

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

B E T W E E N:

DBDC SPADINA LTD.,
and THOSE CORPORATIONS LISTED ON SCHEDULE "A" HERETO

Applicants

- and -

NORMA WALTON, RONAULD WALTON, THE ROSE & THISTLE GROUP
LTD. and EGLINTON CASTLE INC.

Respondents

- and -

THOSE CORPORATIONS LISTED IN SCHEDULE "B" HERETO, TO BE
BOUND BY THE RESULT

FACTUM OF THE MOVING PARTY, SCHONFELD INC.

(Motion by the Manager for Approval of Fees, Advice and Directions and
Authorization to Distribute Schedule "C" Funds, returnable April 26, 2021)

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Table of Contents

I.	Overview	1
II.	EQUITY Claims Process and the manager’s recommendations	3
A.	Claims Process.....	3
B.	The Old Apothecary Building Inc. (“Old Apothecary”)	4
(i)	Facts	4
(ii)	Manager’s Recommendation Regarding Old Apothecary	4
(iii)	Discharge	8
C.	1780355 Ontario Inc. (“178 Ontario”).....	8
(i)	Facts	8
D.	Cecil Lighthouse	9
E.	United Empire Lands Ltd. (“UEL”)	13
III.	Approval of Fee Allocation Methodology and Fees	14
A.	Fee Allocation Methodology	14
(i)	Facts	14
(ii)	Law and Argument	15
B.	Fee Approval.....	17
(i)	Facts	17
(ii)	Law and Argument	18
IV.	CONCLUSION.....	20

I. OVERVIEW

1. This factum is filed by Schonfeld Inc. in its capacity as manager (the “**Manager**”) of (i) certain companies listed in Schedule “B” to the Order of Justice Newbould dated November 5, 2013 (the “**Schedule B Companies**”), together with the real estate properties owned by the Schedule “B” Companies (the “**Schedule B Properties**”), as amended by Order of Justice Newbould dated January 16, 2014, and (ii) the properties listed at Schedule “C” to the Order of Justice Brown dated August 12, 2014 (the “**Schedule C Properties**”, together with the Schedule B Properties, the “**Properties**”). The lengthy history of this matter is detailed in paragraphs 9-47 of the Fifty-Seventh Report of the Manager dated September 7, 2020 (the “**Report**”).

2. This is a long and complicated receivership that involved (among other things) the sale of a large number of real estate properties. By this motion, the Manager seeks to distribute approximately \$567,970 held in respect of three Schedule C Properties that were sold in the course of these proceedings.

3. There is no dispute with respect to who is entitled to the proceeds from two of the properties at issue, which were owned by 1780355 Ontario Inc. (“**178 Ontario**”) and the Old Apothecary Building Inc. (“**Old Apothecary**”). The Manager sought authority to complete, and did complete, an equity claims process and concluded that all of the shares of 178 Ontario and Old Apothecary are held by the Respondents, Norma and Ronald Walton. The Manager has therefore recommended that the funds available to 178 Ontario and Old Apothecary be distributed to the Applicants in partial satisfaction of the \$66.7 million judgment they hold against the Waltons pursuant to Notices of Garnishment that have been served on the Manager by the Applicants.

4. The Manager is also holding \$501,392 in respect of the property formerly owned by Cecil Lighthouse Ltd. (“**Cecil Lighthouse**”). There is a dispute with respect to who is entitled to these funds, and the Manager seeks directions with respect to how that dispute should be resolved. Cecil Lighthouse’s general ledger indicates that the Waltons are the sole shareholders of Cecil Lighthouse. But the Manager has received claims from individuals claiming to hold preferred shares in Cecil Lighthouse. The purported preferred shareholders claim that they should receive the funds held in respect of Cecil Lighthouse, but the Applicants deny the validity of the preferred

shares and argue that the Cecil Lighthouse funds should be paid to them in partial satisfaction of their judgment against the Waltons.

5. The Manager has not made a recommendation with respect to who is entitled to the Cecil Lighthouse funds. It has reported the relevant facts, and sought direction from the Court with respect to the appropriate distribution. Those facts are relatively straightforward. Norma Walton purported to issue preferred shares of Cecil Lighthouse to certain investors after these proceedings were commenced. There is no record that any of the money invested by the purported preferred shareholders was ever transferred to Cecil Lighthouse in consideration for the shares. The legal significance of these facts will be subject of submissions from interested stakeholders.

6. The Manager sought input from the Waltons with respect to how any distributions made in respect of their shares should be structured, in order to avoid any unnecessary tax consequences. In response, Ms. Walton asked that 45% of the distribution be held back to satisfy potential tax liability or paid directly to them. The Manager does not agree that a holdback or payment to the Waltons is appropriate. The Applicants hold a judgment against the Waltons. They have the right to garnish debts owed to, or seize assets owned by, the Waltons. The Manager is not aware of any authority that suggests these rights are limited to after-tax amounts, and the Waltons have not moved to vary the Applicants' Notices of Garnishment.

7. In light of the foregoing, the Manager has recommended that it be authorized to declare a dividend from Old Apothecary, 178 Ontario and Cecil Lighthouse (if any amounts are to be paid in respect of the Waltons' shares in Cecil Lighthouse). The dividend would then be paid to the Applicants pursuant to Notices of Garnishment that they served on the Manager.

