

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

BETWEEN:

AMERICAN GENERAL LIFE INSURANCE COMPANY, LEXINGTON INSURANCE  
COMPANY, and THE VARIABLE ANNUITY LIFE INSURANCE COMPANY  
Applicants

- and -

SOUTHMOUNT HEALTHCARE CENTRE INC., 180 VINE INC., 2478658 ONTARIO LTD.,  
2009 LONG LAKE HOLDINGS INC., 65 LARCH HOLDINGS INC., 100 COLBORNE  
HOLDINGS INC., 240 OLD PENETANGUISSH HOLDINGS INC., GROSS PROPERTIES  
INC.,  
180 VINE PURCHASER INC., and 2413667 ONTARIO INC.  
Respondents

**APPLICATION UNDER section 243 of the Bankruptcy and Insolvency Act, R.S.C.  
1985, c. B-3, as amended, and under section 101 of the *Courts of Justice Act*, R.S.O.  
1990, c.43**

**FACTUM OF THE RECEIVER**  
(Distribution Motion ret. July 5, 2023)

June 29, 2023

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**TO: THE SERVICE LIST**

## PART I - INTRODUCTION

1. This factum is filed in support of a motion by KPMG Inc., as receiver and manager (in such capacities, the “**Receiver**”) without security of, among other things, all of the assets undertakings and properties of Southmount Healthcare Centre Inc., 180 Vine Inc., 2478658 Ontario Ltd., 2009 Long Lake Holdings Inc., 65 Larch Holdings Inc., 100 Colborne Holdings Inc. (“**100 Colborne**”), 240 Old Penetanguish Holdings Inc. (collectively, with 180 Vine Purchaser Inc., the “**Legal Owners**”) acquired for or used in relation to their businesses (collectively, the “**Legal Owners’ Property**”) and all right, title and interest of any beneficial owners in and to the Legal Owners’ Property seeking orders:
  - a) dispensing with the requirement of the Receiver and its counsel to pass their accounts;
  - b) approving the activities of the Receiver as set out in the Receiver’s fourth report to the Court dated June 26, 2023 (the “**Fourth Report**”);
  - c) discharging the Receiver upon filing of the Discharge Certificate (as defined in the Discharge, Distribution and Ancillary Matters Order) and granting certain customary releases in favour of the Receiver and its counsel; and
  - d) authorizing the Receiver to make further distributions to the Applicants (the “**Proposed Distributions**”);
2. This Factum will address the request for approval of the Proposed Distributions, which is referred to as the “**Distribution Motion**”. The other relief sought by the Receiver will be addressed in a separate factum filed by the Receiver’s counsel, Blake, Cassels & Graydon LLP.

## PART II - FACTS

### Background

3. The background facts in these proceedings are set out in the Fourth Report.
4. All of the Legal Owners' real properties have been realized upon by the Receiver through sales processes previously approved by this Court.<sup>1</sup> Following interim distributions to the Applicants also previously approved by the Court,<sup>2</sup> the Receiver remains in possession of cash on hand in the amount of approximately \$1 million.<sup>3</sup>
5. The Receiver is seeking an order authorizing a distribution in the amount of \$750,000 (the "**Interim Distribution**") from such cash on hand. At this time the Receiver intends to maintain a reserve of cash on hand in the amount of approximately \$270,000 (the "**Reserve**") to be released at the Receiver's sole discretion to fund, among other things, (i) the remaining costs of these proceedings, and (ii) the balance of the Legal Owners' bankruptcy proceedings.<sup>4</sup>
6. The Receiver is also seeking an order authorizing it to make one or more further distributions to the Applicants (collectively, the "**Final Distribution**") from any remaining available funds in the possession of the Receiver, upon completion of its remaining activities.<sup>5</sup>

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<sup>1</sup> Fourth Report at para. 47.

<sup>2</sup> Fourth Report at para 13(a)(ii)

<sup>3</sup> Fourth Report at para 56.

<sup>4</sup> Fourth Report at para. 56.

<sup>5</sup> Fourth Report at para. 57.

