

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

IN THE MATTER OF Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c.C.43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

B E T W E E N:

**PS HOLDINGS 1 LLC, PS HOLDINGS 2 LLC
and PS HOLDINGS 3 LLC**

Applicants

- and -

**2738283 ONTARIO INC., 2738284 ONTARIO INC.
and 2738285 ONTARIO INC.**

Respondents

**FACTUM OF THE RECEIVER
(Discharge Motion)
(Returnable September 22 , 2023)**

September 19, 2023

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PART I - NATURE OF THE MOTION

1. By Order of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated November 9, 2021 (the “**Appointment Order**”), MNP Ltd. (“**MNP**”) was appointed as receiver (in such capacity, the “**Receiver**”) of the assets, properties and undertakings of 2738283 Ontario Inc., 2738284 Ontario Inc., and 2738285 Ontario Inc. (collectively, the “**Debtors**”) pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*¹ and section 101 of the *Courts of Justice Act*.²

2. This Factum is filed in support of the Receiver’s motion returnable on September 22, 2023 (the “**Receiver’s Motion**”) for an Order (the “**Discharge Order**”), *inter alia*:
 - (a) approving, *nunc pro tunc*, the letter agreement dated October 17, 2022 among the Receiver, Morris Group Financial Inc. (“**Morris**”), and Blake Larsen (the “**Letter Agreement**”);
 - (b) discharging MNP as Receiver upon the filing of the Discharge Certificate (as defined below);
 - (c) approving the activities of the Receiver as described in the Third Report of the Receiver dated September 14, 2023 (the “**Third Report**”);

¹ R.S.C. 1985, c. B-3.

² R.S.O. 1990, C. C-43.

- (d) approving the fees of the Receiver and its counsel;
 - (e) approving final payments and distributions as set out in the Third Report;
 - (f) releasing the Receiver from any and all liability for any acts or omissions while acting in its capacity as Receiver, save and except for gross negligence and willful misconduct;
 - (g) unsealing Confidential Appendices “1”, “2”, “3”, and “4” of the First Report, which were sealed pending further Order of the Court; and
 - (h) such other relief as the Court deems just.
3. The Receiver requests the Court grant the Discharge Order for the reasons set out below.

PART II - THE FACTS

Background

4. The Debtors are private Ontario corporations whose assets principally consisted of vacant real property that the Debtors were in the process of developing for mixed industrial and residential use. The real property previously owned by the Debtors is located at: (i) 320 Mapleview Drive West, (ii) 366 Mapleview Drive West, (iii) 664 Essa Road, and (iv) 674 Essa Road, each located in Barrie, Ontario (collectively, the “**Real Property**”).³

³ Third Report at paras 3-4, Motion Record, Tab 2.

5. The Debtors and 7 Generations Development Group Limited (“**7 Generations**”) entered into a Management/Service Agreement dated May 13, 2020 (the “**Management Agreement**”). Among other things, the Management Agreement authorized 7 Generations to act as agent on behalf of the Debtors to engage service providers and contractors in respect of the development of the Real Property.⁴

6. On March 7, 2022, the Receiver issued its Amended First Report of the Receiver dated March 3, 2022 (the “**First Report**”) in support of the motion returnable on March 10, 2022 seeking: (a) an Approval and Vesting Order (the “**Approval and Vesting Order**”) to, among other things, approve the sale of the Real Property to the Purchaser (the “**Transaction**”), and approve the sealing of the Confidential Appendices pending completion of the Transaction,⁵ and (b) approve a Claims Process Order (the “**Claims Process Order**”), *inter alia*, approving and authorizing the Receiver to conduct a claims process (the “**Claims Process**”) to call for, assess, and determine claims against the Debtors and 7 Generations in relation to the Real Property, and authorizing the Receiver to administer the Claims Process in accordance with the terms of the proposed Claims Process Order.⁶

7. On June 24, 2022, the Receiver issued the Second Report of the Receiver (the “**Second Report**”), as part of the Receiver’s motion for an Order (the “**Distribution Order**”) to,

⁴ Third Report at para 5, Motion Record, Tab 2.

