnibus motion in the Civil Action to determine, *inter alia*, whether the secured creditors may take steps to enforce their security and whether the *Mareva* injunction should continue.
- d) CIM breached the Injunction and the endorsement of Koehnen J. by, *inter alia*, offering to pay \$200,000 of forbearance fee to the first lender and taking steps to obtain the DIP Financing and the First Priority Charge, to materially prejudice the secured creditors.
- e) The motion judge erred, in fact and law, by approving the DIP Financing and the First Priority Charge. The motion judge improperly authorized litigation financing for CIM to challenge the *bona fide* interest of the secured creditors. In effect, CIM was permitted to utilize the security belonging to the secured creditors to wage litigation against them.

THE COURT DID NOT HAVE JURISDICTION TO AUTHORIZE THE FINANCING

- f) Pursuant to the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (“**BIA**”), a court may authorize DIP Financing only upon a review of the financial documents filed by a debtor,

which are to be reviewed for reasonableness. The court cannot permit DIP Financing, unless it is satisfied that the DIP Financing is limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business for the specified period.

- g) There was no evidence before the court regarding the purported litigation costs, for which the DIP Financing was ultimately authorized. DIP Financing cannot be authorized to fund CIM's litigation costs against secured creditors' *bona fide* interests, as the costs are not "what is reasonably necessary for the continued operations of the debtor company in the ordinary course of its business."
- h) On the return date of the motion, CIM failed to even establish that it had a *prima facie* case with respect to the *bona fides* of the secured creditors' interest. Yet, the Order permitted DIP Financing to fund CIM's litigation costs.
- i) The DIP Financing granted in the circumstances of this case constitutes a fundamental attack against secured creditors' rights, with significant implications for the lending industry in general. It is of utmost importance that the appeal be heard by the Ontario Court of Appeal.

NO REASONS GIVEN IN THE MOTION JUDGE'S DECISION

- j) In his brief endorsement, the motion judge failed to provide any reasons for the decision to grant the exceptional DIP Financing and the First Priority Charge, notwithstanding that the *Mareva* Injunction enjoined this very relief. The lack of the motion judge's reasons in this regard constitutes, in and of itself, sufficient grounds to set aside or vary the Order.

OTHER GROUNDS

- k) Sections 193 of the Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3.
- l) Rules 61.03.1 and 3.02 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194
- m) Such further or other grounds as counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) The Affidavit of Bryan McWatt;
- (b) Such further and other evidence as counsel may advise and this Honourable Court may permit.

December 7, 2020

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Lawyers for the Respondents/Moving Parties,
Bayview Creek Residences Inc. and Bryton
Capital Corp. GP Ltd.

TO: THE SERVICE LIST

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
CIM BAYVIEW CREEK INC.

Court of Appeal File No.:
Court File No.: 31-2684629

COURT OF APPEAL FOR ONTARIO

NOTICE OF MOTION

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Lawyers for the Respondents (Appellants in Appeal),
Bayview Creek Residences Inc. and Bryton Capital
Corp. GP Ltd.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
CIM BAYVIEW CREEK INC.

Court of Appeal File No.:
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COURT OF APPEAL FOR ONTARIO

NOTICE OF APPEAL

OWENS WRIGHT LLP

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Lawyers for the Respondents/Moving Parties, Bayview
Creek Residences Inc. and Bryton Capital Corp. GP
Ltd.

This is **Exhibit "D"**
to the affidavit of **Jeremy Bornstein** sworn before me by
videoconference in accordance with O.Reg. 431/20. The
deponent and I were both located in the City of Toronto in the
Province of Ontario this 12th day of July, 2021

.....


Commissioner for Taking Affidavits
(or as may be)
Kieran May (LSO# 79672P)

From: Cavanagh, Justice Peter (SCJ) <Peter.Cavanagh@scj-csj.ca>
Sent: Tuesday, December 22, 2020 11:22 AM
To: Robert S. Choi; 'Ward, David'; Craddock, Erin; jonathan@hummingbirdlaw.com; lawrence.hansen@devrylaw.ca; Dolny, Tamie; Birch, John; Bornstein, Jeremy; Jonathan Careen; lcorne@dickinsonwright.com
Cc: JUS-G-MAG-CSD-Toronto-SCJ Commercial List
Subject: Court File no. 31-2684629 Re Notice of Intention to Make a Proposal of CIM Bayview Creek Inc.
Attachments: 51260218_1_Counsel Slip (Revised) .PDF

Counsel:

See attached counsel slip.

Endorsement:

On December 21, 2020 I heard motions by (i) Bryton Capital Group and Bayview Creek Residences Inc. to enforce an option agreement to purchase a property in Richmond Hill, and (ii) CIM Bayview Creek Inc. for declaratory and other relief in respect of the option agreement.

CIM Bayview also moves for an order extending the time to file a proposal from December 22, 2020 to February 5, 2021.

On October 29, 2020, Cim Bayview filed a Notice of Intention to Make a Proposal pursuant to s. 50.4(1) of the *BIA*. On November 27, 2020, I made an order extending the date for CIM Bayview to file a proposal to December 22, 2020. In my endorsement making this order, I identified a threshold question in relation to these proceedings as whether the option agreement is legally valid and binding. I noted that if the extension requested was not granted, there will be a deemed bankruptcy, and CIM Bayview will have lost its opportunity to pursue a sales process under the NOI. I extended the date for CIM Bayview to file a proposal in order to allow it to have an adjudication of the motions in relation to the option agreement.

In these circumstances, I am satisfied that the statutory requirements in s. 50.4(9) for an extension have been met to the extent that a further extension should be granted up to and including February 5, 2021.