7. The balance of the Applicants' secured debt is estimated to be approximately \$21.1 million as at May 31, 2023 (not taking into account costs and any other amounts that may be claimable by the Applicants, including yield maintenance amounts).<sup>6</sup>
8. The Receiver's remaining cash on hand will not be nearly sufficient to repay the remaining principal and interest owing to the Applicants (without accounting for their costs and any other amounts that may be claimable by the Applicants pursuant to their loan and security documents, including yield maintenance amounts).<sup>7</sup>
9. Norton Rose Fulbright Canada LLP ("**NRFC**"), independent counsel to the Receiver has provided an independent legal opinion to the Receiver with respect to the validity and enforceability of the security granted by each Legal Owner in favour of the Applicants under the laws of the Province of Ontario. Subject to customary qualifications, assumptions and limitations included therein, NRFC is of the opinion that the Applicants' security is valid and enforceable against the Legal Owners' Property and that first in time registrations of the Applicants' security have been made against the Legal Owners' Property.<sup>8</sup>

### **PART III - ISSUES**

10. The issue to be addressed in the Distribution Motion is whether the Court should approve the Proposed Distribution to the Applicants in partial satisfaction of their secured claims.

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<sup>6</sup> Fourth Report at para. 46.

<sup>7</sup> Fourth Report at para. 47.

<sup>8</sup> Fourth Report at para. 45.

## PART IV - LAW AND ANALYSIS

11. The outstanding principal, accrued interest and other costs owing to the Applicants far exceeds the funds available for distribution.
12. The Applicants hold valid and enforceable security interests against all of the Legal Owners' Property, including the leases entered into in connection with those properties and personal property of the Legal Owners. The Applicants hold first in time real property registrations and registrations under the *Personal Property Security Act* (Ontario) against the Legal Owners' Property.<sup>9</sup>
13. The first in time registrations of the Applicants will in general result in a first priority ranking of their security interests. Subject to limited exceptions, under the *Personal Property Security Act* (Ontario) priorities of security interests in personal property perfected by registration are determined based on the order of registration.<sup>10</sup> Similarly, under the *Land Titles Act* (Ontario), priorities of security interests in real property are determined by the order of registration.<sup>11</sup>
14. The Legal Owners did not have any employees and thus the Receiver understands that there are no potential deemed trust claims in connection with employee source deductions or other priority claims of former employees for unpaid compensation.<sup>12</sup>
15. Payment of municipal realty tax arrears were made by the Receiver following the closing of each sale transaction for the Legal Owners' Property for the period up to the respective closing dates.<sup>13</sup>

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<sup>9</sup> Fourth Report at para 62.

<sup>10</sup> *Personal Property Security Act*, R.S.O. 1990, c. P.10 at s. 30.

<sup>11</sup> *Land Titles Act*, R.S.O. 1990 c. L.5 at s. 78(5).

<sup>12</sup> Fourth Report at para. 51.

<sup>13</sup> Fourth Report at para. 52.

16. Notwithstanding the validity and enforceability of the security interests of the Applicants and their first in time registrations, there are three potential issues that could affect priorities that should be evaluated.
17. First, documentation obtained from Canada Revenue Agency and inquiries made to the property manager of the Legal Owners' Property suggest that certain of the Legal Owners have outstanding HST arrears related to the period prior to the commencement of these proceedings.<sup>14</sup> There are currently insufficient records available to the Receiver to ascertain if all such HST arrears remain outstanding. In the ordinary course outside of a bankruptcy, unremitted HST may result in a deemed trust claim by the Crown under Section 222 of the *Excise Tax Act* (Canada). Section 222 of the *Excise Tax Act* (Canada) reads in part as follows:

**222 (1)** Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

**(1.1)** Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.<sup>15</sup>

18. As a result, in the current case, potential deemed trust claims for unremitted excise taxes may have existed. However, such deemed trusts would not survive in bankruptcies and were resolved upon the bankruptcies of the Legal Owners.<sup>16</sup> The Ontario Court of Appeal

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<sup>14</sup> Fourth Report at para. 53.

<sup>15</sup> *Excise Tax Act*, R.S.C. 1985, c. E-15.

<sup>16</sup> Fourth Report at para. 53; *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended at Section 67(2).

has held that a bankruptcy order may be granted with the express purpose of affecting such priorities.<sup>17</sup>

19. Second, the Receiver was contacted by counsel for a potential lien claimant, who registered a construction lien against the 65 Larch Street property in June 2021. The registration is in the amount of \$160,252 (the “**Construction Lien**”).<sup>18</sup> The Receiver has maintained a reserve for any priority claim related to the Construction Lien.<sup>19</sup>
20. Counsel to the Receiver has responded to certain requests for information from counsel to the Construction Lien claimant. At this time, no further information requests have been received from the Construction Lien claimant and no further information has been provided to the Receiver to suggest a potential priority claim that would rank ahead of the Applicants’ secured claims.<sup>20</sup>
21. Section 78 of the *Construction Act* (Ontario) governs priority ranking as between a real property mortgage, such as those held by the Applicants in this case, and a subsequent construction lien claimant. Section 78 states, in relevant part, as follows:

**Priority over mortgages, etc.**

78 (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner’s interest in the premises.