⁵ Third Report at para 6(a), Motion Record, Tab 2.

⁶ Third Report at para 6(b), Motion Record, Tab 2.

among other things: (a) approve payment of certain proven claims filed pursuant to the Claims Process Order; and (b) approve an interim distribution to 7 Generations in respect of the equity proceeds available from the Transaction.⁷

Claims Process

8. Pursuant to the Claims Process Order, the Receiver commenced and completed a claims process to identify the universe of claims against the Debtors and 7 Generations.⁸
9. The Distribution Order also provided the Receiver with authority to make distributions to any Claimant with a disputed claim if any disputed claim subsequently became a proven claim in accordance with the Claims Process Order. The Receiver has resolved all three disputed claims.⁹ As set out in the Interim Statement of Receipts and Disbursements, the Receiver has made distributions to secured creditors in the aggregate amount of approximately \$20.7 million, distributions to unsecured creditors in the aggregate amount of approximately \$1 million, and distributions to 7 Generations in the aggregate amount of \$3.6 million.¹⁰

⁷ Third Report at para 7, Motion Record, Tab 2.

⁸ Third Report at para 6(b), Motion Record, Tab 2.

⁹ Third Report at paras 20 – 32, Motion Record, Tab 2.

¹⁰ Third Report, Appendix “L”, Receiver’s Interim Statement of Receipts and Disbursements, Motion Record, Tab 2.

Letter Agreement

10. Prior to the commencement of the receivership, Morris commenced an action against the Debtors for breach of contract and liquidated damages in the amount of \$633,750 under Court File No. CV-20-00651075-0000 (the “**Action**”).¹¹

11. On October 17, 2022, the Receiver and Morris entered into a letter agreement (the “**Letter Agreement**”) wherein the Receiver consented to lift the stay of proceedings in respect of the Action to permit Morris to continue its Action as against the Debtors on the following terms:
 - (a) the Receiver or its counsel will not be involved in the Action, and the Receiver will not be requested or required to provide evidence or produce documents or records at any time in relation to the Action;
 - (b) the Debtors will retain separate litigation counsel to represent the Debtors in their defence of the Action;
 - (c) the Receiver and its counsel will not incur any costs in connection with the Action;
 - (d) no costs may be sought against the Receiver or its counsel in connection with the Action;
 - (e) the Receiver or its counsel will not be required to take any steps whatsoever in connection with the Action;

¹¹ Third Report at para 22, Motion Record, Tab 2.

- (f) the consent to temporarily lift the stay of proceedings in respect of the Action will form part of the resolution of the claim filed by Morris in the Claims Process.¹²
12. Further, upon receiving Court authorization to enter into the Letter Agreement, *nunc pro tunc*, the Receiver will transfer \$150,000 to Loopstra Nixon LLP, in escrow, to cover any and all costs and damages with respect to the Debtors' potential obligations in respect of the Action.¹³

Activities of the Receiver

13. As set out in the Third Report, the Receiver's activities included, among other things: (i) administration of the Claims Process, including facilitating the determination and resolution of the disputed claims; (ii) updating the Receiver's website; (iii) finalizing the Second Report and the preparation of the Third Report; (iv) attending Court, along with its counsel; (v) distributions to creditors with proven claims and two interim distributions to 7 Generations, in accordance with the Distribution Order; and (vi) attending to all accounting and banking functions related to the management of the estate funds, including monthly reconciliations of the estate bank account.¹⁴

¹² Third Report at para 29, Motion Record, Tab 2.

¹³ Third Report at para 30, Motion Record, Tab 2.

¹⁴ Third Report at para 14, Motion Record, Tab 2.