I order that the date for filing a proposal under the *BIA* is extended up to and including February 5, 2021. This order is effective today, December 22, 2020. Entry and filing of the formal order is dispensed with.



Cavanagh J.

This is **Exhibit "E"**
to the affidavit of **Jeremy Bornstein** sworn before me by
videoconference in accordance with O.Reg. 431/20. The
deponent and I were both located in the City of Toronto in the
Province of Ontario this 12th day of July, 2021

..........

Commissioner for Taking Affidavits
(or as may be)
Kieran May (LSO# 79672P)



Industry Canada
Office of the Superintendent
of Bankruptcy Canada

Industrie Canada
Bureau du surintendant
des faillites Canada

District of: Ontario
Division No.: 09 - Toronto
Court No.: 31-2684629
Estate No.: 31-2684629

In the Matter of the Bankruptcy of:

CIM Bayview Creek Inc.
Debtor

GRANT THORNTON LIMITED
Licensed Insolvency Trustee
Ordinary Administration

Date of bankruptcy:	February 08, 2021	Security: \$0.00
Meeting of creditors:	February 26, 2021, 10:00 Meeting to be held by Teleconference 416-360-7375 ID #: 1027894, Ontario Canada,	
Chair:	Trustee	Designated person: Jiubin (Jerry) Feng

CERTIFICATE OF ASSIGNMENT - Paragraph 50.4(8)(b.1) of the Act

-- AMENDED --

I, the undersigned, official receiver in and for this bankruptcy district, do hereby certify that:

- a notice of intention in respect of the aforementioned debtor was filed under section 50.4 of the *Bankruptcy and Insolvency Act*;
- the debtor has failed to file a cash-flow statement or a proposal within the provided period following the filing of the notice of intention or within any Court-granted extension and is thereupon deemed to have made an assignment.

The said trustee is required:

- to provide to me, without delay, security in the aforementioned amount;
- to send to all creditors, within five days after the date of the trustee's appointment, a notice of the bankruptcy; and
- when applicable, to call in the prescribed manner a first meeting of creditors, to be held at the aforementioned time and place or at any other time and place that may be later requested by the official receiver.

Date: February 09, 2021


E-File/Dépôt Electronique

Official Receiver

151 Yonge Street, 4th Floor, Toronto, Ontario, Canada, M5C2W7, (877)376-9902

Canada

This is **Exhibit "F"**
to the affidavit of **Jeremy Bornstein** sworn before me by
videoconference in accordance with O.Reg. 431/20. The
deponent and I were both located in the City of Toronto in the
Province of Ontario this 12th day of July, 2021

..........

Commissioner for Taking Affidavits
(or as may be)
Kieran May (LSO# 79672P)

From: Robert S. Choi <RChoi@owenswright.com>
Sent: Friday, February 12, 2021 5:05 PM
To: Birch, John; Ward, David; Bornstein, Jeremy
Cc: Jonathan Careen
Subject: DIP Financing Appeal - Court of Appeal File No.: M52146 (In the Matter of the Notice of Intention to Make a Proposal of CIM Bayview Creek Inc.)
Attachments: Notice of Appeal (00378955xEEFE9).pdf
Importance: High

Mr. Birch and Mr. Ward:

Given the bankruptcy of the Debtor, we will be adjourning the hearing date for this motion re: our appeal of the DIP financing to a date after the first creditors' meeting on Feb. 26, 2021. I am writing to coordinate the date of the hearing with you. We desire to book the motion date between March 8, 2021, to March 19, 2021, so kindly advise me if you are unavailable on any of these dates.

Thank you kindly.

Best regards,

Robert S. Choi B.A., J.D., LL.M.

Partner | Litigation | Owens Wright LLP

Direct: 416.848.4722 | **Fax:** 416.486.3309 | **Email:** RChoi@owenswright.com
300-20 Holly St., Toronto, ON M4S 3B1 owenswright.com

This e-mail message is privileged, confidential and subject to copyright. Any unauthorized use or disclosure is prohibited.

This is **Exhibit "G"**
to the affidavit of **Jeremy Bornstein** sworn before me by
videoconference in accordance with O.Reg. 431/20. The
deponent and I were both located in the City of Toronto in the
Province of Ontario this 12th day of July, 2021

..........

Commissioner for Taking Affidavits
(or as may be)
Kieran May (LSO# 79672P)

From: Birch, John
Sent: Thursday, February 18, 2021 5:17 PM
To: Robert S. Choi
Cc: Jonathan Careen; Ward, David; Dan Wootton (dan.wootton@ca.gt.com); Bornstein, Jeremy; Jonathan Barr; Slavens, Adam; Jordan Wajs
Subject: RE: Motion for leave to appeal the DIP approval order re CIM Bayview Creek Inc. [IWOV-LEGAL.054920-00002]

Dear Mr. Choi,

Without prejudice to the various objections that the trustee intends to raise to the propriety of the motion for leave to appeal (including that it is already out of time), we are prepared to pick a date for the hearing of such motion. I infer your email of yesterday to mean that the leave motion will be brought before a single judge of the Court of Appeal at a regular weekday motion appointment.

Assuming that this is the case, we are prepared to pick a date for the motion so long as all counsel also agree—at the same time—to a reasonable timetable for steps leading to the hearing.

In particular, the timetable for a leave to appeal motion would have to be as follows:

- (a) 28 days before the hearing, Bryton serves its leave to appeal motion record;
- (b) 21 days before the hearing, Bryton serves its factum and book of authorities;
- (c) 7 days before the hearing, the Trustee (and any other responding party) serves its responding factum and book of authorities; and
- (d) 4 days before the hearing, Bryton serves its reply factum (if any).