8. In addition, the Manager's motion seeks an order:

- (a) approving the fee allocation methodology proposed by the Manager (the "**Fee Allocation Methodology**") in respect of the fees of the Manager and its counsel, Goodmans LLP ("**Goodmans**"), applicable to the Schedule B Companies and the Schedule C Properties;

- (b) approving the Manager's activities during the period from June 1, 2019 to December 31, 2019 (the "**Eighth Period**"); and
- (c) approving the fees of the Manager and those of its counsel, Goodmans, for the Eighth Period.

9. The Manager is not aware of any opposition to the relief it seeks on this motion, though it is aware that certain parties that have made claims against Cecil Lighthouse, being the Applicants, Dennis Condos, and Duncan Coopland, intend to make submissions to the Court with respect to the appropriate distribution of funds held in respect of Cecil Lighthouse. Additionally, the Respondent, Ms. Walton, has filed an affidavit in response to the Manager's motion, in which she deposes that the Cecil Lighthouse funds ought to be distributed to the purported Cecil Lighthouse preferred shareholders.

II. EQUITY CLAIMS PROCESS AND THE MANAGER'S RECOMMENDATIONS

A. Claims Process

10. Following the Supreme Court's decision that the Applicants were not entitled to the funds held by the Schedule C Companies by virtue of their claims of knowing assistance and knowing receipt, the Manager sought and obtained authorization to run a claims process to identify equity holders of the Schedule C Companies (as third-party creditors had already been paid in full).

Report at paras. 48-49, MR, Vol 1, Tab 2, pp. 23-24 [**PDF p. 30**]

11. The Manager conducted the claims process in respect of four Schedule C Companies that had funds available for distribution: The Old Apothecary Building Inc., 1780355 Ontario Inc., Cecil Lighthouse Ltd. and United Empire Lands Ltd.. These claims processes, and the Manager's resulting recommendations, are described below.

Report at para. 51, MR, Vol. 1, Tab 2, p. 24 [**PDF p. 30**]

B. The Old Apothecary Building Inc. (“Old Apothecary”)

(i) Facts

12. Old Apothecary owned a Schedule C Property at 66 Gerrard Street East. The property has been sold, creditors with valid claims have been paid and sale proceeds of \$48,098 remain for distribution to equity holders, subject to payment of allocated professional fees. The Manager is holding an additional \$9,515 in respect of a related holding company, Gerrard Church 2006 Inc.

Report at para. 59, MR, Vol. 1, Tab 2, pp. 25-26 [PDF pp. 31-32]

13. Only the Applicants filed a claim against Old Apothecary. The Applicants assert (as the Manager has concluded) that the Waltons are the sole equity holders of Old Apothecary. The Applicants claim against the company in their capacity as judgment creditors (in the amount of approximately \$66 million) of the Waltons and pursuant to Notices of Garnishment against each of Norma and Ronauld Walton.

Notices of Garnishment, Appendix Q to the Report, MR, Vol. 2, Tab 2.Q, pp. 474-488 [PDF p. 125]

14. Ms. Walton states in her affidavit that she and her husband are also judgment debtors of Trez Capital. Trez Capital remains on the Service List in this proceeding and has not served a Notice of Garnishment on the Manager or otherwise taken a position on this motion.

Affidavit of N. Walton sworn March 26, 2021 at para. 4

Affidavit of Service of C. Fox sworn February 1, 2021 at Exhibit A

(ii) Manager’s Recommendation Regarding Old Apothecary

15. The fundamental purpose of the Equity Claims Process is to identify parties who are (or may be) shareholders of the relevant companies.

16. Despite the Waltons’ failure to file a claim, on the basis of Old Apothecary’s books and records, the Manager has determined that the Waltons are the sole shareholders of Old Apothecary. The Equity Claims Procedure Order authorizes the Manager to waive strict compliance as to

completion and execution of proofs of claim where the Manager is satisfied that a claim has been adequately proven.

Equity Claims Procedure Order dated July 3, 2019 at para. 7(a),
Appendix “O” to the Fifty-Seventh Report, MR, Vol. 2, Tab 2.O, p.
441 [PDF p. 90]

17. The Applicants’ Notices of Garnishment require that the Manager pay any “debt” owed to the Waltons to the Applicants in partial satisfaction of the Applicants’ judgment in accordance with Rule 60.08 of the *Rules of Civil Procedure*.

Notices of Garnishment, Appendix Q to the Report, MR, Vol. 2, Tab
2.Q, pp. 475 [PDF p. 126]

18. From an accounting perspective, an equity distribution would typically be treated as a return of capital and/or capital gains, which would not necessarily be a “debt” subject to the Notices of Garnishment. However, if the Manager declares a dividend payable to the Waltons, the dividend would be a debt captured by the Notices of Garnishment.