Fees and Disbursements of the Receiver

14. Further to the Third Report, the Receiver incurred professional fees for the period from June 18, 2022 up to and including August 31, 2023, for a total amount of \$90,566, plus \$11,773 in HST.¹⁵ Barring any unforeseen complications, the Receiver estimates that it will cost approximately \$15,000 plus HST to complete the administration of the receivership.¹⁶
15. The Receiver's legal counsel also incurred professional fees pertaining to the accounts of Thornton Grout Finnigan LLP ("TGF"), which reflects the legal services provided to the Receiver for the period from June 18, 2022 up to and including August 31, 2023, in the amount of \$106,047.50 plus disbursements of \$2,600.48 and HST in the amount of \$14,082.65 for a total of \$122,730.63.¹⁷ Barring any unforeseen complications, TGF estimates that it will cost approximately \$15,000 plus HST to complete its involvement with the receivership.¹⁸
16. The Receiver's Interim Statement of Receipts and Disbursements indicate net receipts of \$586,782 as at September 13, 2023, together with a proforma Final Statement of Receipts

¹⁵ Third Report at para 42, Motion Record, Tab 2.

¹⁶ Third Report at para 42, Motion Record, Tab 2.

¹⁷ Third Report at para 43, Motion Record, Tab 2.

¹⁸ Third Report at para 43, Motion Record, Tab 2.

and Disbursements.¹⁹ These amounts are proposed to be distributed in accordance with the Discharge Order.

PART III - THE ISSUES

17. The issues to be determined on this motion are:
- (a) whether the Letter Agreement should be approved;
 - (b) whether the activities of the Receiver as described in the Third Report should be approved;
 - (c) whether the fees and disbursements of the Receiver and its counsel should be approved;
 - (d) whether the Court should unseal Confidential Appendices “1”, “2”, “3”, and “4”
 - (e) whether the final payments and distributions as set out in the Third Report should be approved; and
 - (f) whether the Court should discharge and release the Receiver

¹⁹ Third Report at para 45, Motion Record, Tab 2.

PART IV - THE LAW

ISSUE 1: The Letter Agreement should be approved

18. The Receiver recommends that the Court authorize the Receiver to enter into the Letter Agreement on a *nunc pro tunc* basis on the grounds that it is fair and equitable to all affected parties, and supported by 7 Generations as the beneficial owner of the real property (the “**Beneficial Owner**”).
19. The Receiver and Morris entered into the Letter Agreement as part of the resolution of a disputed claim filed by Morris with the Receiver. The Letter Agreement provides that no additional amounts will be requested from the Receiver by Morris or the Debtors in connection with the Action.²⁰
20. Further to the Appointment Order, the stay of proceedings against the Debtors and their property can be lifted with the written consent of the Receiver, or with leave of this Court.²¹ In this case, it is equitable to authorize the Letter Agreement to, among other things, allow the Receiver to lift the stay of proceedings with respect to the Action as part of the successful resolution of the disputed claim. Additionally, the Letter Agreement contemplates providing sufficient funding to cover the expected costs and damages associated with the Action.²²

²⁰ Third Report at para 30, Motion Record, Tab 2.

²¹ [Order of Justice Penny dated November 9, 2021, para 8.](#)

²² Third Report at para 30, Motion Record, Tab 2.

21. The Letter Agreement reflects the commercial resolution of the Morris Claim and has been agreed to by all parties affected by the claim. The Receiver respectfully requests the Court's authorization approving the Letter Agreement between the Receiver and Morris.

ISSUE 2: The Third Report and the activities described therein should be approved

22. The Court has the inherent jurisdiction to review and approve the activities of a court appointed receiver as set out in the receiver's report.²³ In bringing a motion for the approval of its reports and activities, the Receiver is to provide all interested parties with notice in order to give them the opportunity to question the receiver's conduct and activities to date.²⁴ Where the report accurately reflects the receiver's activities, the court may approve those activities.²⁵
23. The activities of the Receiver set out in the Third Report were necessary and undertaken in good faith pursuant to the Receiver's duties and powers as set out in the Receivership Order and other Orders made in these proceedings. Additionally, there have not been any objections raised by any interested party with respect to the activities described in the Third Report.
24. The Receiver respectfully requests the Court's approval of the Third Report and the activities of the Receiver described therein.