All of this would indicate a hearing date approximately 5 weeks from now, since that would allow you 7 days to complete step (a). I am available for the motion to be heard on March 26, 29, 30, or 31. I trust that gives you enough latitude to schedule the motion. If these dates do not work, please let me know and I can provide a further list of dates.

I should also warn you that self-represented parties have priority to be heard on Wednesdays and Thursdays so you might want to avoid picking one of those dates for this motion.

I do not know whether the other parties such as the debentureholders or the debtor intend to participate in the motion for leave to appeal, but they will also need to provide their availability and to confirm that they are OK with the proposed timetable in advance of the hearing.

Cassels | **JOHN BIRCH**
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Suite 2100, Scotia Plaza, 40 King St. W.
Toronto, ON M5H 3C2 Canada
Services provided through a professional corporation

From: Robert S. Choi
Sent: Wednesday, February 17, 2021 4:06 PM
To: Birch, John
Cc: Jonathan Careen ; Ward, David ; Dan Wootton (dan.wootton@ca.gt.com) ; Bornstein, Jeremy ; Jonathan Barr ;

Slavens, Adam ; Jordan Wajs

Subject: RE: Motion for leave to appeal the DIP approval order re CIM Bayview Creek Inc. [IWOV-LEGAL.054920-00002]

Mr. Birch and Mr. Ward:

The Court of Appeal's direction was that the motion can be brought on 7 days of notice. You can make whatever argument that you wish to make at the motion, Mr. Birch. Please provide us your availability by tomorrow, failing which we will unilaterally select a date and proceed, as this matter must proceed. Thank you.

Best regards,

Robert S. Choi B.A., J.D., LL.M.

Partner | Litigation | Owens Wright LLP

Direct: 416.848.4722 | **Fax:** 416.486.3309 | **Email:** RChoi@owenswright.com

300-20 Holly St., Toronto, ON M4S 3B1 owenswright.com

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From: Birch, John <jbirch@cassels.com>

Sent: Wednesday, February 17, 2021 3:53 PM

To: Robert S. Choi <RChoi@owenswright.com>

Cc: Jonathan Careen <JCareen@owenswright.com>; Ward, David <dward@millerthomson.com>; Dan Wootton (dan.wootton@ca.gt.com) <dan.wootton@ca.gt.com>; Bornstein, Jeremy <jbornstein@cassels.com>; Jonathan Barr <jonathan@hummingbirdlaw.com>; Slavens, Adam <aslavens@torys.com>; Jordan Wajs <JWajs@owenswright.com>

Subject: RE: Motion for leave to appeal the DIP approval order re CIM Bayview Creek Inc. [IWOV-LEGAL.054920-00002]

We are going to need to speak to the Court of Appeal to confirm the proper process, following which I will get back to you.

However, your email did not address the fact that your leave motion appears to be out of time.

Cassels | **JOHN BIRCH**
 t: +1 416 860 5225
 e: jbirch@cassels.com

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Suite 2100, Scotia Plaza, 40 King St. W.

Toronto, ON M5H 3C2 Canada

Services provided through a professional corporation

From: Robert S. Choi <RChoi@owenswright.com>

Sent: Wednesday, February 17, 2021 3:48 PM

To: Birch, John <jbirch@cassels.com>

Cc: Jonathan Careen <JCareen@owenswright.com>; Ward, David <dward@millerthomson.com>; Dan Wootton (dan.wootton@ca.gt.com) <dan.wootton@ca.gt.com>; Bornstein, Jeremy <jbornstein@cassels.com>; Jonathan Barr <jonathan@hummingbirdlaw.com>; Slavens, Adam <aslavens@torys.com>; Jordan Wajs <JWajs@owenswright.com>

Subject: RE: Motion for leave to appeal the DIP approval order re CIM Bayview Creek Inc. [IWOV-LEGAL.054920-00002]

Mr. Birch:

Thank you for your e-mail.

The Ontario Court of Appeal advised us that motions for leave to appeal are actually heard "in person", not in writing. I recognize that the Rules seem to indicate that the motion is heard in writing, but the practice is otherwise. The Court of

Appeal also advised that these motions are booked in the ordinary course, i.e. at least 7 days prior to the motion date. These were the directions of the Court of Appeal pertaining to the leave motion.

Our office simply requests from your office and David Ward's office is your availability, so that we can canvass the availability for such a motion date with the Court of Appeal. Please provide us your availability in early to mid-March 2021.

Best regards,

Robert S. Choi B.A., J.D., LL.M.

Partner | Litigation | Owens Wright LLP

Direct: 416.848.4722 | **Fax:** 416.486.3309 | **Email:** RChoi@owenswright.com
300-20 Holly St., Toronto, ON M4S 3B1 owenswright.com

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From: Birch, John <jbirch@cassels.com>

Sent: Wednesday, February 17, 2021 3:04 PM

To: Robert S. Choi <RChoi@owenswright.com>

Cc: Jonathan Careen <JCareen@owenswright.com>; Ward, David <dward@millerthomson.com>; Dan Wootton (dan.wootton@ca.gt.com) <dan.wootton@ca.gt.com>; Bornstein, Jeremy <jbornstein@cassels.com>; Jonathan Barr <jonathan@hummingbirdlaw.com>; Slavens, Adam <aslavens@torys.com>

Subject: Motion for leave to appeal the DIP approval order re CIM Bayview Creek Inc. [IWOV-LEGAL.054920-00002]

Dear Mr. Choi,

I am writing in response to your email last Friday in which you ask about dates for a motion for leave to appeal the DIP approval order.

