

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

**COSMAN MORTGAGE CAPITAL CORPORATION**

Applicant

- and -

**LARSON PROPERTIES PARTNERSHIP CORP.**

Respondent

---

**FACTUM OF IRA SMITH TRUSTEE & RECEIVER INC.  
(returnable June 14, 2024)**

---

June 10, 2024

**AIRD & BERLIS LLP**  
Brookfield Place  
181 Bay Street, Suite 1800  
Toronto, ON M5J 2T9

**Ian Aversa** (LSO #55449N)  
Tel: (416) 865-3082  
Email: [iaversa@airdberlis.com](mailto:iaversa@airdberlis.com)

**Matilda Lici** (LSO #79621D)  
Tel: (416) 865-3428  
Email: [mlici@airdberlis.com](mailto:mlici@airdberlis.com)

*Counsel for Ira Smith Trustee & Receiver Inc.,  
in its capacity as court-appointed receiver of  
the lands and premises registered in the name  
of Larson Properties Partnership Corp.*

TO: **SERVICE LIST**

## TABLE OF CONTENTS

|   | <b>Page No.</b> |
|---|-----------------|
| <b>PART I - INTRODUCTION.....</b>                                 | <b>1</b>        |
| <b>PART II - SUMMARY OF FACTS .....</b>                           | <b>3</b>        |
| <b>PART III - ISSUES.....</b>                                     | <b>5</b>        |
| <b>PART IV - STATEMENT OF ISSUES, LAW &amp; AUTHORITIES .....</b> | <b>5</b>        |
| <b>PART V - RELIEF REQUESTED.....</b>                             | <b>10</b>       |

## **PART I - INTRODUCTION**

1. Pursuant to an application made by Cosman Mortgage Capital Corporation (“**Cosman**”), the Ontario Superior Court of Justice (the “**Court**”) made an Order on September 15, 2023 (the “**Appointment Order**”) appointing Ira Smith Trustee & Receiver Inc. (“**ISI**”) as receiver (in such capacity, the “**Receiver**”) of the lands and premises registered in the name of Larson Properties Partnership Corp. (the “**Debtor**”) and known municipally as 31-33 Market Place, Stratford, Ontario (collectively, the “**Real Property**”).<sup>1</sup>
2. Following its appointment, the Receiver engaged Cushman & Wakefield Waterloo Region Ltd. (“**Cushman**”) to assist with the marketing and sale of the Real Property.<sup>2</sup>
3. The Multiple Listing Service (“**MLS**”) listing went live on December 1, 2023. In total, three offers were submitted from two parties.<sup>3</sup>
4. On May 15, 2024, the Receiver accepted an Agreement of Purchase and Sale (the “**APS**”) dated May 8, 2024 in respect of the Real Property between the Receiver (in such capacity, the “**Vendor**”) and Devcor Capital Inc. (in such capacity, the “**Purchaser**”).<sup>4</sup>
5. The APS is conditional upon the issuance of an approval and vesting order (the “**AVO**”) and closing of the transaction contemplated by the APS (the “**Transaction**”) by 6:00 p.m. on June 28, 2024. The AVO must vest the assets of the Debtor in the Purchaser free and clear of all encumbrances.<sup>5</sup>

---

<sup>1</sup> First Report of Ira Smith Trustee & Receiver Inc. dated June 4, 2024 at paras 1.1-1.2 [“**First Report**”].

<sup>2</sup> First Report at para 4.2.

<sup>3</sup> First Report at paras 4.6-4.7.

<sup>4</sup> First Report at para 4.8.

<sup>5</sup> First Report at para 4.8.