Report at para. 69, MR, Vol. 1, Tab 2, p. 27 [PDF p. 33]

I. Waxman & Sons Ltd., Re, [2008 CanLII 8791 \(Ont. Sup. Ct. \[Commercial List\]\)](#) at para. 24

Apple & Spice Fruit & Vegetables Wholesale (1997) Inc., Re, [2002 CanLII 21975 \(Ont. Sup. Ct. \[Commercial List\]\)](#) at paras. 27 and 34

19. If funds are paid directly to the Waltons as a return of capital, then the Applicants would be entitled to exercise their rights as judgment creditors to seize those funds. For example, if funds are paid into a bank account held by the Waltons, the Applicants could seize the funds from the bank account. There is a risk, however, that funds paid to the Waltons would be dissipated before enforcement rights could be exercised.

Report at para. 70, MR, Vol. 1, Tab 2, p. 27, [PDF p. 33]

20. In light of the foregoing, and the history of this proceeding, the Manager does not recommend any payment to the Waltons. In addition to the risk of dissipation, such a payment would result in additional enforcement steps (and related costs) without conferring any benefit.

Report at para. 71, MR, Vol. 1, Tab 2, p. 28, [PDF p. 34]

21. The Manager's mandate does not include Old Apothecary (a Schedule C Company); rather it includes only the Property formerly owned by Old Apothecary, all proceeds thereof and revenue derived therefrom and from the bank accounts. Accordingly, the Manager is not currently authorized to declare a dividend.

Report at para. 72, MR, Vol. 1, Tab 2, p. 28, [PDF p. 34]

22. In the Manager's view, the simplest solution is to authorize the Manager to declare a dividend in respect of Old Apothecary. Alternatively, the Manager could be authorized to make a return of capital, payable by a note. The note would similarly be a debt subject to the Notice of Garnishment.

Report at para. 73, MR, Vol. 1, Tab 2, p. 28, [PDF p. 34]

23. The Manager understands that either approach could have tax consequences for the Waltons. Accordingly, on March 20, 2020, the Manager emailed the Waltons' counsel and asked for input on the Waltons' preferred approach. After not receiving any response, the Manager's counsel followed up with the Waltons' counsel by emails dated April 28, 2020 and September 16, 2020. No response was received from the Waltons' counsel.

Report at para. 73, MR, Vol. 1, Tab 2, p. 28, [PDF p. 34]

Email from C. Fox to M. Kohl dated March 9, 2020, Appendix BB to the Report, MR, Vol. 2, Tab BB, p. 625 [PDF p. 296]

Emails from C. Fox to M. Kohl dated April 28, 2020 and September 16, 2020, Appendix A to the Supplement to the 57th Report of the Manager dated April 15, 2021, Supplementary Motion Record, Tab 1.A, p. 8 [PDF p. 13]

24. On September 17, 2020, Ms. Walton confirmed her understanding that the Manager was seeking her input on how a distribution to the Applicants would be structured. She did not, however, provide such input.

Email from N. Walton dated September 17, 2020, Appendix D to the Supplement to the 57th Report, Supplementary MR, Tab 1.D, p. 13
[PDF p. 21]

25. Instead, Ms. Walton now suggests in her affidavit that 45% of any distribution made to the Applicants pursuant to the Notices of Garnishment ought to be held back and paid either to the CRA or to the Waltons to cover any tax liability that results from the payment of the dividend.

Walton Affidavit at para. 17, p. 6

26. Ms. Walton's affidavit does not provide any information on whether she would prefer a distribution be made to the Applicants (if one is authorized) by way of dividend or return on capital by way of a note.

27. Holding back funds for payment to CRA would extend the Manager's mandate to the Spring of 2022 and cause the companies and properties subject to these proceedings to incur additional expense.

28. Moreover, the Applicants have the right to garnish debts owed to the Waltons, or seize assets belonging to them. The Manager is not aware of any authority that suggests this right is limited to after-tax amounts that would require the Manager to pay the Waltons' tax debts or hold back funds to satisfy potential tax liabilities. Additionally, the Waltons have not moved to vary the Notices of Garnishment in accordance with the *Rules of Civil Procedure*.

29. The Manager has no insight into the Waltons' personal tax position and, as a result, no information on the tax consequences that could arise as a result of a distribution to the Applicants, however such a distribution may be structured.

30. As neither the Waltons nor any party other than the Applicants have filed a claim against Old Apothecary, the Manager is of the view that the funds held in respect of Old Apothecary, less

allocated professional fees, ought to be distributed to the Applicants in partial satisfaction of their judgment obtained in these proceedings against the Waltons. In order to effect this distribution, the Manager is seeking authorization to declare a dividend in the amount of \$44,870 and authorization to pay that dividend to the Applicants as required by the Notices of Garnishment.

Report at para. 74, MR, Vol. 1, Tab 2, p. 28 [PDF p. 34]

(iii) Discharge

31. Once the Manager distributes the above described funds to the Applicants, or as otherwise directed by the Court, and pays its professional fees, the Manager will have distributed all proceeds relating to Old Apothecary and completed its mandate as it relates to Old Apothecary.

Report at para. 75, MR, Tab 2, p. 28 [PDF p. 34]

32. In light of the foregoing, the Manager respectfully recommends that it be discharged from any responsibilities it may have had relating to Old Apothecary and that Old Apothecary be excluded from the receivership/managership proceedings pursuant to the November Order and the August 2014 Judgment.