I am a bit confused by your request. First, the Court of Appeal typically deals with leave motions in writing, with no oral hearing. As such, I am not sure why you would be booking a hearing date for the leave motion. Could you explain this to me, so that I can understand the basis for your request? I also do not understand what hearing your previously booked (in February) or for what purpose.

Second, in any event, nothing relating to the leave motion apart from the notice of motion for leave to appeal has been served on us. We have not been provided with the court file number for the leave motion (to indicate that it was filed) and we have not received any of the other appeal materials that are required to be served and filed, such as the factum, motion record, and book of authorities. Further, the deadline for serving and filing those materials has long passed.

If the leave materials had been served and filed on a timely basis, the respondents would have had time specified in the *Rules* to file their responding materials and then the entire record would be submitted to the Court of Appeal for consideration on the written record (i.e., without an oral hearing). If leave is granted, then the appellant would perfect its appeal and the respondents would file their responding materials, and only then an oral hearing of the appeal on the merits would occur. On the other hand, if the leave motion is dismissed, that ends the matter.

I would sincerely appreciate hearing from you about the questions and concerns that I have raised herein.

To be clear, nothing herein constitutes a waiver or withdrawal of the concerns previously raised by the Trustee about the effect of the stay.

Cassels

JOHN BIRCH

t: +1 416 860 5225

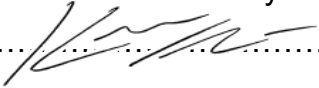
e: jbirch@cassels.com

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Suite 2100, Scotia Plaza, 40 King St. W.

This message, including any attachments, is privileged and may contain confidential information intended only for the person(s) named above. Any other distribution, copying or disclosure is strictly prohibited. Communication by email is not a secure medium and, as part of the transmission process, this message may be copied to servers operated by third parties while in transit. Unless you advise us to the contrary, by accepting communications that may contain your personal information from us via email, you are deemed to provide your consent to our transmission of the contents of this message in this manner. If you are not the intended recipient or have received this message in error, please notify us immediately by reply email and permanently delete the original transmission from us, including any attachments, without making a copy.

This is **Exhibit "H"**
to the affidavit of **Jeremy Bornstein** sworn before me by
videoconference in accordance with O.Reg. 431/20. The
deponent and I were both located in the City of Toronto in the
Province of Ontario this 12th day of July, 2021

.....


Commissioner for Taking Affidavits
(or as may be)
Kieran May (LSO# 79672P)

From: Birch, John
Sent: Wednesday, May 12, 2021 12:09 PM
To: Robert S. Choi
Cc: Dan Wootton (dan.wootton@ca.gt.com); Bornstein, Jeremy; Ward, David; Craddock, Erin; Slavens, Adam; Shea, Patrick; Jonathan Barr
Subject: RE: 4:30 p.m. telephone conference on Friday? [IWOV-LEGAL.054920-00002]

Dear Mr. Choi,

I wanted to engage with you about three aspects of the Notice of Application that you issued yesterday.

First, regarding the transfer at undervalue and other related relief that creditors may take, Grant Thornton Limited in its capacity as bankruptcy trustee of "Inc." has no present intention to seek such relief. One creditor has asked the trustee to pursue such relief and the trustee has declined to do so based on lack of funding. The trustee therefore believes that such relief will be pursued by creditors, such as the creditors that Messrs. Slavens/Barr and Shea represent. However, as those counsel mentioned this morning, they need time to obtain a s. 38 order in the "Inc." bankruptcy. They will also need additional time to obtain a section 38 order in the other two bankruptcies (where MNP is the presumptive trustee) given that such order cannot be obtained until the first meeting of creditors takes place, and the creditors ask the trustee to seek that relief and the trustee then declines. The required time to obtain a section 38 order will need to be taken into account in scheduling your application.

Second, your notice of application refers to the DIP charge but does not properly set out how the optionee intends to deal with that. The DIP charge takes priority over all other encumbrances against the Property and thus the amount of the charge (plus applicable interest) will need to be paid in full if the optionee wishes to take title to the property free and clear of the DIP charge. Your notice of application states that the order approving the DIP charge is under appeal. That statement is not correct. Although Bryton initially provided some appeal materials, it has taken no steps to proceed with either an appeal or a motion for leave to appeal and the deadline for doing so has long passed. As such, the DIP charge is valid and enforceable and cannot be vested out unless paid in full. I am available to discuss the DIP charge with you at your convenience. Feel free to propose time for a call tomorrow or on Friday.

Third, regarding your suggestion of a call among counsel on May 14, I agree with Mr. Shea that such call should be scheduled after you have served the Application Record (including draft order) and all parties have had a few days to consider those materials. If you intend to ask the court on May 25 to schedule the application, it is important that you provide these materials well in advance of that date, otherwise scheduling matters are likely to get further delayed.

Cassels

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Toronto, ON M5H 3C2 Canada

Services provided through a professional corporation

From: Robert S. Choi
Sent: Wednesday, May 12, 2021 10:11 AM
To: aslavens@torys.com; jonathan@hummingbirdlaw.com; Bornstein, Jeremy ; Birch, John ; Lisa S. Corne ; patrick.shea@gowlingwlg.com; sheldon.title@mnp.ca; Alex Ilchenko
Cc: Daniel Kim ; jerry.feng@cimintgroup.com; Tannenbaum, Bryan ; Jonathan Careen ; Angel Zheng
Subject: 4:30 p.m. telephone conference on Friday?