²³ *Bank of America Canada v Willann Investments Ltd.*, [1993] OJ No 1647, 20 CBR (3d) 223 at [para 3](#).

²⁴ *Bank of America Canada v Willann Investments Ltd.*, [1993] OJ No 1647, 20 CBR (3d) 223 at [para 5](#).

²⁵ *Confectionately Yours Inc. (Re)*, [2000] 36 CBR (4th) 299, 219 DLR (4th) 72 (Ont CA) at [para 36](#).

ISSUE 3: The fees and disbursements of the Receiver and its counsel should be approved

25. The Receiver submits that the Fees and Disbursements of the Receiver and TGF should be approved. The Court previously approved the fees and disbursements of the Receiver and TGF up to and including June 17, 2022 by the Order of Justice Osborne dated July 6, 2022.²⁶
26. In *Confectionately Yours Inc. (Re)*, the Court of Appeal confirmed that the test for approving the fees and disbursements of a receiver and its counsel is whether they are fair and reasonable.²⁷ Further, the Court of Appeal held that the following factors may be considered in determining whether such fees and disbursements are fair and reasonable:
- (a) the work done;
 - (b) the responsibility imposed on the receiver;
 - (c) the time spent doing the work;
 - (d) the reasonableness of the time expended;
 - (e) the necessity of doing the work; and
 - (f) the results obtained.²⁸

²⁶ [Order of Justice Osborne dated July 6, 2022, paras 8-9.](#)

²⁷ *Confectionately Yours Inc. (Re)*, [2000] 36 CBR (4th) 299, 219 DLR (4th) 72 (Ont CA) at [para 46](#).

²⁸ *Ibid.*

27. The Receiver submits that the fees and disbursements of the Receiver and TGF were incurred at rates that reflect the appropriate responsibility, scope, and complexity of the case. The time incurred is reasonable given that the fees and disbursements reflect approximately 14 months of work undertaken since the Receiver's previous motion for fee approval, and was at all times necessary and consistent with the Receiver's duties under the Receivership Order.
28. Further, the Fees and Disbursements accurately reflect the work done by the Receiver and by TGF in connection with the receivership, and the results obtained were appropriate under the circumstances of the receivership.
29. The Fees and Disbursement of the Receiver and TGF are fair and reasonable in the circumstances, and further to the factors set forth in *Confectionately Yours Inc. (Re)*. Accordingly, the Receiver respectfully submits that the Fees and Disbursements of the Receiver and TGF should be approved.

ISSUE 4: The Court should unseal Confidential Appendices "1", "2", "3", and "4"

30. Pursuant to the Approval and Vesting Order, Confidential Appendices "1", "2", "3", and "4" were sealed pending further order of the Court, containing: (a) ReMax Listing Agreement dated November 4, 2021, (b) an unredacted summary of the listing proposals received from the real estate brokers, (c) a summary of the offers received by the bidders in the sales process, and (d) the unredacted Purchase Agreement dated February 4, 2022.

31. The Court should unseal Confidential Appendices “1”, “2”, “3”, and “4” because the information contained therein is no longer commercially sensitive, and the Transaction has closed.

ISSUE 5: The final payments and distributions as set out in the Third Report should be approved

32. The final payments and distributions as set out in the Third Report should be approved because they are in compliance with the Claims Process Order previously approved by this Court pursuant to the Order of Justice Penny dated March 11, 2022.²⁹
33. The Distribution Order authorized the Receiver to pay proven claims, as detailed in the Second Report, and to make distributions to any Claimant with a disputed claim if any of the disputed claims subsequently became a proven claim in accordance with the Claims Process Order.³⁰ The Receiver has resolved all three outstanding disputed claims.
34. The Receiver provided a distribution of \$56,500 to Homestore Direct Inc. o/a Rockwood Kitchens on July 6, 2022 in resolution of their disputed claim.³¹

²⁹ [Order of Justice Penny dated March 11, 2022, paras 8-9.](#)

³⁰ Third Report at paras 17, 19, Motion Record, Tab 2.