...

**Prior mortgages, prior advances**

(3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner’s interest in the premises that were registered prior to the time when the first lien arose in respect of an

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<sup>17</sup> [Grant Forest Products Inc. v. The Toronto-Dominion Bank, 2015 ONCA 570 at para. 118.](#)

<sup>18</sup> Fourth Report at paras. 49 and 50.

<sup>19</sup> Fourth Report at para. 49.

<sup>20</sup> Fourth Report at para. 50.

improvement have priority over the liens arising from the improvement to the extent of the lesser of,

(a) the actual value of the premises at the time when the first lien arose; and

(b) the total of all amounts that prior to that time were,

(i) advanced in the case of a mortgage, and

(ii) advanced or secured in the case of a conveyance or other agreement.<sup>21</sup>

22. The Applicants' mortgage on the 65 Larch Street property arose prior to the registration of the Construction Lien on the 65 Larch Street property. There is a shortfall in the recoveries of the Applicants on the amounts advanced on that mortgage. The Receiver has not received any information that would indicate the value of the 65 Larch Street property has increased since the date the Construction Lien first arose.

23. Third, the purchaser of the 100 Colborne real property (the "**100 Colborne Purchaser**") has, in the past, requested to be compensated for time and costs incurred in connection with advancing a municipal tax appeal in connection with the 100 Colborne property after acquisition of that property. In addition to any tax benefits achieved for the post-closing period, that appeal generated refunds on taxes attributable to the period *prior to* the closing of the sale of the 100 Colborne property in the amount of \$293,548.91 (the "**Pre-Closing Refunds**").<sup>22</sup> The Receiver has advised the 100 Colborne Purchaser of the Receiver's position that any amounts received in respect of that tax appeal attributable to the period prior to the closing of the sale of the 100 Colborne property would be an "Excluded Asset" that was not acquired by the 100 Colborne Purchaser. Despite efforts to engage in without prejudice settlement discussions by the Receiver, the matter was not

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<sup>21</sup> *Construction Act*, R.S.O. 1990, c. C-30.

<sup>22</sup> Fourth Report at para. 32.



resolved. The Receiver does not know if this issue is still being pursued by the 100 Colborne Purchaser.

24. The Receiver has received a cheque in the amount of the Pre-Closing Refunds from the City of Orillia representing the portion of a resolution of the above described municipal tax appeal attributable to the period prior to the closing of the 100 Colborne sale.<sup>23</sup> The Receiver believes these Pre-Closing Refunds are assets of 100 Colborne and ought to be distributed to the Applicants in partial satisfaction of their secured claims (and not paid over to the 100 Colborne Purchaser) for the following reasons:

(a) the asset purchase agreement governing the sale of the 100 Colborne property to the 100 Colborne Purchaser expressly described these Pre-Closing Refunds as “Excluded Assets” that were not acquired by the 100 Colborne Purchaser.<sup>24</sup>

(b) there has been no amendment to the definition of “Excluded Assets” in the asset purchase agreement that would carve out these Pre-Closing Refunds. Pursuant to Section 9.9 of the 100 Colborne asset purchase agreement, any such amendment must be in writing signed by the parties (or may be by way of e-mail exchanged by counsel for the parties). No such amendment was entered into.<sup>25</sup>

25. In summary, the Receiver is not aware of any claims that would be entitled to the remaining distributable proceeds of the Legal Owners’ estates in priority to the valid and enforceable secured claims of the Applicants. Accordingly, the Receiver believes that the distribution

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<sup>23</sup> Fourth Report at para. 40.

<sup>24</sup> Fourth Report at Appendix “A”.

<sup>25</sup> Fourth Report at Appendix “A”.

of the remaining available proceeds, net of the costs of the Receiver in these proceedings,  
is appropriate and should be implemented.

**PART V - ORDER REQUESTED**

26. The Receiver respectfully requests that the Court grant the Distribution Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of June, 2023.



