

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

BETWEEN:

**ICICI BANK CANADA**

Applicant

- and -

**1539304 ONTARIO INC.**

Respondent

**APPLICATION UNDER** s.47(1) of the *Bankruptcy and Insolvency Act*,  
R.S.C. 1985 c. B-3, s. 101 of the *Courts of Justice Act*, R.S.O. c. C-43 and  
Rules 14.05(2) and (3) (d), (g) and (h) of the *Rules of Civil Procedure*.

**SUPPLEMENTARY MOTION RECORD  
(returnable March 10, 2009)**

March 4, 2009

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Receiver Inc. in its capacity as  
Interim Receiver and Receiver and  
Manager of 1539304 Ontario Inc.**

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Court File No.: CV-08-7714-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**SUPPLEMENT TO THE FIRST REPORT OF IRA SMITH TRUSTEE & RECEIVER  
INC.**

**IN ITS CAPACITY AS COURT-APPOINTED INTERIM RECEIVER AND RECEIVER  
AND MANAGER OF 1539304 ONTARIO INC.**

**DATED MARCH 4, 2009**

**1.0 INTRODUCTION**

This Supplement to the First Report (the “**Supplementary Report**”) is filed by Ira Smith Trustee & Receiver Inc. (“**ISI**”) in its capacity as court-appointed interim receiver and receiver and manager (the “**Receiver**”), pursuant to section 47.1 of the *Bankruptcy and Insolvency Act*, R.S.C 1985, c. B-3, as amended (the “**BIA**”), and section 101 of the *Courts of Justice Act*, R.S.O 1990, c. C.43, as amended (the “**CJA**”), without security, of all of the assets, undertaking and property of 1539304 Ontario Inc. (the “**Company**” or the “**Debtor**”).

The Honourable Madam Justice Pepall made an order dated November 12, 2008 (the “**Receivership Order**”) appointing the Receiver. A copy of the Receivership Order is attached hereto as **Exhibit “A”**.

### 1.1 Purpose of the Supplementary Report

On February 26, 2009, the Receiver and its legal counsel, Messrs. L. Wittlin and A. Rousseau of Lang Michener LLP (“LM”), Mr. H. Whiteley of Gowling Lafleur Henderson LLP, legal counsel to the Applicant in these proceedings, Mr. R. Weston of Feltmate Delibato Heagle LLP, legal counsel to the City of Hamilton (the “City”) and Mr. H. Ganatra, a Director of the Company, attended in Court on the Receiver’s motion for relief on a variety of matters, including approval of the Receiver’s engagement of Pelican Woodcliff Inc. (“PWI”), an independent real estate consulting firm assisting the Receiver. The Court reviewed the Receiver’s First Report to Court (the “**First Report**”) and heard the submissions of the parties in attendance.

At the conclusion of the hearing, Madam Justice Pepall reserved her decision, and on February 27, 2009, her Order (the “**First Report Approval Order**”) and Endorsement were released. A copy of the First Report Approval Order is attached hereto as **Exhibit “B”** and a copy of Her Honour’s Endorsement is attached hereto as **Exhibit “C”**. The First Report and the actions of the Receiver, other than the approval of the PWI retainer letter, were approved by this Honourable Court.

At the conclusion of the hearing on February 26, 2009, Her Honour directed the Receiver to prepare and file with the Court no later than March 5, 2009, the Supplementary Report for a further hearing on March 10, 2009. Her Honour wished the Receiver to provide additional evidence as to the basis for the Court to approve a specific engagement letter under which PWI will provide overall property management, construction and real estate advisory services to the Receiver without the Receiver tendering the engagement contract in a competitive bidding process.

## **1.2 Disclaimer**

The Receiver has relied upon the financial records and financial statements of the Debtor, as well as other information supplied by management and employees of the Debtor, its accountants, appraisers, valuers, and other advisors. Our procedures did not constitute an audit or review engagement.

Therefore, the Receiver is unable to and does not express an opinion on any financial statements, or elements of accounts referred to in the Supplementary Report, or any of the attached Appendices or Exhibits forming part of the Supplementary Report. Our procedures and enquiries did not include verification work or constitute an audit in accordance with generally accepted auditing standards. In the event any of the information we relied upon was inaccurate or incomplete, the results of our analysis could be materially affected. We reserve the right to review all calculations included or referred to in this Supplementary Report and, if we consider it necessary, to revise our calculations or conclusions in light of new information as such information becomes available.

## **2.0 BACKGROUND AND OVERVIEW**

Messrs. Whiteley, Weston and Ganatra were served with the Receiver's motion materials, including the First Report, prior to the hearing. None of these parties either filed material prior to the hearing date or contacted the Receiver or LM to express any concerns whatsoever about the relief being sought by the Receiver. Immediately prior to the commencement of the hearing of the motion in Court on February 26, 2009, Mr. Ganatra provided the Receiver (and then the Court) with a document outlining his concerns. As well, Mr. Weston approached the Receiver and LM to advise of several concerns of the City. All but one of the City's concerns, the retainer

of PWI, was dealt with during the hearing to the mutual satisfaction of the City and the Receiver. As a result of there not being any evidence proffered by the Receiver in the First Report to the then unknown concerns, Her Honour directed the Receiver to prepare and file the Supplementary Report.

Although it was a part of the First Report, to assist the Court, attached hereto as **Exhibit "D"** is a copy of the PWI engagement letter for which the Receiver seeks approval. The Receiver initially engaged PWI as allowed by Paragraph 3(d) of the Receivership Order, under the Receiver's power to engage consultants.

### **3.0 OBJECTIONS RAISED ON FEBRUARY 26, 2009 TO THE ENGAGEMENT OF PWI**

#### **3.1 *Mr. Ganatra -***

In his material provided to the Receiver during the morning of February 26, 2009, Mr. Ganatra confirmed PWI's knowledge of the real estate project located at 80 King William Street in the City of Hamilton (the "**Project**"). The Project comprises an existing 3 storey rehabilitated commercial structure which is currently under construction to be converted to a 5 storey, 50 unit loft style residential condominium building which has been marketed under the name Trinity Landing Condominiums.

In his material, Mr. Ganatra raises various unsubstantiated allegations against both the Applicant in these proceedings and PWI, under the heading "**2. Receiver's retainer of Pelican Woodcliff Inc. ("PWI")**"<sup>1</sup>. The only response the Receiver wishes to make to Mr. Ganatra's allegations is

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<sup>1</sup> Unnumbered page 2 of Mr. Ganatra's submission dated February 25, 2009.

in respect of his mistaken belief that "...the Receiver, PWI and the Applicant are acting in unison with a view to prejudice the equity of the Respondent."<sup>2</sup>

The Receiver is an independent officer of the Court, whose goal, *inter alia*, is to maximize the recovery for all stakeholders, in all of the circumstances. The Receiver does not take direction from the Applicant, and the Receiver has found the conduct and advice of PWI to date to be professional, unbiased and timely. PWI has sought the approval of the Receiver, and not the Applicant, for all activities, actions and decisions taken, as described in the First Report and as approved by this Honourable Court.

