Court No. 31-2747949

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF GROSS CAPITAL INC.,
of the City of Toronto, in the Province of Ontario

FACTUM OF KSV RESTRUCTURING INC., IN ITS CAPACITY AS LICENSED INSOLVENCY TRUSTEE.

(Returnable on March 2, 2023)

February 21, 2023

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PART I – OVERVIEW

1. This factum is filed pursuant to section 205(1) of the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**"). This section of the BIA imposes a statutory duty on KSV Restructuring Inc. ("**KSV**"), in its capacity as the Licensed Insolvency Trustee (the "**Bankruptcy Trustee**") of Gross Capital Inc. (the "**Bankrupt**"), to report any matter to Court if there are grounds to believe that an offence has been committed with respect to the Bankrupt's estate.

2. The Bankruptcy Trustee seeks an Order:

   (a) approving its First Report dated October 31, 2022 (the "**First Report**") and the actions and activities of the Bankruptcy Trustee and its counsel described therein;

   (b) timetabling an advice and directions motion to determine whether there are grounds to believe that Mark and/or Sheldon Gross is guilty of a bankruptcy offence, and, if there are such grounds, whether the Bankruptcy Trustee ought to proceed to initiate proceedings for prosecution, or whether such a decision should be deferred until later in this bankruptcy proceeding;

(c) in the interim, directing Mark and Sheldon Gross to cause the audited sum of $453,240 (the "**Audited Indebtedness**") to be released to the Bankruptcy Trustee from the pool of over $1 million that is being held in trust by Fogler Rubinoff LLP ("**Fogler**") on behalf of Gross Medical Opportunities Fund (the "**Trust Fund**");

(d) dismissing the purported cross-motion of Mark Gross in its totality (which seeks, amongst other things: (i) the removal of the Bankruptcy Trustee, its counsel and the inspectors; (ii) the cross-examination of the Bankruptcy Trustee and the inspectors; and (iii) costs against the Bankrupt's estate); and

(e) costs in favour of the Bankrupt's estate.

PART II - FACTS

3. The Bankrupt was a real estate investment firm, which identified, invested in and managed commercial real estate assets on behalf of investors. Its estate owns several nominee entities (collectively, the "**Nominees**"). The Nominees are (or, as applicable, were) registered owners of real property, as nominee for and on behalf of co-tenants.

First Report of the Bankruptcy Trustee dated October 31, 2022 [First Report] at section 2.0.

4. At all relevant times, the Bankrupt's directors and officers were Mark and Sheldon Gross. Mark Gross is Sheldon Gross' son.

First Report, *supra* at section 2.0.

5. On or around June 29, 2021, certain stakeholders of the Bankrupt and its related parties commenced a Court application (the "**Original Application**") naming Mark and Sheldon Gross, the Bankrupt and other parties as respondents. The Application was the result of accusations made by investors of misappropriation of investor funds by Mark Gross, Sheldon Gross and/or entities controlled by them.

First Report, *supra* at section 2.1.

6. Four days before the Original Application was issued, Mark Gross assigned the Bankrupt into bankruptcy.

First Report, *supra* at sections 2.0 and 2.1.
Affidavit of Mark Gross affirmed January 10, 2023 [Gross Affidavit] at para. 28.

7. Mark Gross was the "*designated officer*" for the purpose of filing the bankruptcy assignment. He swore the Bankrupt's statement of affairs and provided the Bankruptcy Trustee with the information required to file the assignment. He also executed a standard notice, acknowledging his duties as the "*designated officer*" in the bankruptcy proceeding. KSV's appointment as the Bankruptcy Trustee was then affirmed by the Bankrupt's creditors at the first meeting of creditors on July 15, 2021.

First Report, *supra* at sections 2.0, 2.1 and 5.0 and Appendix "O" thereto.
Gross Affidavit, *supra* at para. 28.

8. Notwithstanding the Bankrupt's bankruptcy, certain stakeholders continue to bring their own proceedings against Mark and Sheldon Gross and other connected parties (including the Bankrupt, subject to the lifting of the stay of proceedings). The Bankruptcy Trustee is aware of:

(a) the Original Application (which, to date, has resulted in the Court granting leave to register Certificates of Pending Litigation on certain real property);

(b) on July 28, 2021, certain creditors commencing an action against Mark and Sheldon Gross, the Bankrupt, multiple Nominees and other connected entities, alleging, in substance, "*fraudulent misrepresentation and deceit, conspiracy, conversion, negligence, negligent misrepresentation, breach of contract, and unjust enrichment*;"

(c) on September 1, 2021, other creditors commencing an action against Mark and Sheldon Gross, multiple Nominees and other connected entities, alleging, according to the Court, that Mark Gross "*assumed direct fiduciary duties to beneficial owners of [certain] properties (including the plaintiffs) and breached those fiduciary duties, that he (and Sheldon Gross) used [the Bankrupt and another connected entity] as fraudulent sham corporations, and that he personally made fraudulently [sic] misrepresentations to the plaintiffs*;"

(d) on October 6, 2021, other creditors commencing an action against Mark and Sheldon Gross, the Bankrupt and their agent, making similar allegations as set out in the July 28, 2021 action;

(e) on September 16, 2022, one of the Nominees (200 Ronson Drive Inc., which owns the property from which the Bankrupt previously operated) commencing an action on behalf of 50 co-tenants against Mark and Sheldon Gross and other connected parties, alleging, in substance, "*breach of trust, fraud, and inducing breach of contract*;"

(f) on January 20, 2023, another Nominee (40 King West Holdings Inc.) commencing an action on behalf of 31 co-tenants against Mark and Sheldon Gross, the Bankrupt and other connected parties, alleging, in substance, "*breach of contract, breach of fiduciary duty, breach of trust, knowing assistance, knowing receipt, self-dealing, fraud and/or breach of the duty of fair dealing and good faith;*" and

(g) at least seven separate bankruptcy proceedings and three separate receivership proceedings in respect of Nominees or other Bankrupt-related entities. Schedule "C" of this factum lists these proceedings (as stated in the Most Recent Lift Stay Order).