6. Accordingly, the Receiver brings this motion for:
  - (a) the AVO which, among other things:
    - (i) approves the Receiver's engagement of Cushman pursuant to a listing agreement dated November 10, 2023 for the marketing and sale of the Real Property;
    - (ii) approves the Transaction contemplated by the APS and authorizes the Receiver to complete the Transaction; and
    - (iii) upon execution and delivery of a certificate by the Receiver containing confirmation of the closing of the Transaction (the "**Receiver's Certificate**"), vests in the Purchaser all of the Debtor's right, title, benefit, and interest in and to the Real Property free and clear of and from any and all security interests, liens, executions, levies, charges, or other financial or monetary claims;
  - (b) an Order (the "**Ancillary Relief Order**") which, among other things:
    - (i) approves the First Report of the Receiver dated June 4, 2024 (the "**First Report**"), and the actions, conduct, and activities of the Receiver described therein;
    - (ii) seals the Confidential Supplement to the First Report (the "**Confidential Supplement**"), and each appendix appended thereto, until the closing of the Transaction or further Order of this Court;
    - (iii) approves the fees and disbursements of the Receiver, as set out in the Affidavit of Brandon Smith sworn June 4, 2024, and the fees and disbursements of the Receiver's counsel, Aird & Berlis LLP, as set out in the Affidavit of Ian Aversa, sworn June 4, 2024, including, in both cases,

estimates of the remaining fees expected to accrue to close the Transaction and complete the administration of the receivership estate;

- (iv) authorizes and directs the Receiver to make (or cause to be made) a distribution to The Corporation of the City of Stratford in respect of property taxes owing on the Real Property;
- (v) subject to the Receiver maintaining such reserves as the Receiver deems appropriate for, *inter alia*, the administration of the receivership estate, authorizes and directs the Receiver to distribute to Cosman the net proceeds of the receivership estate, but not to exceed the amount of its secured claim; and
- (vi) discharges the Receiver upon the filing of a certificate certifying that the Receiver has completed all outstanding receivership matters in connection with its appointment as Receiver in these proceedings.<sup>6</sup>

## **PART II - SUMMARY OF FACTS**

7. The Real Property consists of a conjoined one and two-storey historic building.<sup>7</sup>

8. Prior to the appointment of the Receiver, the Debtor had listed the Real Property for sale with Trillium West Real Estate Brokerage Ltd. (“**Trillium**”). The Receiver corresponded with Trillium and agreed to maintain status quo with the listing. No offers were presented by Trillium to the Receiver. On October 24, 2023, the Receiver advised Trillium that it was causing the Company to terminate the listing agreement effective immediately.<sup>8</sup>

---

<sup>6</sup> First Report at para 1.3.

<sup>7</sup> First Report at para 2.5.

<sup>8</sup> First Report at paras 3.9-3.10.

9. The Appointment Order, *inter alia*, granted to the Receiver the power to market the Real Property, including advertising and soliciting offers and negotiating terms of sale.<sup>9</sup> The Receiver engaged Cushman to market the Real Property for sale by listing it on the MLS and perform all other normal marketing activities for such a property, including establishing a website to advertise the Real Property for sale.<sup>10</sup>

10. The marketing and sale process allowed the Receiver to: (i) expose the Real Property to all parties looking to purchase such a property; (ii) evaluate all offers received; (iii) provide any information to the relevant parties that they may need in connection with such offers; (iv) obtain all necessary approvals from this Court; and (v) complete a sale for the Real Property.<sup>11</sup>

11. The MLS listing went live on December 1, 2023. A link to the listing was provided by the Receiver to Cosman, Bennington Financial Corp. (which holds a second-ranking mortgage on the Real Property), counsel for Olympia Trust Company (which acts as trustee in respect of a third-ranking mortgage on the Real Property held by a group of private investors in a syndicated investment) and counsel to one such Olympia investor. The principal of the Debtor, Kevin Larson, was independently aware of the listing before the link was provided to the Receiver by Cushman. All parties were advised that in the event they or someone known to them had interest in participating in the marketing and sale process, they should contact Mr. F. Vrenjak at Cushman.<sup>12</sup>

---

<sup>9</sup> First Report at para 4.1.

<sup>10</sup> First Report at para 4.2.

<sup>11</sup> First Report at para 4.3.

<sup>12</sup> First Report at para 4.6.