### 3.2 *The City –*

Mr. Weston did not submit any material in support of his submissions. The Receiver's understanding of his submissions on behalf of the City, in relation to the engagement of PWI, is as follows:

1. The Receiver did not enter into a competitive bidding or tender process for the selection of the real estate construction and project management consultant engaged by the Receiver. Mr. Weston advised that he did not object to the Receiver engaging such consultant but felt a competitive process should have been undertaken; and
2. Based on Mr. Weston's review of certain documents, it is not clear to him that the Applicant's secured claim ranks in priority to the secured claim of the City, either in whole or in part.

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<sup>2</sup> Paragraph 2.6 of Mr. Ganatra's submission dated February 25, 2009.

The significance of the second submission is that in the First Report, the Receiver advised:

“The Receiver consulted with ICICI, which concurred with the Receiver’s choice of PWI. At a meeting held between representatives of the Receiver and ICICI and respective legal counsel on November 13, 2008, representatives of the ICICI advised that since it was funding the costs of this receivership administration and was aware of PWI’s abilities, it did not wish the Receiver to incur the time to obtain other quotes for the consulting services required.”<sup>3</sup>

#### 4.0 SECURITY OF THE APPLICANT

The issue raised by Mr. Weston is a significant one. The Receiver at the time of writing the First Report was unaware of any controversy over the ranking of the security of the Applicant, ICICI Bank Canada and the City. The Applicant’s motion material indicated that the Applicant’s view was that the only priority issue yet to be determined was the priority of any valid construction liens over both the security of the Applicant and the security of the City. Upon learning in November, 2008 that the City did not either object to or file responding materials in reply to the Applicant’s characterization of its security at the hearing that resulted in the appointment of the Receiver, the Receiver assumed that the priority of the Applicant’s security over the security held by the City was not in dispute as between them. Accordingly, upon its appointment, the Receiver proceeded on the basis that subject to obtaining a legal opinion on the validity and enforceability of the Applicant’s security, the Applicant was the first secured creditor, subject to any priority of valid construction liens (and/or deemed trust claims against the personal property of the Debtor).

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<sup>3</sup> Section 4.0 of the First Report to Court, **RETAINER OF PWI**.

Accordingly, the Receiver concluded that the Applicant, as the primary lender stakeholder, should have been first consulted on its views of the engagement of PWI as consultant to the Receiver, and that the Receiver should consider the Applicant's practical request that the Receiver not spend the time, and therefore incur the costs, of obtaining competitive quotes, as the Applicant would be funding the costs, both through cash advances to the Receiver under the Receiver's Borrowing Authority as well as through a diminution of its ultimate entitlement to distribution from the Receiver of the net sales proceeds (subject to a review of construction lien claims and the Receiver obtaining the approval of this Honourable Court to any distribution of sale proceeds realized from the sale process).

As is usual in Court-appointed receivership administrations, the Receiver did not obtain an opinion from LM on the validity, enforceability and ranking of the security held by the Applicant and the City for the First Report. Rather, the Receiver was deferring those costs to the point in the future where there are net sales proceeds to distribute. Given Mr. Weston now raising for the first time during the receivership proceedings that there may be a wider priority of security issue, the Receiver instructed LM to provide its opinion on the validity and enforceability of the security of the Applicant, and to provide whatever views it could on the priority ranking of the security held by the Applicant and by the City.

On the morning of February 27, 2009, the Receiver sent an email to both Messrs. Whiteley and Weston requesting that they forthwith provide a copy of any documents not contained in the Applicant's application record that they believed would assist LM in opining on the security of the Applicant, and the relative priority of the Applicant's and the City's security for loan advances to the Debtor. Mr. Whiteley replied on a timely basis to Mr. Wittlin, but Mr. Weston did not. Accordingly, at the end of the day, Mr. Wittlin sent an email to Mr. Weston urging him

to provide a copy of the documents he was relying upon in making the submissions he put forward to the Court on February 26, 2009.

Attached hereto as **Exhibits "E" and "F"** are the emails sent by the Receiver and Mr. Wittlin, respectively.

Attached hereto as **Exhibit "G"** is the opinion of LM dated March 3, 2009 (the "**LM Opinion**") indicating in summary that:

1. The mortgage security and general security agreement held by the Bank are valid and enforceable in accordance with their terms subject to the usual qualifications, including the priority of any loan advances secured thereby and the priority of all other encumbrances, including valid construction lien claims.
2. The existing registered priority agreements made between the City and the Bank provide that the Bank security is to enjoy priority for its loan advances over those of the City under its security to the full extent thereof.
3. The only references LM could find to the possibility that the Debtor could use some of the proposed individual condominium unit sales proceeds to repay the indebtedness secured by the mortgage held by the City make it clear that the Debtor would have to establish a condominium and achieve a significant sales volume of units for this to occur. Clearly, no condominium has been established, and the necessary threshold of aggregate sales volume was not and will not now be achieved in the receivership.

The Receiver also notes that LM has advised subsequently that it did receive further information and documents from Mr. Weston, but such material does not alter LM's opinion.

Accordingly, based on the information currently available to the Receiver, as described above, the Receiver continues to believe that it was prudent to have consulted with the Applicant, as the primary secured lender, on its views as to the engagement of PWI as consultant to the Receiver, and to consider the Applicant's practical request that the Receiver not expend the time and costs of obtaining competitive quotes. The Applicant would be funding the costs, both through cash advances to the Receiver under the Receiver's Borrowing Authority as well as through a diminution of its ultimate entitlement to distribution from the Receiver of the net sales proceeds (subject to a review of construction lien claims and the Receiver obtaining the approval of this Honourable Court to any distribution of sale proceeds realized from the sale process).

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## 5.0 FACTORS FOR THE ENGAGEMENT OF PWI

As indicated in the First Report and above, the Appointment Order gives the Receiver the authority to retain consultants and advisors to assist it in this receivership administration. Also, as indicated in the First Report, the Receiver requested PWI to attend the initial site visit to the Project on November 13, 2008.

As indicated in the PWI Report dated December 30, 2008 (contained in sealed Volume 2 of the First Report) (the “PWI Report”), PWI identified many challenges with the site on the November 13, 2008 site visit and inspection. PWI representatives were surprised to find that the state of the Project did not appear to have improved since its engagement by the Applicant and the Company prior to the receivership (disclosed in the First Report). Many of these challenges required immediate action. PWI was in the best position to act immediately on the more urgent issues, and as the PWI Report discloses, PWI did so, upon instructions from the Receiver.

The factors that the Receiver believes are important for this Honourable Court to consider in connection with the Receiver’s recommendation that the PWI engagement letter be approved are:

1. As indicated above and in the First Report, City representatives met with representatives of both the Receiver *and* PWI on two prior occasions, on December 11, 2008 and on February 17, 2009. At no time before February 26, 2009 did the City advise of any concerns whatsoever with the engagement of PWI by the Receiver. The only reasons of which the Receiver is aware are based on Mr. Weston’s observations about the lack of a public tender bidding process, such as the City might have done, and the possibility that the City may rank either in priority to or *pari passu* with the Applicant in respect of repayment of its

indebtedness, in whole or in part. The LM opinion does not support the priority or pari passu sharing argument raised by Mr. Weston.