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**NORTON ROSE FULBRIGHT CANADA LLP**  
Independent Counsel to the Receiver, KPMG Inc.

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

Case Law

1. *Grant Forest Products Inc. v. The Toronto-Dominion Bank*, [2015 ONCA 570](#)

**SCHEDULE “B”  
RELEVANT STATUTES**

***BANKRUPTCY AND INSOLVENCY ACT***

R.S.C., 1985, c. B-3

**PART IV – PROPERTY OF THE BANKRUPT**

**Deemed trusts**

**67(2)** Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

**Exceptions**

**(3)** Subsection (2) does not apply in respect of amounts deemed to be held in trust under [subsection 227\(4\)](#) or [\(4.1\)](#) of the *Income Tax Act*, [subsection 23\(3\)](#) or [\(4\)](#) of the *Canada Pension Plan* or [subsection 86\(2\)](#) or [\(2.1\)](#) of the *Employment Insurance Act* (each of which is in this subsection referred to as a “federal provision”) nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in [subsection 227\(4\)](#) or [\(4.1\)](#) of the *Income Tax Act*, or

(b) the province is a province providing a comprehensive pension plan as defined in [subsection 3\(1\)](#) of the *Canada Pension Plan*, that law of the province establishes a provincial pension plan as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in [subsection 23\(3\)](#) or [\(4\)](#) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

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***PERSONAL PROPERTY SECURITY ACT***

R.S.O. 1990, c. P.10

**PART III – PERFECTION AND PRIORITIES**

**Priorities**

**30(1)** If no other provision of this Act is applicable, the following priority rules apply to security interests in the same collateral:

1. Where priority is to be determined between security interests perfected by registration, priority shall be determined by the order of registration regardless of the order of perfection.
2. Where priority is to be determined between a security interest perfected by registration and a security interest perfected otherwise than by registration,
  - i. the security interest perfected by registration has priority over the other security interest if the registration occurred before the perfection of the other security interest, and
  - ii. the security interest perfected otherwise than by registration has priority over the other security interest, if the security interest perfected otherwise than by registration was perfected before the registration of a financing statement related to the other security interest.
3. Where priority is to be determined between security interests perfected otherwise than by registration, priority shall be determined by the order of perfection.
  - 1.1 Where priority is to be determined between perfected security interests in a prescribed class of collateral, priority shall be determined in accordance with the regulations.
  2. Where priority is to be determined between unperfected security interests, priority shall be determined by the order of attachment.

### **Idem**

(2) For the purpose of subsection (1), a continuously perfected security interest shall be treated at all times as if perfected by registration, if it was originally so perfected, and it shall be treated at all times as if perfected otherwise than by registration if it was originally perfected otherwise than by registration.

### **Future advances**

(3) Subject to subsection (4), where future advances are made while a security interest is perfected, the security interest has the same priority with respect to each future advance as it has with respect to the first advance.

### **Exception**

(4) A future advance under a perfected security interest is subordinate to the rights of persons mentioned in subclauses 20 (1) (a) (ii) and (iii) if the advance was made after the secured party received written notification of the interest of any such person unless,

- (a) the secured party makes the advance for the purpose of paying reasonable expenses, including the cost of insurance and payment of taxes or other charges incurred in obtaining and maintaining possession of the collateral and its preservation; or
- (b) the secured party is bound to make the advance, whether or not a subsequent event of default or other event not within the secured party's control has relieved or may relieve the secured party from the obligation.

## **Proceeds**

(5) For the purpose of subsection (1), the date for registration or perfection as to collateral is also the date for registration or perfection as to proceeds.

## **Reperfected security interests**

(6) Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period.

## **Same, extended time**

(6.1) Despite subsection (6), where a security interest that is perfected by registration becomes unperfected between February 26, 1996 and April 3, 1996, the security interest shall be deemed to have been continuously perfected from the time of first perfection if the security interest is again perfected by registration by April 12, 1996.

## **Deemed trusts**

(7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act, 2000*, the *Pension Benefits Act* or the *Pooled Registered Pension Plans Act, 2015*. R.S.O. 1990, c. P.10, s. 30 (7); 2015, c. 9, s. 32.

## **Exception**

(8) Subsection (7) does not apply to a perfected purchase-money security interest in inventory or its proceeds.