Dear Counsel:

For those who are available, I'd like to host a **4:30 p.m. telephone conference on Friday, May 14, 2021**, to discuss the scheduling issue re: Bryton's Notice of Application. For those who are not available, perhaps I can touch base with you individually later.

Please let me know if all/most of you are available at 4:30 p.m. this Friday, in which case I will circulate the call-in information.

FYI:

- I have cc'ed Jerry Feng and Lisa Corne in this e-mail, as I'm not sure who, if any, is representing the debtors.
- I have cc'ed the Debtors' Trustees' counsel in this e-mail.

Thank you kindly.

Best regards,

Robert S. Choi B.A., J.D., LL.M.

Partner | Litigation | Owens Wright LLP

Direct: 416.848.4722 | **Fax:** 416.486.3309 | **Email:** RChoi@owenswright.com

300-20 Holly St., Toronto, ON M4S 3B1 owenswright.com

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This is **Exhibit "I"**
to the affidavit of **Jeremy Bornstein** sworn before me by
videoconference in accordance with O.Reg. 431/20. The
deponent and I were both located in the City of Toronto in the
Province of Ontario this 12th day of July, 2021

.....


Commissioner for Taking Affidavits
(or as may be)
Kieran May (LSO# 79672P)

From: Robert S. Choi <RChoi@owenswright.com>
Sent: Tuesday, June 29, 2021 12:27 PM
To: Birch, John
Cc: Slavens, Adam; Jonathan Barr; lawrence.hansen@devrylaw.ca; Shea, Patrick; Jonathan Careen; Dan Wootton (dan.wootton@ca.gt.com); Bornstein, Jeremy; Ward, David
Subject: RE: DIP charge and the vesting order being sought by Bryton [IWOV-LEGAL.054920-00002]

Mr. Birch, I respectfully disagree. The Debtors' counsel's fees are subject to the passing of the accounts, contrary to your allegation below. It makes no sense to bring an appeal when the fees may not be ordered to be paid. We can make our respective submissions at the Court of Appeal.

Robert S. Choi B.A., J.D., LL.M.

Partner | Litigation | Owens Wright LLP

Direct: 416.848.4722 | **Fax:** 416.486.3309 | **Email:** RChoi@owenswright.com
300-20 Holly St., Toronto, ON M4S 3B1 owenswright.com

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From: Birch, John
Sent: Tuesday, June 29, 2021 12:24 PM
To: Robert S. Choi
Cc: Slavens, Adam ; Jonathan Barr ; lawrence.hansen@devrylaw.ca; Shea, Patrick ; Jonathan Careen ; Dan Wootton (dan.wootton@ca.gt.com) ; Bornstein, Jeremy ; Ward, David
Subject: RE: DIP charge and the vesting order being sought by Bryton [IWOV-LEGAL.054920-00002]

Any attempt by your client to seek leave to appeal the DIP Charge order has long been out of time.

Under the *Rules of Civil Procedure*, a prospective appellant does not get to serve a Notice of Motion for Leave to Appeal and then fail to proceed with the motion for leave to appeal outside the deadlines in the *Rules* established for taking such steps.

No other party (including the Proposal Trustee) ever agreed to any extensions of time (nor did Bryton ever ask for any) to proceed with the leave motion.

Further, the fact that the Proposal Trustee brought a motion to approve fees was no reason to delay the motion for leave to appeal. Funds under the DIP Charge may be used for purposes other than the fees of the Proposal Trustee and its counsel—such as the fees of counsel for the debtor, in respect of which no court approval is required. Thus, even in the unthinkable event that Justice Cavanagh denied approval of all Cassels and GT fees, the proceeds of the DIP Charge could be fully used by counsel for the debtor. That is why your assertion that the purported leave motion needs to await the outcome of the fee approval motion makes no sense.

I also note that the order approving the DIP Charge is not stayed because there is has never been any extant “appeal”. There has only been a motion for leave to appeal that has never proceeded. Since no appeal exists (and no appeal can exist until a Court of Appeal judge gives leave under BIA s. 193(e)), there is no stay, and since there is no stay, the DIP Charge remains enforceable.

I again emphasize that I must review any proposed vesting order to see whether it properly reflects the rights under the DIP Charge. Regrettably, if your client continues to take the same position set out in your email below, it may be necessary for me to appear on August 11 to make submissions.



John Birch
 t: +1 416 860 5225
 e: jbirch@cassels.com

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 Toronto, ON M5H 3C2 Canada
 Services provided through a professional corporation

From: Robert S. Choi <RChoi@owenswright.com>
Sent: Tuesday, June 29, 2021 12:06 PM
To: Birch, John <jbirch@cassels.com>
Cc: Slavens, Adam <aslavens@torys.com>; Jonathan Barr <jbarr@hummingbirdlaw.com>; lawrence.hansen@devrylaw.ca; Shea, Patrick <Patrick.Shea@gowlingwlg.com>; Jonathan Careen <JCareen@owenswright.com>; Dan Wootton (dan.wootton@ca.gt.com) <dan.wootton@ca.gt.com>; Bornstein, Jeremy <jbornstein@cassels.com>; Ward, David <dward@millertomson.com>
Subject: RE: DIP charge and the vesting order being sought by Bryton [IWOV-LEGAL.054920-00002]

Mr. Birch:

Thank you for your e-mail.

With respect to the DIP financing, we had served the Notice of Motion pertaining to the DIP financing, and we are presently waiting for Cavanagh J.'s decision. If the Court does not allow for fees to the Proposal Trustee, then the appeal re: DIP financing will be moot and it will not be necessary for the appeal to proceed (and also provided that the Debtor does not seek any payment of the fees). If the Court does allow for fees, then the DIP Financing will be subject to challenge. Any vesting order that we seek will deal with the DIP Financing by either providing for escrowed funds on a without-prejudice basis or an adjudication of the above-noted issues.