2. PWI was best-positioned on November 12, 2008 to immediately assess and address the urgent needs of the Receiver to preserve and protect the property. As a result of PWI's initial involvement, it gained further knowledge of the Project which made it highly unlikely that any other real estate consultant could react as quickly and knowledgeably as PWI.
  
3. The Receiver does not believe that it is appropriate to attempt to replace PWI at this stage, now that they have been working with the Receiver since November 12, 2008. The Receiver is not aware of any other consultant as knowledgeable in respect of the Project and its details and needs as PWI, and no party has brought forward any other consultant for the Receiver to consider. The cost for a new consultant to duplicate PWI's knowledge of the Project at this time would be substantial. Assuming the costs of learning what PWI already knows about the Property would be built into any quotation from any other real estate consultant, the Receiver believes it is safe to assume that the likelihood of both another firm providing the Receiver with a competitive quotation for the necessary consultant services, **and** of that consultant being able to provide such services on as timely a basis as PWI, is remote.

Moreover, the Receiver could not embark sensibly on the Sales Process without knowing who the permanent property manager and Project consultant is. The Sales Process could not begin until the tendering process was complete and the successful firm,

if it were not PWI, had sufficiently informed itself regarding the Project. Accordingly, the Receiver believes that it must await the decision of the Court regarding the PWI engagement letter prior to embarking on the Sales Process. As a result, the target dates described in the First Report must be pushed back by two weeks. The Receiver believes that it would not be justifiable on any basis to foist the additional costs, and the resultant time delay on the stakeholders, that tendering the consulting contract at this time would create.

4. There is no requirement in the Receivership Order that the Receiver tender the position for any consultant the Receiver wishes to engage.
5. The City has different constituents, stakeholders and requirements than a Court-appointed Receiver. The fact that the City must prove, through a tendering process, that it selected the most low-priced tender for a service to be provided by a local provider, is irrelevant to the Receiver, whose duty is to maximize the recovery of the value of the assets of the Debtor for all stakeholders.
6. PWI is a respected provider of the full range of services required by the Receiver in the proper conduct of this receivership administration. In the brief time the Receiver had to prepare and file the Supplementary Report, the Receiver obtained one independent reference on PWI from Laurentian Bank of Canada (“Laurentian”). Attached hereto as **Exhibit “H”** is the reference letter signed by Mr. N. Greer, Assistant Vice President of Laurentian. Mr. Greer states that PWI:
  - (i) have been providing various services to Laurentian over the past twelve years;
  - (ii) Laurentian has recommended PWI to many of their developer clients;
  - (iii)

Laurentian's experience is that PWI operates in a proficient and professional manner with a high degree of integrity, while maintaining the cost of their services at a very competitive industry level; and (iv) Laurentian has no reservations in recommending PWI.

7. No evidence whatsoever has been submitted by either Mr. Ganatra or Mr. Weston to indicate that the engagement by the Receiver of PWI is either not at prevailing market rates for this type of work or is not a commercially reasonable decision. In the opinion of the Receiver, the engagement of PWI is at prevailing market rates.
8. Mr. Weston is in possession of an appraisal of the Project obtained for the City dated July 7, 2008 which Mr. Weston arranged to provide to the Receiver. Without divulging the contents of that appraisal, the Receiver finds it instructive that Mr. Weston has chosen not to submit a copy of that appraisal to support his submission that it may be the City who will end up funding this receivership administration and not the Applicant. The Receiver, having reviewed both that appraisal, and the LM opinion, submits that is because the appraisal does not support such a position, but rather, supports the Receiver's position.

The Receiver is mindful of the Court's reluctance to provide an Order sealing documents in a Court-appointed receivership administration, unless the Court can be persuaded that such sealing is absolutely necessary and in the best interests of all the stakeholders. As the sealing of documents was a contentious issue in the Receiver's application on February 26, the Receiver has chosen not to submit a copy of that appraisal at this time in a second volume of the Supplementary

Report along with a request that it be sealed. Rather, the Receiver will provide all appraisal information to this Honourable Court as part of any application the Receiver may make for the approval of the sale of the Project.

## 6.0 RECOMMENDATION

For the reasons set out in the Supplementary Report, the Receiver respectfully requests that this Honourable Court approve both this Supplementary Report and the Receiver's engagement of PWI, to assist in the management and sale of the Project, and specifically, the PWI engagement letter contained as Exhibit "D" to the Supplementary Report.

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All of which is respectfully submitted at Toronto, Ontario this 4<sup>th</sup> day of March, 2009.

### **IRA SMITH TRUSTEE & RECEIVER INC.**

solely in its capacity as Court-Appointed Interim Receiver  
and Receiver and Manager of 1539304 Ontario Inc.  
and not in its personal Capacity

Per: \_\_\_\_\_

President

Court File No. CV-08-7714-00CL

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

THE HONOURABLE MADAM )  
JUSTICE PEPALL )  
WEDNESDAY, THE 12<sup>th</sup> DAY  
OF NOVEMBER, 2008

B E T W E E N:

ICICI BANK CANADA

Applicant

- and -

1539304 ONTARIO INC.

Respondent

**APPLICATION UNDER** s. 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3, s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43 and Rules 14.05(2) and (3) (d), (g) and (h) of the *Rules of Civil Procedure*

**ORDER**

**THIS APPLICATION** made by ICICI Bank Canada (the "**Bank**") for an Order pursuant to section 47.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "**CJA**") appointing Ira Smith Trustee & Receiver Inc. ("**Smith**") as interim receiver and receiver and manager (in such capacities, the "**Receiver**") without security, of all of the assets, undertakings and properties of 1539304 Ontario Inc. (the "**Company**") was heard this day at 330 University Avenue, Toronto, Ontario.

**ON READING** the affidavit of Lionel Meunier, sworn September 4, 2008 and the Exhibits thereto, and on hearing the submissions of counsel for the Bank, no other parties appearing although duly served as appears from the affidavit of service of Fiorella Sasso sworn September 10, 2008, and on reading the consent of Smith to act as the Receiver,

*✓ the City of Hamilton + from 1539304  
custains  
me  
870*

### **SERVICE**

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged so that this Application is properly returnable today and hereby dispenses with further service thereof.

### **APPOINTMENT**

2. **THIS COURT ORDERS** that pursuant to section 47.1 of the BIA and section 101 of the CJA, Smith is hereby appointed Receiver, without security, of all of the Company's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Property").

### **RECEIVER'S POWERS**

3. **THIS COURT ORDERS** that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:
  - (a) to take possession and control of the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

- (b) to receive, preserve, protect and maintain control of the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;
- (c) to manage, operate and carry on the business of the Company, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Company
- (d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the powers and duties conferred by this Order;
- (e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Company or any part or parts thereof;
- (f) to receive and collect all monies and accounts now owed or hereafter owing to the Company and to exercise all remedies of the Company in collecting such monies, including, without limitation, to enforce any security held by the Company;
- (g) to settle, extend or compromise any indebtedness owing to the Company;
- (h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Company, for any purpose pursuant to this Order;
- (i) to undertake environmental or workers' health and safety assessments of the Property and operations of the Company;
- (j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Company, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

- (k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
- (l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,
  - (i) without the approval of this Court in respect of any transaction not exceeding \$100,000, provided that the aggregate consideration for all such transactions does not exceed \$200,000; and
  - (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause,

and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act* and subsection 31(1) of the Ontario *Mortgages Act* shall not be required, and in each case the Ontario *Bulk Sales Act* shall not apply;

- (m) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;
- (n) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;
- (o) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;
- (p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Company;
- (q) to enter into agreements with any trustee in bankruptcy appointed in respect of the Company, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Company;
- (r) to exercise any shareholder, partnership, joint venture or other rights which the Company may have; and

(s) to take any steps reasonably incidental to the exercise of these powers; and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Company, and without interference from any other Person.