Report at para. 76, MR, Tab 2, p. 28 [PDF p. 34]

C. 1780355 Ontario Inc. (“178 Ontario”)

(i) Facts

33. The Manager received a claim against 178 Ontario only from the Applicants. The Applicants claim against 178 Ontario on the basis of their judgment and Notices of Garnishment against the Waltons and on the basis that the Waltons are the sole equity holders in 178 Ontario.

Report at para. 77, MR, Vol. 1, Tab 2, p. 29 [PDF p. 35]

34. The Manager has determined that 50% of the shares of 178 Ontario are owned by the Waltons, and that the other 50% are owned by 781526 Ontario Inc. (“781 Ontario”). The Applicants have reached an agreement with 781 Ontario such that 781 Ontario does not oppose

the proceeds of 178 Ontario being distributed to the Applicants. Counsel to the Manager has confirmed this arrangement with counsel to 178 Ontario.

Report at para. 78, MR, Vol. 1, Tab 2, p. 29[PDF p. 35]

35. Ms. Walton suggests in her affidavit that the funds held in respect of 178 Ontario ought to be distributed to John and Michele Rocha because they initially invested in 178 Ontario. However, the books and records of 178 Ontario record that the Rochas' funds were transferred to Royal Agincourt and the Rochas did not file a claim in respect of 178 Ontario. As such, the Manager has no basis on which to pay to the Rochas funds held in respect of 178 Ontario.

Walton Affidavit at para. 15, p. 6

Report at para. 103, MR, Vol. 1, p. 34 [PDF p. 40]

(ii) *Manager's Recommendation*

36. The Manager has recommended that the funds held in respect of 178 Ontario ought to be distributed to the Applicants in partial satisfaction of their judgment obtained in these proceedings against the Waltons.

Report at para. 79, MR, Vol. 1, Tab 2, p. 29 [PDF p. 35]

37. In order to effect this distribution, and for the same reasons articulated above with respect to Old Apothecary at paragraphs 23 to 27, the Manager is seeking authorization to declare a dividend in the amount of \$44,207 (being the amount held in respect of 178 Ontario less allocated professional fees) and authorization to pay that dividend to the Applicants as required by the Notices of Garnishment.

Report at para. 80, MR, Vol. 1, Tab 2, p. 29 [PDF p. 35]

D. Cecil Lighthouse

38. The issue to be resolved in respect of Cecil Lighthouse is the validity of preferred shares purportedly issued by Cecil Lighthouse but for which no consideration appears in the company's books and records. If the preferred shares are valid, then funds should be distributed to the

preferred shareholders. If they are not valid, then funds should be distributed to the Applicants pursuant to their Notices of Garnishment. The Manager seeks the advice and direction of the court.

(i) *Facts*

39. The Manager is currently holding \$501,392 in respect of Cecil Lighthouse.

40. Cecil Lighthouse's books and records show that the Waltons own all of the outstanding common shares in the company. The Waltons did not file a claim against Cecil Lighthouse.

Report at para. 81, MR, Vol. 1, Tab 2, p. 29 [PDF p. 35]

41. On December 13, 2013, before the Manager was appointed Manager of the property formerly owned by Cecil Lighthouse, but one day after Ms. Walton was served with a motion by the Applicants for an order restraining the Waltons from dealing with the Schedule C Companies, Ms. Walton purported to issue 1,039,300 preferred shares in Cecil Lighthouse (the "**Cecil Transactions**").¹

Report at para. 82, MR, Vol. 1, Tab 2, p. 29 [PDF p. 35]

42. Five days later, on December 18, 2013, an Order was issued requiring the Waltons to provide written notice to the Applicants and the Manager of any dealings with the Schedule C Properties.

Report at para. 82, MR, Vol. 1, Tab 2, p. 30 [PDF p. 36]

43. The Cecil Transactions are described in an email from Ms. Walton to a law clerk employed by Rose & Thistle. The email directs that preferred shares (the "**Cecil Preferred Shares**") be issued as follows:

¹ 42% of the preferred shares were purportedly issued to Irene and Gideon Levytam. The Levytam's assigned their right to claim against Cecil Lighthouse to the Applicants, and the Applicants received a distribution of \$359,814.50 in respect of Cecil Lighthouse pursuant to the Order of Justice Hainey dated July 27, 2018 on the basis that the Applicants would be entitled to these funds in their capacity as (a) preferred shareholder; (b) judgment creditor pursuant to the Notices of Garnishment; or (c) judgment creditor pursuant to its claim against the Schedule C Companies for knowing assistance which, at that time, had been accepted by the Court of Appeal.

Name (the “Cecil Preferred Shareholders”)	Preferred Shares
John Rocha Michele Peng	62,800
Duncan Coopland	150,000
Duncan Coopland	121,500
Dennis Condos	150,000
Peggy Condos	10,000
Vane Plesse	100,000
Gideon and Irene Levytam	199,000
Gideon and Irene Levytam	46,000
Gideon and Irene Levytam	200,000 ²
Total Preferred Shares Issued	1,039,300

Report at para. 83, MR, Vol. 1, Tab 2, p. 30 [PDF p. 36]

44. The Manager has received the following claims against Cecil Lighthouse:

Claimant	Amount
DBDC Spadina Applicants	Unspecified
Dennis Condos and Peggy Condos	\$160,000
Duncan Coopland	\$150,000
Duncan Coopland	\$121,500
John Rocha and Michele Rocha	\$62,800
Celicia Vane Plesse	\$188,000

Report at para. 90, MR, Vol. 1, Tab 2, p. 31 [PDF p. 37]

² Distributions have already been made to the Applicants on account of the shares issued to the Levytams.