12. In total, three offers were submitted from two parties. The Purchaser submitted two offers, the first of which contained conditions that did not make it commercially reasonable within the context of a receivership.<sup>13</sup>

13. On May 8, 2024, the Purchaser submitted a new offer which eliminated the Purchaser's conditions while leaving the Receiver's stated conditions intact. After several rounds of writebacks, the binding APS was mutually accepted on May 15, 2023. The Transaction is conditional on the issuance of the AVO and closing of the Transaction by 6:00 p.m. on June 28, 2024.<sup>14</sup> Deposit funds from the Purchaser were received by Cushman on May 15, 2024.<sup>15</sup>

### **PART III - ISSUES**

14. The issues to be determined on this motion are whether this Court should:

- (a) grant the AVO to, among other things, authorize and approve the Transaction contemplated in the APS;
- (b) grant a sealing order in respect of the Confidential Supplement; and
- (c) approve the activities and fees of the Receiver and its counsel.

### **PART IV - STATEMENT OF ISSUES, LAW & AUTHORITIES**

#### **A. The APS Should be Approved:**

15. The APS is conditional on the granting of the AVO.

---

<sup>13</sup> First Report at para 4.7.

<sup>14</sup> First Report at para 4.8.

<sup>15</sup> First Report at para 4.10.

16. When considering whether to approve a sale transaction involving an insolvent debtor, courts have relied on the factors set out by the Ontario Court of Appeal in *Royal Bank of Canada v Soundair Corp.*<sup>16</sup> which were written to specifically address sales by receivers of a debtor's assets:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) whether the interests of all parties have been considered;
- (c) the integrity and efficacy of the process for obtaining offers; and
- (d) whether there has been unfairness in the working out of the process.<sup>17</sup>

17. The Receiver submits that the *Soundair* principles are satisfied:

- (a) **The marketing and sale process was reasonable and not unfair:** Assessing the reasonableness of a sale process does not require the Court to examine in minute detail all of the circumstances leading up to the acceptance of a particular offer.<sup>18</sup> The Court should be satisfied overall that the Receiver has not acted improvidently. The Real Property was broadly marketed on the MLS over the span of over five months. The marketing and sale process provided sufficient time for prospective bidders to conduct due diligence and adequately assess the sale opportunity. Further, the APS is the product of negotiations undertaken between the Receiver

---

<sup>16</sup> *Royal Bank of Canada v. Soundair Corp.* (1991), [1991 CarswellOnt 205](#) (ONCA).

<sup>17</sup> *Royal Bank of Canada v. Soundair Corp.* (1991), [1991 CarswellOnt 205](#) at [para 16](#) (ONCA); see also *Canwest Global Communications Corp.*, 2010 ONSC 2870 at [para 13](#).

<sup>18</sup> *Royal Bank of Canada v. Soundair Corp.* (1991), [1991 CarswellOnt 205](#) at [paras 48-49](#) (ONCA).



and the Purchaser. A second marketing and sale process is not recommended due to the low prospect of identifying any new prospective purchasers;

- (b) **Receiver filed a report:** In support of the relief sought in this motion, the Receiver has filed the First Report. The Receiver is of the view that the purchase price contemplated in the APS was the highest received;<sup>19</sup>
- (c) **Creditors were consulted:** All known creditors received notice of the Receiver's motion. The Debtor's fulcrum secured creditor, Cosman, supports the Transaction;
- (d) **Purchase price is fair and reasonable:** To establish this criterion, the Receiver must demonstrate that sufficient effort has been made to obtain the best price and that the Receiver has not acted improvidently based on the information available at the time the offer is accepted.<sup>20</sup> The decision to accept a particular offer is a matter of business judgment that should not be interfered with lightly in the absence of evidence of imprudence or unfairness.<sup>21</sup> After over five months on the market, the APS was the sole firm offer received, and was the sole offer that did not contain terms and conditions that were, in the Receiver's opinion, either not commercially reasonable or not viable within the context of a receivership.

18. Based on the foregoing, it is the informed business judgment of the Receiver that the APS is in the best interests of the Debtor and its stakeholders. In the absence of any indication that the Receiver has acted improvidently, that business judgment is entitled to deference by this Court.