#### **DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER**

4. **THIS COURT ORDERS** that: (i) the Company, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.
  
5. **THIS COURT ORDERS** that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Company, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to

the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. **THIS COURT ORDERS** that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

#### **NO PROCEEDINGS AGAINST THE RECEIVER**

7. **THIS COURT ORDERS** that no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

#### **NO PROCEEDINGS AGAINST THE COMPANY OR THE PROPERTY**

8. **THIS COURT ORDERS** that that no Proceeding against or in respect of the Company or the Property shall be commenced or continued except with the

written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Company or the Property are hereby stayed and suspended pending further Order of this Court.

#### **NO EXERCISE OF RIGHTS OR REMEDIES**

9. **THIS COURT ORDERS** that all rights and remedies against the Company, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that nothing in this paragraph shall (i) empower the Receiver or the Company to carry on any business which the Company is not lawfully entitled to carry on, (ii) exempt the Receiver or the Company from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien for the purpose of perfecting such lien.

#### **NO INTERFERENCE WITH THE RECEIVER**

10. **THIS COURT ORDERS AND DECLARES** that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Company, without written consent of the Receiver or leave of this Court.

#### **CONTINUATION OF SERVICES**

11. **THIS COURT ORDERS** that all Persons having oral or written agreements with the Company or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Company are hereby restrained until further Order of this Court from discontinuing, altering, interfering

with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Company's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Company or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

### **RECEIVER TO HOLD FUNDS**

12. **THIS COURT ORDERS** that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Interi Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

### **EMPLOYEES**

13. **THIS COURT ORDERS** that all employees of the Company shall be considered the employees of the Company until such time as the Receiver, on the Company's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including wages, severance pay, termination pay, vacation pay, and pension or benefit amounts, other than such amounts as the Receiver may specifically agree in writing to pay,

or such amounts as may be determined in a Proceeding before a court or tribunal of competent jurisdiction.

14. **THIS COURT ORDERS** that that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of current employees only to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**") and for the sole purpose of assisting or facilitating the prospective purchaser's or bidder's negotiations or discussions with said employees in respect of future employment with the prospective purchaser or bidder. Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Company, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

#### **LIMITATION ON ENVIRONMENTAL LIABILITIES**

15. **THIS COURT ORDERS** that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or

relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

#### **LIMITATION ON THE RECEIVER'S LIABILITY**

16. **THIS COURT ORDERS** that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

#### **RECEIVER'S ACCOUNTS**

17. **THIS COURT ORDERS** that any expenditure or liability which shall properly be made or incurred by the Receiver, including the fees of the Receiver and the fees and disbursements of its legal counsel, incurred at the standard rates and charges of the Receiver and its counsel, shall be allowed to it in passing its accounts and shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person (the "**Receiver's Charge**").
18. **THIS COURT ORDERS** that the Receiver and its legal counsel shall pass its 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 Commercial List of the Ontario Superior Court of Justice.

19. **THIS COURT ORDERS** that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

#### **FUNDING OF THE RECEIVERSHIP**

20. **THIS COURT ORDERS** that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed ~~\$800,000~~ <sup>200,000</sup> (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge.

21. **THIS COURT ORDERS** that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

22. **THIS COURT ORDERS** that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as **Schedule "A"** hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.
23. **THIS COURT ORDERS** that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

### **GENERAL**

24. **THIS COURT ORDERS** that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.
25. **THIS COURT ORDERS** that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Company.
26. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.
27. **THIS COURT ORDERS** that that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or



## Schedule "A"

### RECEIVER CERTIFICATE

CERTIFICATE NO. ●

AMOUNT \$ ●

1. THIS IS TO CERTIFY that Ira Smith Trustee & Receiver Inc., the interim receiver and the receiver and manager (the "**Receiver**") of the assets, undertakings and properties of 1539304 Ontario Inc. (the "**Company**") appointed by Order of the Ontario Superior Court of Justice (the "**Court**") dated the 12<sup>th</sup> day of November, 2008 (the "**Order**") made in an action having Court file number CV-08-7714-00CL, has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of \$ ●, being part of the total principal sum of \$ ● which the Receiver is authorized to borrow under and pursuant to the Order.
2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the \_\_\_\_\_ day of each month] after the date hereof at a notional rate per annum equal to the rate of \_\_\_\_\_ per cent above the prime commercial lending rate of Bank of \_\_\_\_\_ from time to time.
3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property (as defined in the Order), in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property (as defined in the Order) as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the \_\_\_\_\_ day of \_\_\_\_\_, 2008.

**IRA SMITH TRUSTEE & RECEIVER INC.**  
solely in its capacity as Receiver of the  
Property (as defined in the Order), and not  
in its personal capacity

Per: \_\_\_\_\_  
Name:  
Title:

**B E T W E E N:**

**ICICI BANK CANADA**  
Applicant

- AND -

**1539304 ONTARIO INC.**

Respondent

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

(PROCEEDING COMMENCED AT TORONTO)

**ORDER**

**GOWLING LAFLEUR HENDERSON LLP**

Barristers & Solicitors  
1600 – 1 First Canadian Place  
100 King Street West  
Toronto, Ontario  
M5X 1G5

**Heath P.L. Whiteley**  
(L.S.U.C. No. 38528P)

Tel: (416) 862-4400  
Fax: (416) 862-7661

Solicitors for the Applicant

Court File No.: CV-08-7714-00CL

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

THE HONOURABLE

)  
)  
)  
)

THURSDAY, THE 26<sup>TH</sup> DAY

JUSTICE PEPALL

OF FEBRUARY, 2009

ICICI BANK CANADA

Applicant

- and -

1539304 ONTARIO INC.

Respondent

APPLICATION UNDER s.47(1) of the *Bankruptcy and Insolvency Act*,  
R.S.C. 1985 c. B-3, s. 101 of the *Courts of Justice Act*, R.S.O. c. C-43 and  
Rules 14.05(2) and (3) (d), (g) and (h) of the *Rules of Civil Procedure*.