45. Other than the Applicants (whose claim is made as creditors of the Waltons), each of the claimants claim to hold Cecil Preferred Shares.

Report at para. 91, MR, Vol. 1, Tab 2, p. 32 [PDF p. 38]

46. The Cecil Preferred Shares are not recorded in Cecil Lighthouse's general ledger. There is no record in Cecil Lighthouse's bank statements that any of the funds invested by the Cecil Lighthouse Claimants were actually transferred to Cecil Lighthouse. Instead, it appears that funds were transferred to the Rose & Thistle Account (the main bank account used by the Waltons), comingled with other funds, and used by Rose & Thistle.

Report at para. 85, MR, Vol. 1, Tab 2, p. 31 [PDF p. 37]

47. The Manager has described in its Fifty-Seventh Report the claims made by each of the Cecil Preferred Shareholders.

Report at paras. 94-105 and Appendix "U", MR, Vol. 1, Tab 2, pp. 32-35 [PDF pp. 38-41] and Vol. 2, Tab U, p. 512 [PDF p. 512]

48. The Applicants have also filed a claim against Cecil Lighthouse in their capacity as judgment creditor and pursuant to the Notices of Garnishment. The Applicants assert that the common shares of Cecil Lighthouse owned by the Waltons are the only shares of Cecil Lighthouse and that, accordingly, the Applicants are entitled to the remaining funds held by the Manager in respect of Cecil Lighthouse.

Report at para. 94, MR, Vol. 1, Tab 2, p. 31 [PDF p. 38]

(ii) *The Manager's Observations and Request for Direction*

49. Given the timing of the Cecil Transactions, and the apparent lack of any business reason for them, it is possible that they were part of an effort to maximize recovery for certain Schedule C Investors at the expense of the Applicants.

Report at para. 86, MR, Vol. 1, Tab 2, p. 31 [PDF p. 37]

50. In this regard, the Manager notes that Justice Brown found in the August 12 Reasons that Ms. Walton sought to prefer her “non-Bernstein” creditors by disposing of Schedule C Properties before the Manager’s appointment (see **Appendix “D”** at paragraph 231) and entering into a settlement agreement with the DeJongs that would prefer their interests over the interests of other creditors, including the Applicants.

August 12 Reasons as para. 231, Appendix D to the Report, MR, Vol. 1, Tab 2.D, p. 163 [**PDF p. 173**]

51. As noted above, the Waltons own the common shares in Cecil Lighthouse. If the Cecil Preferred Shares had not been granted, the Waltons’ personal creditors could garnish any debts paid to the Waltons in their capacity as shareholders of Cecil Lighthouse. The Applicants were, when the Cecil Preferred Shares were granted, contingent creditors of the Waltons who had served a motion to prevent the Waltons from dealing with the Schedule C Companies.

Report at para. 88, MR, Vol. 1, Tab 2, p. 31 [**PDF p. 37**]

52. The Manager seeks the advice and direction of this Court on the appropriate distribution of funds held in respect of Cecil Lighthouse.

E. United Empire Lands Ltd. (“UEL”)

(i) Facts

53. UEL owned a Schedule C Property known municipally as 3270 American Drive, Mississauga, Ontario (“**American Drive**”).

Report at para. 53, MR, Vol. 1, Tab 2, pp. 24-25 [**PDF pp. 30-31**]

54. The Manager did not receive any claims against UEL prior to the Claims Bar Date (as defined in the Equity Claims Procedure Order). Thus, in accordance with the Equity Claims Procedure Order, the Manager distributed the remaining funds, less a holdback for professional fees, to the DeJongs on August 20, 2019.

Report at para. 56, MR, Vol. 1, Tab 2, p. 25 [**PDF p. 31**]

55. The professional fees that the Manager recommends allocating to American Drive exceed the funds on hand such that, once fees are paid, the Manager will have distributed all sale proceeds and completed its mandate with respect to American Drive.

Report at para. 57, MR, Vol. 1, Tab 2, p. 25 [PDF p. 31]

(ii) Discharge

56. Thus, the Manager recommended in the Report that it be discharged in respect of American Drive and that American Drive be excluded from the receivership/managership proceedings pursuant to the November Order and the August 2014 Judgment.

Report at para. 58, MR, Vol. 1, Tab 2, p. 25 [PDF p. 31]

III. APPROVAL OF FEE ALLOCATION METHODOLOGY AND FEES

A. Fee Allocation Methodology

(ii) Facts

57. A methodology for the allocation of fees incurred by the Manager and its counsel from the Manager's appointment on November 5, 2013 to November 30, 2014 (the "**First Period**") was approved by Order dated April 20, 2015 (the "**First Methodology**"). A methodology for the allocation of fees incurred by the Manager and its counsel from December 1, 2014 to December 31, 2015 (the "**Second Period**") was approved by Order dated September 16, 2016 (the "**Second Methodology**"). The Second Methodology was utilized by the Manager and approved by this Court for five other periods. This motion relates to the allocation of the Manager's fees and those of its counsel, Goodmans LLP ("**Goodmans**") relating to the period from June 1, 2019 to December 31, 2019 (the "**Eighth Period**"), for which the Manager proposes using the Second Methodology.