---

<sup>19</sup> First Report at para 4.11(a).

<sup>20</sup> *Terrance Bay Pulp Inc. (Re)*, [2012 ONSC 4247](#) at [paras 50-55](#).

<sup>21</sup> *Royal Bank of Canada v. Sundair Corp.* (1991), [1991 CarswellOnt 205](#) at [paras 21](#) and [30-31](#) (ONCA); *Terrance Bay Pulp Inc. (Re)*, [2012 ONSC 4247](#) at [paras 45](#) and [52-54](#).

**The Sealing Order Should be Granted:**

19. The Receiver is seeking a sealing order in respect of the Confidential Supplement to the First Report, which details the offers received in respect of the Real Property, and the purchase price and deposit set out in the APS, until the Transaction closes or further Order of this Court.

20. The sealing order is sought pursuant to subsection 137(2) of the *Courts of Justice Act* (Ontario) (the “CJA”).<sup>22</sup> Subsection 137(2) of the CJA provides this Court with the statutory jurisdiction to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

21. The Supreme Court of Canada has set out the test to be applied by courts in determining whether to grant sealing orders in *Sherman Estate v. Donovan*.<sup>23</sup> The party asking the court to exercise its discretion in a way that limits the open court presumption must establish that:

- (a) court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.<sup>24</sup>

22. The Receiver submits that the test is satisfied in this case. The Confidential Supplement to the First Report includes commercially sensitive terms relating to the marketing and sale of the

---

<sup>22</sup> [Courts of Justice Act](#), R.S.O. 1990, c. C.4, s. 137(2).

<sup>23</sup> *Sherman Estate v. Donovan*, [2021 SCC 25](#).

<sup>24</sup> *Sherman Estate v. Donovan*, [2021 SCC 25](#) at [para 38](#).

Real Property which, if publicly disclosed, could materially and negatively impair the ability of the Receiver to market the Real Property to other interested parties and obtain the highest and best price if the APS is not approved or the Transaction does not close. Granting a time-limited sealing order maintains public confidence in the efficacy of the insolvency regime, which is an important public interest to protect.

23. The benefits of the sealing order, namely, protecting the commercially sensitive nature of the Confidential Supplement, outweigh any deleterious effects of the sealing order and no reasonable alternative measure is available.

**Fees and Activities of the Receiver Should be Approved:**

24. The approval of a court officer's activities and reports is relief that is "routinely granted".<sup>25</sup> The Receiver seeks this Court's approval of its activities and conduct set out in the First Report.

25. The activities of the Receiver described in the First Report were all necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Appointment Order, and were, in each case, in the best interests of the Debtor and its stakeholders generally.

26. The approval language in the proposed draft Order makes clear that the approval is only for the Receiver personally and is not intended to create rights or impose obligations for any other party.<sup>26</sup>

27. The jurisdiction of this Court to pass the accounts of the Receiver and its counsel is confirmed in the Receivership Order, which directs that: "the Receiver and its legal counsel shall

---

<sup>25</sup> *Target Canada Co. (Re)*, [2015 ONSC 7574](#) at [paras 2](#) and [23](#).

<sup>26</sup> Draft Ancillary Relief and Discharge Order at para 2, Motion Record of Ira Smith Trustee & Receiver Inc. at Tab 5.

pass their accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Ontario Superior Court of Justice”.<sup>27</sup>

28. On a motion to pass accounts, the Court must consider the “overriding principle of reasonableness”, focusing on the overall value contributed by the Receiver and its counsel.<sup>28</sup> The Court does not engage in a docket-by-docket or line-by-line assessment of the accounts as minute details of each element of a professional services may not be instructive when looked at in isolation.<sup>29</sup> In *Bank of Nova Scotia v. Diemer*,<sup>30</sup> the Ontario Court of Appeal stated “the focus of the fair and reasonable assessment should be on what was accomplished, and not how much time it took.”<sup>31</sup>

29. The Receiver and its counsel have charged standard hourly rates that are consistent with market rates for insolvency services of this nature rendered by other firms across the province.