ORDER

THIS MOTION, made by Ira Smith Trustee & Receiver Inc., in its capacity as court-appointed interim receiver and receiver and manager (the "Receiver") of all the assets, undertaking and property of 1539304 Ontario Inc. (the "Debtor"), for an order, *inter alia*, approving the First Report of the Receiver dated February 20, 2009, (the "First Report") and the actions and activities of the Receiver as detailed therein, and for an order approving the sales process outlined in the First Report (the "Sales Process") in relation to the assets, undertaking and property of the Debtor was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the First Report of the Receiver and the exhibits thereto, filed, and upon hearing the submissions of counsel for the Receiver, ~~and no one appearing for the other parties~~ *ICICI Bank Canada, the City of Hamilton + Mr Ganatra on behalf of 1539304 Ontario Inc,*

served with the Receiver's Motion Record, although duly served as appears from the affidavit of service of Deborah Russell sworn February 20, 2009:

SERVICE

1. ~~THIS COURT ORDERS~~ that the time for service of the Receiver's Notice of Motion and Receiver's Motion Record herein is abridged, that this motion is properly returnable today, the service, including the manner of service, of the Motion Record is hereby approved and that ~~further service is dispensed with.~~

SVP

FIRST REPORT

2. THIS COURT ORDERS that the First Report and the actions of the Receiver as reported therein be and are hereby approved *with exception of approval of the PwI contract which is adjourned to be addressed later me on March 10, 2009 - unless minimal to 1539304 custans inc to give all the info on cooperation set forth in written*

SVP

3. THIS COURT ORDERS that the Receiver's fees and disbursements from November 13, 2008 to February 15, 2009, and the fees and disbursements of its legal counsel, Lang Michener LLP, from November 11, 2008 to December 17, 2008 and from January 5, 2009 to January 30, 2009, all as detailed in the First Report, be and are hereby approved.

4. THIS COURT ORDERS the Volume 2 of the First Report shall be treated as confidential and shall be sealed, segregated from and not form a part of the public record pending further order of this Court and shall be filed with this Court in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order.

SALE PROCESS

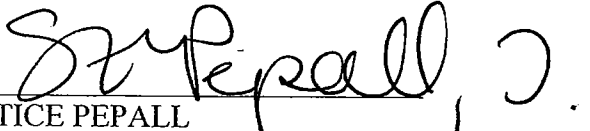
5. THIS COURT ORDERS that the sale process as described in the First Report and as specifically described in Exhibit "F" to the first Report and procedures and conditions contained therein including the Terms and Condition of Sale at Exhibit "G" to the First Report

(collectively, the "Sale Process") is approved, and the Receiver is authorized and directed to implement and to take all steps necessary or desirable to complete and fulfill all requirements, terms, conditions and steps contemplated therein, and any information received by the Receiver or its respective directors, officers, counsel, agents, professional advisors or employees related to or arising from the Sale Process shall be kept confidential and be utilized only for the purposes of the Sale Process and for no other purpose.

6. **THIS COURT ORDERS** that the confidentiality agreement to be executed by all prospective purchasers seeking to participate in the Sales Process, attached as Exhibit "F" to the First Report, is hereby approved.

**FUNDING OF THE RECEIVERSHIP**

7. **THIS COURT ORDERS** that the Receiver's authority to borrow monies for the purpose of funding the exercise of the powers and duties conferred upon it as interim receiver and receiver and manager of the Debtor and the Receiver's Borrowing Charge, both as set out in paragraph 20 of the Order Appointing the Receiver dated November 12, 2008, are hereby amended to increase the Receiver's authority to borrow monies and the Receiver's Borrowing Charge to \$450,000.

  
JUSTICE PEPALL

ENTERED AT / INSCRIT A TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO.:

MAR 02 2009

PER / PAR: 

**B E T W E E N:**

**ICI BANK CANADA**  
Applicant

- AND -

**1539304 ONTARIO INC.**  
Respondent

Court File No. CV-08-7714-00CL

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
(Commercial Court)  
Proceeding commenced at Toronto

**ORDER**

**LANG MICHENER LLP**  
P.O. Box 747, Suite 2500  
Brookfield Place, 181 Bay Street  
Toronto, ON M5J 2T7

**Leslie A. Wittlin**  
Law Society Registration #14629M  
Tel: (416) 307-4087

**Alex Ilchenko**  
Law Society Registration #33944Q  
Tel: (416) 307-4116

**Aaron Rousseau**  
Law Society Registration #53833E  
Tel: (416) 307-4081  
Fax: (416) 365-1719

Lawyers for Ira Smith Trustee &  
Receiver Inc. in its capacity as  
Interim Receiver and Receiver and  
Manager of 1539304 Ontario Inc.



SUPERIOR COURT OF JUSTICE  
 Judges' Administration  
 Court House  
 361 University Avenue, Room 170  
 TORONTO, ONTARIO M5G 1T3  
 Tel: (416) 327-5284 Fax: (416) 327-5417

## FAX COVER SHEET

Date: February 27, 2009

To	Fax No.
H. Whiteley	416 863 3403
R. Weston	1 905 639 8467-8017
L. A. Wittlin and A. Rousseau	416 304 3855
Mr. Ganatra	416 778 5442

From: The Honourable Madam Justice Pepall

Total No. of Pages: 8\_\_ (including cover)

Message:

Re: *ICICI BANK CANADA v. 1539304 ONTARIO INC.*  
 Court File No.: CV-08-7714-00CL

Please see the attached Endorsement.

*The information contained in this facsimile message is confidential information. If the person actually receiving this facsimile or any other reader of the facsimile is not the named recipient, any use, dissemination, distribution, or copying of the communication is strictly prohibited. If you have received this communication in error, please notify us by telephone and return the original message to us at the above address.*

Original will NOT follow. If you do not receive all pages, please telephone us immediately at the above number.

Superior Court of Justice  
Commercial List

FILE/DIRECTION/ORDER

ICICI Bank Canada  
Plaintiff(s)

AND

1539304 Ontario Inc  
Defendant(s)

Case Management  Yes  No by Judge: Pepall

Counsel	Telephone No.:	Facsimile No.:
Messrs W. Hlin + Rousseau		416 - 304 - 3855
Mr Whiteley		416 - 863 - 3603
Mr Weston		905 - 639 - 8107
Mr Ganatra		416 - 778 - 5442

- Order  Direction for Registrar (No formal order need be taken out)  
 Above action transferred to the Commercial List at Toronto (No formal order need be taken out)

- Adjourned to: March 10, 2009  
 Time Table approved (as follows):

The Receiver seeks approval of its first report + its actions described therein, approval of fees, approval of a sales process, an increase of its bonding authority to \$40,000 + a sealing order for vol 2 of its 1st report. The Applicant, ICICI Bank Canada, supports the Receiver's request. The Respondent City of Hamilton complains of the lack of tender for the PWI contract + initially took issue with the proposed sealing order but was able to reach agreement with the Receiver during the course of the motion. I adjourned that portion of the Receiver's motion dealing with approval of the PWI contract to March 10, 09 to permit the Receiver to file additional material. The only remaining party participating + objecting is the debtor, 1539304 Ontario Inc, for whom Mr Ganatra was sounded. Please to speak.

Feb 27, 2009  
Date

[Signature]  
Judge's Signature

Additional Pages 2

Superior Court of Justice  
Commercial List

## FILE/DIRECTION/ORDER

## Judges Endorsement Continued

He too took issue with PWI's contract + I will address that matter on March 10, 09. He also questions certain facts contained in the Receiver's report. He states that information has been provided by him as set forth in paragraphs 3, 2 to 3.6 of his submission; so long as it is not the Co's principal asset; the information on the insolvency is inaccurate. I am not in a position to assess what was or was not given to the Receiver but nothing turns on this issue. Clearly so long as William Street is the principal asset although it may not be the duty asset of the company. Thirdly, the complaint relating to the insolvency of non-cooperation by the company with respect to the insolvency would also appear to be immaterial.