Report, para. 107, MR, Tab 2, p. 35 [PDF p. 41]

Fee Approval Orders, Appendices W and X, MR, Tabs 2.W and 2.X,
pp. 543-573 [PDF p. 201-231]

58. The allocation process began with the Manager and Goodmans each conducting a review of the docket descriptions entered in respect of fees incurred during the Eighth Period, as they had done in respect of fees incurred during the Second to Seventh Periods. Based on this review, the Manager determined that it was feasible to allocate a significant portion of the time spent based on docket descriptions.

Report, para. 110, MR, Tab 2, p. 36 [PDF p. 42]

59. This allocation was performed in accordance with the following principles:

- (a) As a general rule, where dockets referenced multiple properties, the relevant time was divided evenly among the properties unless either the docket description itself or contemporaneous notes or correspondence indicated that time should be divided unevenly among the properties.
- (b) Where a docket did not relate to any particular property(ies), the relevant docket was categorized as “general”. General allocations are spread evenly over all Companies that the Manager worked on during the Eighth period.

Report, para. 111, MR, Tab 2, pp. 36 [PDF p. 42]

Fee Allocation Table, Appendix Y to the Report, MR, Vol. 2, Tab 2.Y, pp. 574 [PDF p. 233]

60. Based on this methodology, a total of 67% of the fees incurred by the Manager and its counsel were allocated to specific properties.

Report, para. 113, MR, Tab 2, p. 36 [PDF p. 42]

(iii) Law and Argument

61. Canadian courts recognize that the allocation of professional fees in insolvency proceedings is a flexible, discretionary exercise. A receiver or manager is not required to

undertake a strict accounting that attributes fees to each party with absolute accuracy, as doing so is impractical, cost-inefficient, and economically self-defeating. Furthermore, a manager is not required to allocate fees equally, on a *pro rata* basis, or in any other particular manner. Rather, fees are to be allocated on a case-by-case basis at the receiver or manager's discretion.

Royal Bank of Canada v. Atlas Block Co., 2014 ONSC 1531 [*Royal Bank of Canada*] [at para. 43](#), (Sup. Ct. [Commercial List])

Hunjan International Inc., Re, 2006 CanLII 63716 (Sup. Ct.) [*Hunjan International Inc.*] [at paras. 4-5](#), [55](#) and [57](#), (Sup. Ct.), BOA, Tab 1

Winnipeg Motor Express Inc., Re, 2009 MBQB 204 [at paras. 41](#) and [52](#)

62. Canadian courts also recognize that it is unlikely that any particular allocation method will result in absolute fairness to all parties. Each creditor will have a view, from its own perspective, of what is or is not fair in terms of allocation. In light of the receiver or manager's role in preserving and realizing on assets for the benefit of all stakeholders, the allocation methodology must only be fair and equitable; it need not be perfect.

Hunjan International Inc., supra, at [paras. 4-5](#), [55](#), [57](#), [71-72](#)

Royal Bank of Canada, supra, [at para. 43](#)

63. Justice D.M. Brown (as he then was) summarized the principles governing the allocation of fees in insolvency proceedings in *Royal Bank of Canada v. Atlas Block Co.*, [2014 ONSC 1531](#) as follows:

- (i) The allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee;
- (ii) Costs should be allocated in a fair and equitable manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;
- (iii) A strict accounting to allocate such costs is neither necessary nor desirable in all cases. To require a receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-à-vis another likely would not be cost effective and would drive up the overall cost of the receivership;

(iv) A creditor need not benefit “directly” before the costs of an insolvency proceeding can be allocated against that creditor's recovery;

(v) An allocation does not require a strict cost/benefit analysis or that the costs be borne equally or on a *pro rata* basis;

(vi) Where an allocation appears *prima facie* as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial.

Royal Bank of Canada, supra, at para. 43

64. The Manager respectfully submits that the Fee Allocation Methodology is fair and equitable, and accords with the general principles set out by Justice Brown in *Royal Bank of Canada*. It is not opposed by any stakeholder. It should be approved.

B. Fee Approval

(i) Facts

65. The Manager's fees during the Fee Approval Period total \$44,097.91 inclusive of HST and disbursements. The fees of its counsel, Goodmans, during the Fee Approval Period total \$78,163.28 inclusive of HST and disbursements. The Manager has received and reviewed Goodmans' invoices and concluded that (i) the fees and disbursements set out in Goodmans' invoices relate to advice sought by the Manager; and (ii) in the Manager's view, Goodmans' fees and disbursements are reasonable.