With respect to DUCA's mortgage, my client's intention is to retire DUCA's mortgage on closing.

Best regards,

Robert S. Choi B.A, J.D., LL.M.

Partner | Litigation | Owens Wright LLP
Direct: [416.848.4722](tel:416.848.4722) | **Fax:** [416.486.3309](tel:416.486.3309) | **Email:** RChoi@owenswright.com
 300-20 Holly St., Toronto, ON M4S 3B1 owenswright.com

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From: Birch, John <jbirch@cassels.com>
Sent: Tuesday, June 29, 2021 10:35 AM
To: Robert S. Choi <RChoi@owenswright.com>
Cc: Slavens, Adam <aslavens@torys.com>; Jonathan Barr <jbarr@hummingbirdlaw.com>; lawrence.hansen@devrylaw.ca; Shea, Patrick <Patrick.Shea@gowlingwlg.com>; Jonathan Careen <JCareen@owenswright.com>; Dan Wootton (dan.wootton@ca.gt.com) <dan.wootton@ca.gt.com>; Bornstein, Jeremy <jbornstein@cassels.com>; Ward, David <dward@millertomson.com>
Subject: DIP charge and the vesting order being sought by Bryton [IWOV-LEGAL.054920-00002]

Dear Mr. Choi,

I am writing further to the parties' attendance before Justice Cavanagh this morning.

Assuming that the creditors represented by Messrs. Shea, Slavens, and Barr obtain their order under section 38 of the BIA prior to August 11, 2021, it will not be necessary for our client, as bankruptcy trustee, to take a position on the main relief that your client will seek that day (i.e., a vesting order).

However, there is one part of the vesting order that is of relevance to the Trustee. As you are aware, Justice Cavanagh approved a DIP charge against the property as part of the proposal proceedings. That DIP charge was registered on title as far as I am aware. The charge ultimately secures payment of the fees of Grant Thornton Limited, its counsel, and counsel for Inc. If the court grants a vesting order, the DIP Charge will need to be paid in full upon closing (including any interest that has accrued). You will need to ensure that you provide me with all drafts of the vesting order that you are seeking, and such order will need to provide for payment of the DIP Charge as a condition precedent to the transfer of the property to Bryton (if the court grants the Bryton application).

In addition, I recall that you repeatedly said in late 2020 and early 2021 that Bryton intended to acquire the property pursuant to the option based on Bryton assuming the existing Duca mortgage. This would minimize the amount of "cash" that Bryton had to pay on closing. However, any assumption would, of course, be subject to Duca consenting to have Bryton assume the mortgage rather than paying it out in full. Based on the fact that Mr. Hansen now intends to proceed with an application for the appointment of a receiver, it appears that Duca is not prepared (assuming that it was ever prepared) to permit Bryton to assume the mortgage. Thus, Duca is going to want the mortgage paid on closing if Justice Cavanagh grants the vesting order. Does Bryton have cash ready to pay out the Duca mortgage, interest and costs on the Duca mortgage, and the DIP Charge concurrent with the transfer to Bryton, assuming that Justice Cavanagh grants the Bryton application? If so, please provide particulars of where the money is coming from.

The logo for Cassels, consisting of the word "Cassels" in a bold, blue, sans-serif font.

John Birch

t: +1 416 860 5225

e: jbirch@cassels.com

Cassels Brock & Blackwell LLP | cassels.com

Suite 2100, Scotia Plaza, 40 King St. W.

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This is **Exhibit "J"**
to the affidavit of **Jeremy Bornstein** sworn before me by
videoconference in accordance with O.Reg. 431/20. The
deponent and I were both located in the City of Toronto in the
Province of Ontario this 12th day of July, 2021

..........

Commissioner for Taking Affidavits
(or as may be)
Kieran May (LSO# 79672P)

From: Robert S. Choi <RChoi@owenswright.com>
Sent: Thursday, July 08, 2021 3:09 PM
To: Birch, John; lawrence.hansen@devrylaw.ca
Cc: Ward, David; Dan Wootton (dan.wootton@ca.gt.com); Bornstein, Jeremy; Shea, Patrick; Slavens, Adam; Jonathan Barr
Subject: RE: Applications in the Bayview Creek matter to be heard on August 11, 2021 [IWOV-LEGAL.054920-00002]
Attachments: Order of Cavanagh J. dated November 29, 2020 - Re NOI CIM Bayview Creek Inc._Court File No. 31-2684629_Order_November 27, 2020 (00363254xEEFE9).PDF

Mr. Birch:

Thank you for your e-mail.

1. A copy of the draft order was circulated in the Application Record, in the Third Affidavit of Bryan McWatt.
2. Your e-mail erroneously states that it is not necessary for Miller Thomson to pass its accounts. In fact, Miller Thomson is required to pass its account pursuant to Cavanagh J.'s order dated Nov. 27, 2020, attached. Para. 5 of the Court Order defines the Administration Professionals to include the counsel for CIM Bayview, and para. 6 of the same Court Order requires the Administration Professionals to pass the accounts from time to time. Para. 5 of the Court Order states that the Court may disallow the fees on the motion to pass of accounts. Bryton's position is that no fees shall be payable to the Administration Professionals, because the proposal proceeding by the bare trustee constituted an abuse of process.
3. Bryton duly served, *inter alia*, the Notice of Motion seeking leave to challenge the DIP charge, and it has maintained the intention to appeal. Bryton has held off on the motion, as the motion would be moot if the Court determines that no fees are to be paid to the Administration Professionals. As you know, we are awaiting the Court decision on the fees claimed by Cassels Brock and Grant Thornton. We are also awaiting to see whether any motion will be brought by Miller Thomson to pass its accounts.
4. If the DIP charge or the fee issues are not resolved by the return date of Bryton's vesting order application, then it would make sense for \$200,000 of the DIP charge to be paid to the Receiver to be held in escrow, for the funds to be released upon the direction of the Court or the Court of Appeal.