In these circumstances, I am approving the 1<sup>st</sup> report of the Receiver + its actions described therein but not including the PWI contract + without prejudice to 1539304 Ontario Inc to raise the issue of the <sup>appropriateness</sup> of non-cooperation if they become material.

No one takes issue with the proposed sale process. It appears to me to be commercially reasonable + designed to help maximize the value of the assets. The Request for approval is granted.

Under my Grant on behalf of 1539304 Ontario Inc takes exception to the increase to \$40,000 in the Receiver's borrowing authority, it clearly requires that increase to address other costs. The Request is granted.

The Receiver seeks approval of its fees + those of its counsel. No one took issue with them + I am satisfied

Superior Court of Justice  
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsement Continued

that they are appropriate. Details of the work done + roles charged have been included. In haste, the Receiver requests a sealing order for volume 2 of its 1<sup>st</sup> report. It contains PW's report + other reports commissioned by PW. The former assesses the state of the project known as Trinity Landing + which is the subject matter of the sales process + contains recommendations by independent. It is the Receiver's position that it is in the best interests of Stakeholders that disclosure to potential purchasers should be made through the sales process. This ensures a level playing field, no impediment to any participant, protection of sensitive commercial information + the integrity of the process, all for the benefit of Stakeholders. The Receiver has agreed to make a presentation to the City of Hamilton who is allegedly owed approximately \$1.2 million + the Bank who is allegedly owed between \$5 + \$6 million subject to them entering into confidentiality agreements beforehand + on the understanding that no written materials would be provided. Mr. Gammon or an affiliated or related party could be a bidder so that arrangement is unavailable to him. *Sierra Club of Canada v Canada (2002) SCC 51* governs the practice of a confidentiality order. In my view the request should be granted. The order is necessary to prevent serious risk to the commercial interest of maintaining integrity in the sales process + achieving value for all interested stakeholders + the salutary effects outweigh any deleterious effects. The report clearly contains sensitive commercial information + I am persuaded that it should be sealed pending further order by me. I have signed the order amended by me.



7100 Woodbine Avenue  
 Suite 208  
 Markham, Ontario L3R 5J2  
 tel: (905) 477-4507  
 fax: (905) 477-4509

November 17, 2008

e-mail: [pwi@pelicanwoodcliff.com](mailto:pwi@pelicanwoodcliff.com)

Mr. Ira Smith  
 Ira Smith Trustee & Receiver Inc.  
 167 Applewood Crescent  
 Suite 6  
 Concord, Ontario L4K 4K7

Via E-mail: [ira@irasmithinc.com](mailto:ira@irasmithinc.com)

Dear Mr. Smith,

**Re: 80 King William Street**  
**Property Management and Project Management Services**

Further to our meeting at the above Property on November 13, 2008, we are pleased to provide you with our proposal for Property Management and Project Management Services in connection with the Trinity Landing condominium project located at 80 King William Street, Hamilton, ON (the "Property").

The purpose of this letter is to record the terms and provisions of the engagement of Pelican Woodcliff Inc. ("PWI") by Ira Smith Trustee & Receiver Inc. ("ISI" or the "Receiver"), solely in its capacity as Interim Receiver and Receiver and Manager. PWI acknowledges that its retainer by the Receiver is in accordance with the terms of the Order of the Ontario Superior Court of Justice (Commercial List) dated November 12, 2008 (the "Appointment Order") and specifically, paragraph 3(d) of the Appointment Order.

We previously became familiar with the Property while preparing a Peer Review Report for ICICI Bank which dealt with the status of the project at that time and provided an estimate of cost to complete together with recommendation. This report is dated June 25, 2008 and based on our preliminary walk through the building on November 13, there has been no material progress in construction since the time of the report.

Our proposal encompasses the following services:

1. Property Management
2. Project Management
3. Disposition Analysis

## **SCOPE OF WORK**

### **I. Property Management**

Under the role of Property Manager, we will be responsible for the following:

- a) Security of the Property including lock replacement, overseeing patrol company, securing points of entry, installing monitoring devices (if deemed necessary);

- b) Building utilities: ensuring that the building is properly heated and has continuous hydro service;
- c) Insurance coverage: with the receiver, ensuring proper coverage;
- d) Building inspections: Minimum of one visit per week by PWI personnel to ensure that the building remains secure and operational.

## II. Project Management

### 1. Emergency Work

We propose that the following activities take place immediately to reduce the likelihood of further deterioration of the building (emergency work).

- a) Meet with the General Contractor to receive his input on the scope of emergency work;
- b) Meet with Consulting Team (Architect and Engineers, as required);
- c) Assemble all available documentation (from Developer, Consultants, General Contractor);
- d) Prepare a scope of emergency work;
- e) Prepare a cost estimate to complete the emergency items and provide it together with recommendations to the Receiver.
- f) Review bid(s) by contractor(s) and co-ordinate work with chosen contractor.

### 2. Marketing & Sales Review

We propose to conduct:

- a) A review of all the Agreements of Purchase and Sale and prepare a summary of each agreement. This summary will assist the Receiver in deciding which course of action is most appropriate once the Property is stabilized;
- b) A review of the condominium documents;
- c) Meeting with the Sales Agent (Marvin Caplan, Coldwell Banker)

3. Discussions with the City of Hamilton

The City of Hamilton has vested interest in this Property both through its program to revitalize the downtown area and as a Lender to the project. A meeting with the appropriate people (Councilor, Area Planner, etc.) will help us understand the City's position in regard to the project.

4. Disposition Analysis and Implementation

Based on the information gathered through the above activities, we will provide the Receiver with an analysis of the disposition options available and will provide our recommendations. Once a decision is made as to the optimal mode of disposition, we will manage the process in conjunction with the Receiver.

5. Other

Depending on the requirements of the Receiver, we are able to provide additional project management services based on our experience in condominium development projects.

**FEES**

Our fees will be based on the following hourly rates:

Principals	\$250.00 per hour
Associates/Senior Quantity Surveyors/Property Manager	\$170.00 per hour
Quantity Surveyors/Junior Management	\$130.00 per hour
Analyst	\$110.00 per hour

The following are preliminary estimates of the range of potential fees.

I.	Property Management: Ia, Ib and Ic	\$15,000 - \$20,000
	Property Management: Id	\$650/week (based on one visit per week)
II.	Project Management: II 1a, II 1b, II 1c, II 1d, II 1f	\$25,000 - \$30,000
	Project Management: II 1e	\$3,000 - \$5,000
	Marketing & Sales Review: II 2	\$5,000 - \$7,000
	Discussions with City of Hamilton: II 3	Hourly
	Disposition Analysis: II 4	Hourly
	Other: II 5	Hourly

**Note: The above fee ranges are based on a preliminary understanding of the scope of work. We will inform you if the actual fees exceed the upper end of the range by more than 20%.**

## **EXPENSES**

The foregoing fee ranges exclude GST and out of pocket expenses which will be billed in addition

Our invoices will be submitted monthly and are payable within 30 days.