Report at paras. 114-115, MR, Tab 2, p. 37 [**PDF p. 43**]

66. The Manager has submitted affidavits from Harlan Schonfeld (the principal of the Manager) and Brian Empey (the partner at Goodmans having overall carriage of this matter) attesting to the fees and disbursements that are the subject of the Manager's motion. The evidence of Messrs. Schonfeld and Empey has not been questioned or challenged by any stakeholder.

Appendices Z and AA to the Report, MR, Tab 2.Z and 2.AA, pp. 577-622 [**PDF p. 236-291**]

67. During the Eighth Period, the Manager's included addressing accounting issues, preparing and filing tax returns, addressing any remaining disputes relating to certain Companies, distributing available funds after seeking court approval for same, responding to various requests for information from the Applicants and the Waltons in connection with the criminal proceedings against the Waltons and a potential appeal in respect of the judgments in respect thereof, responding to requests for information from the DeJongs and Condos, and administering the Schedule C Equity Claims Process.

Appendices Z and AA to the Report, MR, Tab 2.Z and 2.AA, pp. 577-622 [PDF p. 236-291]

(ii) *Law and Argument*

68. The Manager's fees, and those of its counsel, have been approved by this Court on several previous occasions:

- (a) The Manager's fees were approved by Order of Justice Witon-Siegel dated April 25, 2014 (for the period from November 5, 2013 to December 31, 2013), Order of Justice Brown dated June 18, 2014 (for the period from January 1, 2014 to May 31, 2014); Order of Justice Newbould dated April 20, 2015 (for the period from June 1, 2014 to November 30, 2014); Order of Justice Newbould dated September 16, 2016 (for the period from December 1, 2014 to December 31, 2015); the Order of Justice Newbould dated April 12, 2017 (for the period from January 1, 2016 to December 31, 2016); the Order of Justice McEwen dated November 16, 2017 (for the period from January 1, 2017 to August 31, 2017); the Order of Justice Hainey dated July 27, 2018 (for the period from September 1, 2017 to May 31, 2018); the Order of Justice Dietrich dated January 28, 2019 (for the period from June 1, 2018 to December 31, 2018); and the Order of Justice Hainey dated July 3, 2019 (for the period from January 1, 2019 to May 31, 2019).

- (b) Goodmans' fees and disbursements were approved by Order of Justice Brown dated June 18, 2014 (for the period from December 9, 2013 to May 27, 2014); Order of Justice Newbould dated April 20, 2015 (for the period from May 28, 2014 to November 30, 2014); the Order of Justice Newbould dated September 16, 2016 (for the period from December 1, 2014 to December 31, 2015); the Order of Justice Newbould dated April 12, 2017 (for the period from January 1, 2016 to December 31, 2016); the Order of Justice McEwen dated November 16, 2017 (for the period from January 1, 2017 to August 31, 2017); the Order of Justice Hailey dated July 27, 2018 (for the period from September 1, 2017 to May 31, 2018); the Order of Justice Dietrich dated January 28, 2019 (for the period from June 1, 2018 to December 20, 2018); and the Order of Justice Hailey dated July 3, 2019 (for the period from December 21, 2018 to May 31, 2019).

Report at para. 107, MR, Tab 2, p. 35 [**PDF p. 41**]

69. In granting the Manager's motion for approval for fees incurred between June 18, 2014 and November 30, 2014 over the opposition of certain stakeholders, Justice Newbould noted that no stakeholder had challenged the time spent, or rates charged, by the Manager or its counsel, that what had been charged was fair and reasonable and that the motion before the Court was "one of those situations described by Pepall J.A. [in *Diemer*] in which the docketed charges are synonymous with what is a fair and reasonable charge."

DBDC Spadina Ltd. v. Walton, 2015 ONSC 2550 [Commercial List]
[at para. 21](#)

Bank of Nova Scotia v. Diemer, 2014 ONCA 851 [at para. 33](#)

70. The Manager respectfully submits that this Honourable Court's previous approval of the Manager's fees, and those of its counsel, provide strong support for approval of the fees at issue

on this motion. The current fees are based on the same rates and docketing practices that have previously been approved by Justices Newbould, Brown, Wilton-Siegel, McEwen, Hailey and Dietrich.

71. The principles applicable to motions for fee approval are well-established. The standard of review of a court-appointed receiver or manager is whether the amounts claimed are fair and reasonable. The purpose of passing accounts is, among other things, to satisfy the court that the fees and disbursements are fair and reasonable and to provide a measure of judicial protection to the receiver or manager carrying out its powers and duties. In general, a court-appointed receiver is entitled to recover its actual costs and only in extraordinary circumstances will the court reduce its costs.

Confectionately Yours Inc., Re (2002), 2002 CanLII 45059 (Ont. C.A.) [at paras. 35-36](#)

Sub-Prime Mortgage Corp. v. Phoenix Apartments Ltd., 2010 ONSC 6535 [at para. 17](#)

Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc., 1996 CanLII 1437 (B.C. C.A.) [at paras. 24-25](#)

72. In light of all of the foregoing, and the fact that the Manager's fees are supported by the Applicants and not opposed by any stakeholder, the Manager respectfully submits that the fees set out in its Notice of Motion are fair and reasonable and ought to be approved.

IV. CONCLUSION

73. For the foregoing reasons, the Manager respectfully requests the relief sought in its Notice of Motion.

All of which is respectfully submitted this 15th day of April, 2021.