I have reproduced the relevant portion of the Court Order regarding the passing of accounts.

Best regards,

ADMINISTRATION PROFESSIONALS

5. THIS COURT ORDERS that, subject to paragraph 6, 7 and 8 of this order, the Proposal Trustee, counsel to the Proposal Trustee and counsel to CIM Bayview (the “**Administration Professionals**”) shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by CIM Bayview unless otherwise ordered by the Court on the passing of accounts, as part of the costs of these proceedings.

6. THIS COURT ORDERS that the Administration Professionals shall pass their accounts from time to time, and for this purpose these accounts are referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

5.

Robert S. Choi B.A, J.D., LL.M.

Partner | Litigation | Owens Wright LLP

Direct: 416.848.4722 | **Fax:** 416.486.3309 | **Email:** RChoi@owenswright.com
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From: Birch, John <jbirch@cassels.com>

Sent: Thursday, July 8, 2021 10:33 AM

To: Robert S. Choi <RChoi@owenswright.com>; lawrence.hansen@devrylaw.ca

Cc: Jonathan Careen <JCareen@owenswright.com>; Ward, David <dward@millerthomson.com>; Dan Wootton (dan.wootton@ca.gt.com) <dan.wootton@ca.gt.com>; Bornstein, Jeremy <jbornstein@cassels.com>; Shea, Patrick <Patrick.Shea@gowlingwlg.com>; Slavens, Adam <aslavens@torys.com>; Jonathan Barr <jbarr@hummingbirdlaw.com>

Subject: Applications in the Bayview Creek matter to be heard on August 11, 2021 [IWOV-LEGAL.054920-00002]

Dear Messrs. Choi and Hansen,

I am writing to you about the applications that your respective clients have served and which are returnable on August 11, 2021.

As you know, our firm represented Grant Thornton Limited in its capacity as proposal trustee of CIM Bayview Creek Inc. (the “**Proposal Trustee**”) and subsequently as bankruptcy trustee.

Grant Thornton Limited will not take any position on the relief being sought by either Bryton (as to whether the option can be exercised, whether the property can be purchased on the terms of the option, or whether a vesting order should be granted) or by Duca (whether a receiver should be appointed over the property). Therefore, our client does not intend to file any evidence regarding those issues or make any submissions regarding those issues at the hearing.

However, there remains the issue of the DIP charge that was approved by Justice Cavanagh's November 27, 2020 Order (the "**Order**"). That charges creates security for the payment of the legal fees of Cassels Brock & Blackwell LLP (as counsel to the Proposal Trustee), of the Proposal Trustee, and of Miller Thomson LLP ("**MT**") as counsel for CIM Bayview Creek Inc.

The DIP Charge created by the order ranks in priority to all of the Bryton mortgage, the Bryton option, and the Duca mortgage. Therefore, if the relief that Bryton seeks is granted, the vesting order will need to require the payment of the amount of the DIP Charge prior to title to the property being vested in the relevant Bryton entity. This is a matter that needs to be dealt with in the proposed vesting order.

The norm in Commercial List matters is for the party seeking relief to formally include in its application record or motion record the proposed draft order being sought. However, the Bryton application materials do not contain such order. I therefore ask Mr. Choi to provide me, as soon as possible, with a proposed vesting order, and in particular an order that provides for payment of the DIP Charge—in cash—immediately prior to any transfer of title to the property to the Bryton entity.

I have spoken with Mr. Hansen about the DIP Charge and my understanding is that his client acknowledges that such charge needs to be satisfied on a priority basis and will be satisfied at the appropriate time. If a receiver is appointed, I would expect that a sales process would occur and then the DIP Charge will get satisfied, off the top, out of sales proceeds. However, if Mr. Hansen has any other intentions, I would appreciate hearing from him. However, it is important to emphasize at this stage that the proposed receivership order will need to be amended to make clear that any priority charges sought in that order (including the receiver's borrowing charge and the receiver's charge) will be subordinate to the DIP Charge (which was granted first). As such, Mr. Hansen will need to add specific language to paragraphs 17 and 20 of the receivership order to indicate that those charges are subordinate to the DIP Charge. I look forward to receiving such proposed language.