#### **PART V - RELIEF REQUESTED**

30. The Receiver requests that this Court grant the proposed form of AVO and the Ancillary Relief Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 10<sup>th</sup> day of June, 2024.



---

Ian Aversa / Matilda Lici

---

<sup>27</sup> Receivership Order of Justice Howard dated September 15, 2023 at para 18, Appendix A of the First Report.

<sup>28</sup> *Nortel Networks Inc.*, [2022 ONSC 6680](#) at [para 10](#).

<sup>29</sup> *Nortel Networks Inc.*, [2022 ONSC 6680](#) at [para 10](#).

<sup>30</sup> *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#).

<sup>31</sup> *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#) at [para 45](#).

**AIRD & BERLIS LLP**

Brookfield Place  
181 Bay Street, Suite 1800  
Toronto, ON M5J 2T9

**Ian Aversa** (LSO #55449N)

Tel: (416) 865-3082

Email: [iaversa@airdberlis.com](mailto:iaversa@airdberlis.com)

**Matilda Lici** (LSO #79621D)

Tel: (416) 865-3428

Email: [mlici@airdberlis.com](mailto:mlici@airdberlis.com)

*Counsel for Ira Smith Trustee & Receiver Inc.,  
in its capacity as court-appointed receiver of  
the lands and premises registered in the name  
of Larson Properties Partnership Corp.*

## SCHEDULE “A”

### LIST OF AUTHORITIES

1. *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#).
2. *Canwest Global Communications Corp.*, [2010 ONSC 2870](#).
3. *Nortel Networks Inc.*, [2022 ONSC 6680](#).
4. *Royal Bank of Canada v. Soundair Corp.* (1991), [1991 CarswellOnt 205](#) (ONCA).
5. *Sherman Estate v. Donovan*, [2021 SCC 25](#).
6. *Target Canada Co. (Re)*, [2015 ONSC 7574](#).
7. *Terrance Bay Pulp Inc. (Re)*, [2012 ONSC 4247](#).

## SCHEDULE “B”

### TEXT OF STATUTES, REGULATIONS & BY-LAWS

#### *Bankruptcy and Insolvency Act, [R.S.C., 1985, c. B-3](#)*

##### **Court may appoint receiver**

**243 (1)** Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
- (c) take any other action that the court considers advisable.

##### **Restriction on appointment of receiver**

**(1.1)** In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

##### **Definition of *receiver***

**(2)** Subject to subsections (3) and (4), in this Part, *receiver* means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
  - (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
  - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

##### **Definition of *receiver* — subsection 248(2)**

(3) For the purposes of subsection 248(2), the definition *receiver* in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

**Trustee to be appointed**

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

**Place of filing**

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

**Orders respecting fees and disbursements**

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

**Meaning of *disbursements***

(7) In subsection (6), *disbursements* does not include payments made in the operation of a business of the insolvent person or bankrupt.



*Courts of Justice Act, [R.S.O. 1990, c. C.43](#)*

**Vesting orders**

**100** A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

**Documents public**

**137** (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

**Sealing documents**

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

**COSMAN MORTGAGE CAPITAL CORPORATION**  
Applicant

and

**LARSON PROPERTIES PARTNERSHIP CORP.**  
Respondent

Court File No. CV-23-00001179-0000

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT  
LONDON

**FACTUM OF THE MOVING PARTY,  
IRA SMITH TRUSTEE & RECEIVER INC.  
(Motion returnable June 14, 2024)**

**AIRD & BERLIS LLP**

Brookfield Place  
181 Bay Street, Suite 1800  
Toronto, ON M5J 2T9

**Ian Aversa** (LSO #55449N)

Tel: (416) 865-3082

Email: [iaversa@airdberlis.com](mailto:iaversa@airdberlis.com)

**Matilda Lici** (LSO #79621D)

Tel: (416) 865-3428

Email: [mlici@airdberlis.com](mailto:mlici@airdberlis.com)

*Counsel for Ira Smith Trustee & Receiver Inc., in its capacity  
as court-appointed receiver of the lands and premises  
registered in the name of Larson Properties Partnership Corp.*