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## ***LAND TITLES ACT***

**R.S.O. 1990, c. L.5**

## **PART VII – SUBSEQUENT REGISTRATIONS**

### **General**

#### *Registration*

#### Priorities

**78(5)** Subject to any entry to the contrary in the register and subject to this Act, instruments registered in respect of or affecting the same estate or interest in the same parcel of registered land as between themselves rank according to the order in which they are entered in the register and not according to the order in which they were created, and, despite any express, implied or constructive notice, are entitled to priority according to the time of registration.

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***EXCISE TAX ACT***  
**R.S.C. 1985, c. E-15**

**PART IX – GOODS AND SERVICES TAX**

**Division V – Collection and Remittance of Division II Tax**

*Subdivision A – Collection*

Trust for amounts collected

**222** (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

Amounts collected before bankruptcy

(1.1) Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the [Bankruptcy and Insolvency Act](#)), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

Withdrawal from trust

(2) A person who holds tax or amounts in trust by reason of subsection (1) may withdraw from the aggregate of the moneys so held in trust

- (a) the amount of any input tax credit claimed by the person in a return under this Division filed by the person in respect of a reporting period of the person, and
- (b) any amount that may be deducted by the person in determining the net tax of the person for a reporting period of the person,

as and when the return under this Division for the reporting period in which the input tax credit is claimed or the deduction is made is filed with the Minister.

Extension of trust

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the [Bankruptcy and Insolvency Act](#)), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

- (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
- (b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

#### Meaning of security interest

(4) For the purposes of subsections (1) and (3), a security interest does not include a prescribed security interest.

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### ***CONSTRUCTION ACT*** **R.S.O. 1990 c. C-30**

#### **PART XI – PRIORITIES**

##### **Priorities over mortgages, etc.**

**78** (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.

##### **Building mortgage**

(2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.

##### **Prior mortgages, prior advances**

(3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

- (a) the actual value of the premises at the time when the first lien arose; and
- (b) the total of all amounts that prior to that time were,
  - (i) advanced in the case of a mortgage, and



(ii) advanced or secured in the case of a conveyance or other agreement.

### **Prior mortgages, subsequent advances**

(4) Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled under subsection (3), over the liens arising from the improvement, to the extent of any advance made in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

### **Special priority against subsequent mortgages**

(5) Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV.

### **General priority against subsequent mortgages**

(6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

### **Advances to trustee under Part IX**

(7) Despite anything in this Act, where an amount is advanced to a trustee appointed under Part IX as a result of the exercise of any powers conferred upon the trustee under that Part,

- (a) the interest in the premises acquired by the person making the advance takes priority, to the extent of the advance, over every lien existing at the date of the trustee's appointment; and
- (b) the amount received is not subject to any lien existing at the date of the trustee's appointment.

### **Where postponement**

(8) Despite subsections (4) and (6), where a preserved or perfected lien is postponed in favour of the interest of some other person in the premises, that person shall enjoy priority in accordance with the postponement over,

(a) the postponed lien; and

(b) where an advance is made, any unpreserved lien in respect of which no written notice has been received by the person in whose favour the postponement is made at the time of the advance,

but nothing in this subsection affects the priority of the liens under subsections (2) and (5).

### **Saving**

(9) Subsections (2) and (5) do not apply in respect of a mortgage that was registered prior to the 2nd day of April, 1983.

### **Financial guarantee bond**

(10) A purchaser who takes title from a mortgagee takes title to the premises free of the priority of the liens created by subsections (2) and (5) where,

(a) a bond of an insurer licensed under the *Insurance Act* to write surety and fidelity insurance;  
or

(b) a letter of credit or a guarantee from a bank listed in Schedule I or II to the *Bank Act* (Canada),

in the prescribed form is registered on the title to the premises, and, upon registration, the security of the bond, letter of credit or the guarantee takes the place of the priority created by those subsections, and persons who have proved liens have a right of action against the surety on the bond or guarantee or the issuer of the letter of credit.

### **Home buyer's mortgage**

(11) Subsections (2) and (5) do not apply to a mortgage given or assumed by a home buyer.

AMERICAN GENERAL LIFE  
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Applicants

- and -

SOUTHMOUNT HEALTHCARE  
CENTRE INC., ET AL.  
Respondents

Court File No.: CV-21-00664273-00CL

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

Proceeding commenced at TORONTO

**FACTUM OF THE RECEIVER**  
(Distribution Motion ret. July 5, 2023)

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