## **OTHER**

PWI is being retained by ISI, solely in its capacity as Court-appointed Interim Receiver and Receiver and Manager of 1539304 Ontario Inc. in connection with the Property ("ISI" or the "Receiver"). The purpose of PWI's retainer is to assist ISI as described above.

This agreement and the terms of PWI's retainer, is subject to the Receiver obtaining the approval of the Ontario Superior Court of Justice (Commercial List) (the "Court") to such Agreement, and is subject to any subsequent Orders of the Court made which may alter or terminate this Agreement.

This Agreement is binding with effect from the date the Court approves the appointment of PWI. It shall remain in effect thereafter, subject to any further Order of the Court affecting this Agreement. The Scope may be altered by the agreement of both parties, subject to Court approval.

PWI will perform the services set out herein as an independent contractor. Nothing contained herein shall be deemed to create any association, partnership, joint venture or to provide either party with the right, power or authority, whether expressed or implied, to create any such duty or obligation on behalf of the other party.

PWI shall comply with all applicable federal, provincial and municipal laws, rules and regulations arising out of or connected with the performance of the services under this Agreement.

PWI acknowledges that it is being retained by ISI, solely in its capacity as the Interim Receiver and Receiver and Manager under the Appointment Order. Any protection granted to ISI by the Appointment Order, or any subsequent Order of the Court, shall also be granted to PWI in performing its duties under this Agreement.

PWI agrees that it must bring to the attention of the Receiver any event which transpires that may lead to any party having a claim against the Property, PWI or the Receiver.

PWI will cooperate and assist the Receiver in the defence of any such claim at the cost of the Receiver.

## **NOTICES**

All notices, requests, demands or other communications (collectively, "Notices") by the terms hereof required or permitted to be given by one party to any other party, or to any

other person shall be given in writing by personal delivery or by registered mail, postage prepaid, facsimile transmission or by electronic mail by such other party as follows:

(a) To ISI: #6-167 Applewood Crescent, Concord, ON L4K 4K7  
Attention: Ira Smith

Fax: 905.738.9848  
Email: [ira@irasmithinc.com](mailto:ira@irasmithinc.com)

(b) To PWI: #208-7100 Woodbine Avenue, Markham, ON L3R 5J2  
Attention: Ronald Mandowsky

Fax: 905.477.4509  
Email: [ronnie@pelicanwoodcliff.com](mailto:ronnie@pelicanwoodcliff.com)

Or at such other address as may be given by such person to the other parties hereto in writing from time to time.

#### **ENTIRE AGREEMENT**

This Agreement constitutes the entire Agreement between the parties with respect to all the matters herein and its execution has not been induced by or do any of the parties rely upon or regard as material, any representations or writings whatever not incorporated herein and made a part hereof and may not be amended or modified in any respect except by written instrument signed by the parties hereto. Any schedules referred to herein are incorporated herein by reference and form part of the Agreement.

#### **CONFIDENTIALITY**

PWI recognizes the confidential nature of this assignment. PWI undertakes that its retainer, and all information obtained by PWI as a result of this retainer, will not be disclosed to third parties unless PWI has first obtained the prior consent of the Receiver to release specific information.

#### **GOVERNING LAW**

This Agreement shall be governed by and construed in accordance to the law of the Province of Ontario and the federal laws of Canada applicable therein and each of the parties hereto agrees irrevocably to conform to the exclusive jurisdiction of the Court.

#### **TRANSMISSION BY FACSIMILE AND EMAIL**


The parties hereto agree that this Agreement, and any other notices to be given under this Agreement, may be transmitted by Facsimile or Email or such similar device and that the reproduction of signatures by facsimile or as contained in Email or such similar device will be treated as binding as if originals and each party hereto undertakes to provide each and every other party hereto with a copy of the Agreement bearing original signatures forthwith upon demand.

We look forward to working with you on this project.

If you are in agreement with this proposal, please sign below and return to this office.

Yours truly,

**PELICAN WOODCLIFF INC.**



Ronald R. Mandowsky  
Principal

RRM/am

**IRA SMITH TRUSTEE & RECEIVER INC.,  
SOLELY IN ITS CAPACITY AS COURT APPOINTED  
INTERIM RECEIVER AND RECEIVER AND MANAGER  
OF 1539304 ONTARIO INC.**

WE ACCEPT THE TERMS OF THIS PROPOSAL

Per: \_\_\_\_\_



President

**Ira Smith**

---

**From:** Ira Smith  
**Sent:** February 27, 2009 10:15 AM  
**To:** [heath.whiteley@gowlings.com](mailto:heath.whiteley@gowlings.com); '[rweston@fdhlawyers.com](mailto:rweston@fdhlawyers.com)'  
**Cc:** Les Wittlin; Aaron Rousseau  
**Subject:** 1539304 Ontario Inc. o/a Trinity Landing

**Importance:** High

Dear Messrs. Weston and Whiteley:

As you know, yesterday, Madam Justice Pepall directed that the Court-appointed Receiver filing a Supplementary Report with the Court no later than March 5, 2009, for a re-attendance in Court on March 10, to provide the Court with additional evidence regarding the Receiver's request for Court approval of the Pelican Woodcliff retainer letter. As you heard, Her Honour wanted to hear more about the economic reasons why the Receiver believes that it is appropriate for the retainer letter to be approved by the Court.

As you also know, prior to yesterday's Court attendance, our Mr. Brandon Smith, along with representatives of Pelican Woodcliff, held two meetings with the City of Hamilton. Mr. Weston was also in attendance at the second meeting. Our notes of both meetings with the City, do not indicate the City having expressed any concern over the retainer of Pelican Woodcliff. Our notes also do not indicate any discussion of the City's view, as described to Her Honour yesterday by Mr. Weston, that their security ranks in some fashion on a *pari passu* basis with that of the Bank.

In order to be able to provide the Court with as much information as possible, we have today instructed Lang Michener to provide us with an opinion on the validity and enforceability of the Bank's security. Such opinion will be included in our Supplementary Report to Court. Mr. Whiteley, I believe that the Bank's motion material for the appointment of the Receiver, and in particular, the Affidavit of Lionel Meunier and the Exhibits thereto, provides the documentation that Lang Michener will require, along with any updated searches they deem necessary to provide such opinion to the Receiver. If you believe that you have any documents in your possession that would be helpful to Lang Michener that is not in the motion material, please have it scanned and emailed to Mr. Aaron Rousseau of Lang Michener today.

Similarly Mr. Weston, please have scanned and emailed to Mr. Rousseau today, any documents you are relying on as the basis of your submissions to the Court yesterday on the City's *pari passu* ranking with the Bank, in whole or in part, so that Lang Michener may review those documents as well for the opinion that they will be providing the Receiver first thing next week. If you are correct that the City ranks *pari passu* for all or a portion of its debt with the Bank, it is essential that Lang Michener be able to report on that to the Receiver also, and for the Receiver to advise the Court accordingly.

The Receiver thanks you both in advance for your anticipated cooperation. If you have any questions, please contact Mr. Wittlin directly. I have copied Messrs. Wittlin and Rousseau on this email, so that you will have their email addresses.