Goodmans LLP

SCHEDULE “A” COMPANIES

1. Dr. Bernstein Diet Clinics Ltd.
2. 2272551 Ontario Limited
3. DBDC Investments Atlantic Ltd.
4. DBDC Investments Pape Ltd.
5. DBDC Investments Highway 7 Ltd.
6. DBDC Investments Trent Ltd.
7. DBDC Investments St. Clair Ltd.
8. DBDC Investments Luttrell Ltd.
9. DBDC Investments Leslie Ltd.
10. DBDC Investments Lesliebrook Ltd.
11. DBDC Fraser Properties Ltd.
12. DBDC Fraser Lands Ltd.
13. DBDC Queen’s Corner Ltd.
14. DBDC Queen’s Plate Holdings Inc.
15. DBDC Dupont Developments Ltd.
16. DBDC Red Door Developments Inc.
17. DBDC Red Door Lands Inc.
18. DBDC Global Mills Ltd.
19. DBDC Donalda Developments Ltd.
20. DBDC Salmon River Properties Ltd.
21. DBDC Cityview Lands Ltd.
22. DBDC Weston Lands Ltd.
23. DBDC Double Rose Developments Ltd.
24. DBDC Skyway Holdings Ltd.
25. DBDC West Mall Holdings Ltd.
26. DBDC Royal Gate Holdings Ltd.
27. DBDC Dewhurst Developments Ltd.
28. DBDC Eddystone Place Ltd.
29. DBDC Richmond Row Holdings Ltd.

SCHEDULE “B” COMPANIES

1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline – 1185 Eglinton Avenue Inc.
3. Wynford Professional Centre Ltd.
4. Liberty Village Properties Ltd.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Development Inc.
9. Ascalon Lands Ltd.
10. Luttrell Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd.
13. Fraser Properties Corp.
14. Fraser Lands Ltd.
15. Queen’s Corner Corp.
16. Northern Dancer Lands Ltd.
17. Dupont Developments Ltd.
18. Red Door Developments Inc. and Red Door Lands Ltd.
19. Global Mills Inc.
20. Donalda Developments Ltd.
21. Salmon River Properties Ltd.
22. Cityview Industrial Ltd.
23. Weston Lands Ltd.
24. Double Rose Developments Ltd.
25. Skyway Holdings Ltd.
26. West Mall Holdings Ltd.
27. Royal Gate Holdings Ltd.
28. Royal Gate Nominee Inc.
29. Royal Gate (Land) Nominee Inc.
30. Dewhurst Development Ltd.
31. Eddystone Place Inc.
32. Richmond Row Holdings Ltd.

33. El-Ad (1500 Don Mills) Limited

34. 165 Bathurst Inc.

SCHEDULE “C” PROPERTIES

1. 3270 American Drive, Mississauga, Ontario
2. 0 Luttrell Ave., Toronto, Ontario
3. 2 Kelvin Avenue, Toronto, Ontario
4. 346 Jarvis Street, Suites A, B, C, E and F, Toronto, Ontario
5. 1 William Morgan Drive, Toronto, Ontario
6. 324 Prince Edward Drive, Toronto, Ontario
7. 24 Cecil Street, Toronto, Ontario
8. 30 and 30A Hazelton Avenue, Toronto, Ontario
9. 777 St. Clarens Avenue, Toronto, Ontario
10. 252 Carlton Street and 478 Parliament Street, Toronto, Ontario
11. 66 Gerrard Street East, Toronto, Ontario
12. 2454 Bayview Avenue, Toronto, Ontario
13. 319-321 Carlaw, Toronto, Ontario
14. 260 Emerson Ave., Toronto, Ontario
15. 44 Park Lane Circle, Toronto, Ontario
16. 19 Tennis Crescent, Toronto, Ontario
17. 646 Broadview, Toronto, Ontario

SCHEDULE “D”
RELEVANT AUTHORITIES

1. *Royal Bank of Canada v. Atlas Block Co.*, [2014 ONSC 1531](#) [Commercial List]
2. *Hunjan International Inc., Re*, [2006 CanLII 63716](#) (Sup. Ct.)
3. *Winnipeg Motor Express Inc., Re*, [2009 MBQB 204](#)
4. *Confectionately Yours Inc., Re*, [2002 CanLII 45059](#) (Ont. C.A.)
5. *Sub-Prime Mortgage Corp. v. Phoenix Apartments Ltd.*, [2010 ONSC 6535](#)
6. *Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc.*, [1996 CanLII 1437](#)
(B.C.
C.A.)
7. *DBDC Spadina Ltd. v. Walton*, [2015 ONSC 2550](#) [Commercial List]
8. *Bank of Nova Scotia v. Diemer*, [2014 ONCA 851](#)

DBDC SPADINA LTD., *et al.*
Applicants

- and -

NORMA WALTON, *et al.*
Respondents

Court File No. CV-13-10280-00CL

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

Proceeding commenced at Toronto

Factum of the Moving Party, Schonfeld Inc.
(Motion by the Manager for Advice and Directions and
Authorization to Distribute Schedule “C” Funds
returnable April 26, 2021)

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