³¹ Third Report at para 21, Motion Record, Tab 2.

35. Further to the Letter Agreement, the Receiver will transfer \$150,000, in escrow, to Loopstra Nixon LLP in resolution of the disputed claim of Morris in relation to their pre-receivership action as against the Debtors.³²
36. In accordance with the Claims Process, the Receiver is authorized to resolve or settle Claims filed with the Receiver. Following extensive negotiations, the Receiver resolved the entirety of the proof of claim filed by Tony Guergis for an aggregate amount of \$450,000 plus HST.³³
37. Following the final resolution of all Claims filed with the Receiver pursuant to the Claims Process, and the payment of professional fees and expenses incurred and estimated to be incurred, there will be additional funds available to 7 Generations.³⁴ Given the Bare Trust Agreement provides that the proceeds derived from the Real Property is held in trust by the Debtors for 7 Generations, the Receiver is of the view that a clearance certificate is not required in order to distribute the funds to 7 Generations.³⁵ Accordingly, the Receiver seeks authorization to make a final distribution of the remaining funds to 7 Generations.

³² Third Report at para 30, Motion Record, Tab 2.

³³ Third Report at para 36, Motion Record, Tab 2.

³⁴ Third Report at para 48, Motion Record, Tab 2.

³⁵ Third Report at para 49, Motion Record, Tab 2.

ISSUE 6: The Receiver should be discharged and released

38. The Receiver has substantially completed its mandate as contemplated by the Receivership Order, including realizing upon all available assets of the Debtors and distributing the proceeds of realization.³⁶ There are no outstanding claims to be determined, and following final distributions, the claims process will be complete.³⁷ Accordingly, the Receiver respectfully submits that it should be discharged and released, following the filing of a discharge certificate confirming that it has completed the remaining activities in respect of its administration of the receivership.
39. The Receiver is also requesting a release from any and all liability for any acts or omissions while acting in its capacity as Receiver, save and except for gross negligence and willful misconduct.
40. In *Pinnacle v Kraus*, Justice Pattillo held that a Receiver will be granted a release and discharge where there is no evidence of improper or negligent conduct on the part of the Receiver.³⁸ In the case at bar, there is no evidence of improper or negligent conduct on the part of the Receiver. Accordingly, the Receiver submits that it is fair and reasonable for the Court to discharge and release the Receiver.

³⁶ Third Report at para 51, Motion Record, Tab 2.

³⁷ Third Report at para 53, Motion Record, Tab 2.

³⁸ *Pinnacle v Kraus*, 2012 ONSC 6376 at [para 47](#).

PART V - RELIEF REQUESTED

41. For the reasons set forth herein and in the Third Report, the Receiver respectfully requests the granting of the Discharge Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of September, 2023.

September 19, 2023



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**SCHEDULE “A”
LIST OF AUTHORITIES**

1. [*Bank of America Canada v Willann Investments Ltd.*, \[1993\] OJ No 1647, 20 CBR \(3d\) 223.](#)
2. [*Confectionately Yours Inc. \(Re\)*, \[2000\] 36 CBR \(4th\) 299, 219 DLR \(4th\) 72 \(Ont CA\).](#)
3. [*Pinacple v Kraus*, 2012 ONSC 6376.](#)

SCHEDULE “B” – TEXT OF RELEVANT STATUTES***Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.*****Court may declare that stays, etc., cease**

69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections;
or

(b) that it is equitable on other grounds to make such a declaration.

IN THE MATTER OF THE RECEIVERSHIP OF 2738283 ONTARIO INC., 2738284 ONTARIO INC. and 2738285 ONTARIO INC.

**PS HOLDINGS 1 LLC, PS HOLDINGS 2 LLC
and PS HOLDINGS 3 LLC**

and **2738283 ONTARIO INC., 2738284 ONTARIO INC.
and 2738285 ONTARIO INC.**

Applicants

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Court File No.: CV-21-00670723-00CL

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Proceedings commenced at Toronto

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