**Ira Smith MBA CA-CIRP**  
President

Suite 6 - 167 Applewood Crescent, Concord, Ontario L4K 4K7

**P:** 905.738.4167 ext. 111

**Toll free:** 1.866.483.NO DEBT (6633)

**F:** 905.738.9848

**E:** [ira@irasmithinc.com](mailto:ira@irasmithinc.com)

[www.irasmithinc.com](http://www.irasmithinc.com)

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Ira Smith

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**From:** Leslie Wittlin [[lwittlin@langmichener.ca](mailto:lwittlin@langmichener.ca)]  
**Sent:** February 27, 2009 7:00 PM  
**To:** [rweston@fdhlawyers.com](mailto:rweston@fdhlawyers.com)  
**Cc:** Ira Smith; [heath.whiteley@gowlings.com](mailto:heath.whiteley@gowlings.com)  
**Subject:** Trinity Landing

Ron:

It is imperative that you provide me forthwith with any documentation whatsoever which your client may have which supports the position you outlined orally in court on Thursday before Justice Pepall that there is or may be some binding agreement in place which permits the City to get some or all of its mortgage loan paid back in priority to or pari passu with the Bank mortgage.

I have now reviewed in detail the Bank security and the priority agreements entered into between the City and the Bank as parties. Both documents are contained in the original Bank application record, and they provide for clear and unequivocal priority in favour of the Bank with respect to its security, to the extent of all amounts advanced thereunder.

The only reference I could find to any monies which might flow to the City would be the Bank agreeing to an allowance of \$25 per square foot from sales of individual condominium units once closed to be used by Trinity Landing to start repaying the City mortgage loan. This reference is briefly outlined at the top of the second page of the mortgage loan commitment given to Trinity Landing by the Bank in 2006 when the Bank issued the commitment. This requires a condominium to be legally established and then for sales of individual units to be closed, both of which events are highly unlikely given the current state of the property.

If your client has no evidence to offer, I hope you will advise me in writing promptly so that I have some idea of what position your client is taking before we are back in court on March 10. Please give me the courtesy of bearing in mind that the Receiver must file its supplementary report by on or before March 5.

Your unexpected appearance on February 26, and the unbacked oral submissions you made came as a complete surprise, especially because I had understood that you and/or your client had already met at some length with the Bank and the Receiver on at least one prior recent occasion, had been brought up to date about the progress of the Receiver with respect to the property, and had not raised any objection whatsoever to the actions being taken in respect of this failed condominium project. While I do understand your client's concern about the sealing of the second volume of the Receiver's first report, leaving it to the time in court to raise made it most difficult to proceed and helped keep us there most of the day when an hour had been anticipated.

Please respond to this note in writing for record purposes and on a timely basis as the Receiver would like to have as complete a supplementary report in place as possible by March 5.

Thank you,

Les.

Leslie A. Wittlin  
Direct Tel - 416-307-4087

Direct Fax - 416-304-3855

Lang Michener LLP

Lawyers - Patent & Trade Mark Agents

Brookfield Place, 181 Bay Street, Suite 2500 Toronto, Ontario, Canada M5J 2T7 Telephone (416) 360-8600 Fax (416) 365-1719 Visit us on the web at [www.langmichener.ca](http://www.langmichener.ca)

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## Lang Michener LLP

Lawyers – Patent & Trade Mark Agents

Brookfield Place, 181 Bay Street, Suite 2500  
P.O. Box 747  
Toronto ON M5J 2T7  
Canada

Telephone: 416-360-8600  
Facsimile: 416-365-1719

Reply to:  
Leslie A. Wittlin  
Direct Tel: 416-307-4087  
Direct Fax: 416-304-3855  
lwittlin@langmichener.ca

March 3, 2009

VIA E-MAIL

Ira Smith Trustee & Receiver Inc.  
167 Applewood Crescent, Suite 6  
Concord, Ontario  
L4K 4K7

Attention: Ira Smith

Dear Ira:

**Re: 1539304 Ontario Inc., carrying on business as Trinity Landing (“Trinity Landing”)  
- Receivership**

Following the remarks of Justice Pepall in Court on Thursday, February 26, 2009 and as requested by you, we have now specifically reviewed the security held by ICICI Bank Canada (the “Bank”) over the property, assets and undertaking of Trinity Landing securing the indebtedness, liabilities and obligations of Trinity Landing to the Bank.

### **Bank Security Review**

According to the Affidavit of Lionel Meunier, the Assistant Vice-President of the Bank, sworn September 4, 2008, Trinity Landing granted the following security to the Bank upon which it relied in seeking your appointment as Receiver:

1. Charge/Mortgage charging the lands and premises known municipally as 80 King William Street, Hamilton, registered as instrument no. WE436883 on December 4, 2006 in the Land Registry Office at Hamilton and subsequently amended (the “Mortgage”).
2. General Security Agreement dated November 29, 2006, notice of which was filed under the *Personal Property Security Act* Ontario (the “PPSA”) as registration no. 2006 1120 1620 1862 4215 (the “GSA”).

We note that there are several other pieces of security obtained by the Bank and perfected under the PPSA relating to the indebtedness, liabilities and obligations of Trinity Landing to the Bank, but which are collateral to the Mortgage and the GSA.

You have asked us to provide you with an opinion as to the validity and enforceability of the Mortgage and the GSA. We have reviewed search certificates from the Land Registry Office

(No. 62) in Hamilton and under the PPSA with a file currency of November 13, 2008, being the day following the issuance of the receivership order made by Justice Pepall.

In reviewing the Mortgage and the GSA, we have relied upon the Affidavit of Lionel Meunier mentioned above confirming that true copies of both documents are contained as Exhibit “B” and Exhibit “C” to his Affidavit.

In expressing our opinions, we have therefore assumed, without further independent verification by us:

- (a) the genuineness of all signatures on, and the authenticity and completeness of the Mortgage and the GSA as true copies thereof;
- (b) the completeness, truth, accuracy and currency of the indices and filing systems maintained by the public offices and registries where we have searched or enquired or have caused searches or enquiries to be made and upon the information and advice provided to us by appropriate government, regulatory or other like officials with respect to those matters referred to herein;
- (c) the accuracy of the description of the collateral contained in the Mortgage and the GSA;
- (d) Trinity Landing has rights in the lands charged by the Mortgage and the property, assets and undertaking charged by the GSA and that value has been given to Trinity Landing by the Bank;
- (e) the indebtedness, liabilities and obligations of Trinity Landing secured by the Mortgage and the GSA were, at all times, legal, valid, binding and enforceable obligations of Trinity Landing;
- (f) Trinity Landing was at the time of authorization, execution and delivery of the Mortgage and the GSA, and is validly constituted and existing under the laws of Ontario, had the corporate power and authority to execute, deliver and perform its obligations under the Mortgage and the GSA, has taken all necessary corporate action to authorize the execution, delivery and the performance of its obligations under the Mortgage and the GSA and has duly executed and delivered each of the Mortgage and the GSA;
- (g) there are no agreements, judgments, rulings, instruments, facts or understandings affecting or concerning either of the Mortgage or the GSA or the principal obligations with respect to which each security has been granted, or statutory or regulatory prohibitions on the execution and delivery of any of the Mortgage or the GSA or the security interests granted thereunder by Trinity Landing which were not apparent from a review of each security and which would or might affect the validity or enforceability thereof;