Finally, I wanted to mention to Mr. Choi that although he disagrees with the position of Cassels and the Proposal Trustee that there is no valid motion for leave to appeal the Order still in existence (given that the timelines for proceeding with a leave motion have long expired and no basic attempt to proceed with the leave motion has even been made), it is indisputable based on the BIA that the Order is not stayed (given that leave has not been granted) and thus the DIP Charge remains fully in effect and enforceable. Thus, payment under the DIP Charge must be made if the vesting order is granted and payment must occur before vesting takes place. In the unlikely event later on that the Court of Appeal (i) allowed the leave motion to proceed, (ii) granted the motion for leave, AND (iii) heard the appeal and then allowed the appeal, Cassels, the Proposal Trustee, and MT could then deal with a request by Bryton for disgorgement of any fees that were paid to them based on the DIP Charge. However, in the absence of any existing stay, the mere theoretical possibility that Bryton might get over all of the hurdles to overturning the Order is not sufficient cause to delay or prevent payment of the DIP charge. Since Mr. Choi has raised the concern that Justice Cavanagh has not approved the fees of the Proposal Trustee or Cassels, I propose that if Justice Cavanagh's fee decision has not been released by the time that Justice Cavanagh releases his decision arising out of the August 11, 2021 hearing, and if the vesting order is granted, that Bryton be ordered to pay the full amount of the DIP Charge to Cassels Brock & Blackwell LLP in trust on the basis that Cassels is not permitted to use such funds to pay its fees or the fees of GT until Justice Cavanagh's fee approval decision is released and, once such decision is released, Cassels is only permitted to pay GT fees and Cassels fees out of the DIP Charge to the extent that those fees were approved in Justice Cavanagh's decision. The fees of MT are a completely separate issue because no court approval of such fees has been sought or is required.

I look forward to hearing from both of you regarding the issues that I have identified above that pertain to each of you.

Cassels | **JOHN BIRCH**
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e: jbirch@cassels.com

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Services provided through a professional corporation

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BRYTON CAPITAL CORP. GP LTD. et. al.
Applicants

- and-

CIM BAYVIEW CREEK INC. et. al.
Respondents

Court File No. CV-21-00662099-00CL

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

PROCEEDING COMMENCED AT
TORONTO

**AFFIDAVIT
(SWORN JULY 12, 2021)**

Cassels Brock & Blackwell LLP

2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

John N. Birch LSO #: 38968U

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jbirch@cassels.com

Lawyers for the Grant Thornton Limited, in its
former capacities as Proposal Trustee and
Trustee in Bankruptcy of CIM Bayview Creek Inc.

Tab 2

District of Ontario
 Division No. 09-Toronto
 Court File No. 31-2684629
 Estate File No. 31-2684629

**ONTARIO
 SUPERIOR COURT OF JUSTICE
 (IN BANKRUPTCY AND INSOLVENCY)**

THE HONOURABLE)	TUESDAY, THE 21 ST
)	
JUSTICE CAVANAGH)	DAY OF DECEMBER, 2021

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
 CIM BAYVIEW CREEK INC.**

**ORDER
 (APPROVAL OF PROPOSAL TRUSTEE'S FEES)**

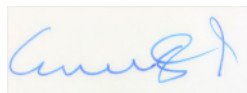
THIS MOTION, made by Grant Thornton Limited in its capacity as proposal trustee (“**Trustee**”) of CIM Bayview Creek Inc. (“**CIM Bayview**”) for approval of its fees and those of its counsel for the period up to February 5, 2021, was heard on May 25, 2021 by judicial videoconference using Zoom due to the COVID-19 crisis, with judgment having been reserved to this day.

ON READING the Notice of Motion, the Affidavit of Jeremy Bornstein, sworn April 23, 2021 (the “**Bornstein Affidavit**”), the Affidavit of Daniel Wootton, sworn April 23, 2021 (the “**Wootton Affidavit**”), the endorsement of this Court dated November 27, 2020, the transcript of the cross-examination of Daniel Wootton dated March 15, 2021, the submissions of the Trustee dated May 22, 2021, the submissions of Bryton Capital Corp. GP Ltd and Bayview Creek Residences Inc. (collectively, “**Bryton**”) dated May 20, 2021, and upon hearing the submissions of counsel for the Trustee and of counsel for Bryton, and upon the parties listed on the counsel slip also attending, no one else on the

service list appearing although properly served with the motion record and submissions of the Trustee, as evidenced by the Affidavits of Service of Ana Maciel, sworn April 23, 2021 and of Jeremy Bornstein, sworn May 25, 2021,

1. THIS COURT ORDERS that for the period from October 7, 2020 to February 5, 2021, the fees of the Trustee are hereby approved in the amount of \$56,500 (inclusive of HST) and the disbursements of the Trustee are approved in the amount of \$96.39.

2. THIS COURT ORDERS that for the period from November 16, 2020 to February 5, 2021, the fees of Cassels Brock & Blackwell LLP as counsel to the Trustee are approved in the amount of \$158,200 (inclusive of HST) and the disbursements of Cassels Brock & Blackwell LLP are approved in the amount of \$4,475.03 (inclusive of HST).



Digitally signed by Mr.
Justice Peter Cavanagh

Court File No. District of Ontario
Division No. 09-Toronto
Court File No. 31-2684629
Estate File No. 31-2684629

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
(IN BANKRUPTCY AND INSOLVENCY)**

PROCEEDING COMMENCED AT
TORONTO

**ORDER
(APPROVAL OF PROPOSAL TRUSTEE'S FEES)**

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Lawyers for Grant Thornton Limited, in its capacity as
Proposal Trustee of CIM Bayview Creek Inc.

BRYTON CAPITAL CORP. GP LTD. et. al.
Applicants (Appellants)

- and-

CIM BAYVIEW CREEK INC. et. al.
Respondents (Respondents)

Court of Appeal File No. C70436

COURT OF APPEAL FOR ONTARIO

**COMPENDIUM OF THE RESPONDENTS
(GRANT THORNTON LIMITED IN ITS CAPACITY AS
FORMER PROPOSAL TRUSTEE AND CURRENT
BANKRUPTCY TRUSTEE OF CIM BAYVIEW CREEK INC.)**

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Lawyers for Grant Thornton Limited, in its former
capacity as Proposal Trustee and current capacity as
Trustee in Bankruptcy of CIM Bayview Creek Inc.