First Report, *supra* at sections 2.1 and 5.0 and Appendices "E" and "P" thereto.

Statement of Claim issued on July 28, 2021 in CV-21-00666297-0000 at para. 2, posted to Caselines Bundle for February 8, 2023 in this bankruptcy proceeding.

***Xie v. Gross*, 2022 ONSC 7343 (CanLII: https://canlii.ca/t/jtp0c) at para. 9.**

Statement of Claim issued on October 6, 2021 in CV-21-00669858-0000 at para. 2, posted to Caselines Bundle for February 8, 2023 in this bankruptcy proceeding.

Statement of Claim issued on January 20, 2023 in CV-23-00693283-0000 at para. 1.

Order of The Honourable Madam Justice Kimmel dated February 8, 2023 [Most Recent Lift Stay Order] at Schedule "B" thereto.

BIA, s. 190.

9. As part of its mandate, the Bankruptcy Trustee is investigating the pre-bankruptcy affairs of the Bankrupt. This investigation was commenced due to, amongst other things, the allegations made in the Original Application (and similar allegations in the subsequent proceedings listed above). In accordance with directions received from the inspectors of the Bankrupt's estate, the Bankruptcy Trustee has examined several parties believed to have knowledge of the Bankrupt's affairs pursuant to section 163 of the BIA. In due course, the Bankruptcy Trustee intends to examine additional parties under this section of the BIA, including, without limitation, Mark and Sheldon Gross.

First Report, *supra* at section 2.0.

BIA, *supra*, s. 163.

10. The Bankruptcy Trustee is also aware that, on July 21, 2021, the Ontario Securities Commission (the "**OSC**") issued a summons to Mark Gross requiring him, as one of the two directors and directing minds of the related exempt market dealer Gross Securities Corp. ("**Gross Securities**"), to attend an examination under oath "*to explore certain issues raised by the [Original] Application to ascertain whether they impugned the suitability of Gross Securities for ongoing registration, or would make its registration otherwise objectionable.*" Rather than attend at the examination, Mark Gross agreed with the OSC not to object or contest a decision to suspend Gross Securities' registration, which suspension was so ordered on October 15, 2021.

> ***In the Matter of the Registration of Gross Securities Corp.*** **(OSC Website: oth_20211021_gross.pdf (osc.ca)).**

11. As at the date of the Bankruptcy Trustee's First Report (October 31, 2022), there have been 152 proofs of claim filed with the Bankruptcy Trustee in the aggregate amount of approximately $51.6 million. There are approximately $2.6 million in the Bankruptcy Trustee's estate account.

> **First Report, *supra* at section 2.0.**

The Trust Fund

12. In addition to being the Bankrupt's directors and officers, Mark and Sheldon Gross are also the sole trustees of the Trust Fund (which is not bankrupt) called Gross Medical Opportunities Fund.[1] The Trust Fund is an unincorporated, open-ended investment trust, and a "*mutual fund trust*" for tax purposes.

> **First Report, *supra* at sections 1.0 and 3.0.**
>
> **Offering Memorandum of the Trust Fund dated May 25, 2017 (filed on SEDAR on July 21, 2017), Appendix "F" to the First Report, *supra* [Most Recent Offering Memorandum].**

[1] Certain documents refer to the Trust Fund as the "Trust" (or the "Fund") and the Bankruptcy Trustee as the "Trustee." For greater certainty, the Bankruptcy Trustee is not the trustee of the Trust Fund.

13. The Trust Fund's Most Recent Offering Memorandum confirms that:

(a) the Trust Fund is the sole holder of the Class A limited partnership units of Gross Medical Opportunities Fund LP (the "**Limited Partnership**");

(b) holding companies controlled by Mark Gross, Sheldon Gross and Justin Di Ciano[2] hold all the Class B limited partnership units of the Limited Partnership; and

(c) Mark and Sheldon Gross are: (1) the trustees of the Trust Fund; (2) control the Limited Partnership's general partner, Gross Medical Opportunities Fund GP Inc. (the "**General Partner**"); and (3) control the now-OSC-suspended Gross Securities, which is featured on the front page of the Most Recent Offering Memorandum and was expected to sell "*the majority, if not all, of the Trust Units*" to investors.

First Report, *supra* at section 3.0.

14. The Trust Fund's investment objectives are described in the Most Recent Offering Memorandum, and include:

(a) to "*indirectly acquire, own and lease through the Limited Partnership a portfolio of medical related revenue-producing commercial real estate properties ("**Properties**") in the Province of Ontario and elsewhere in Canada*;" and

(b) to "*make distributions of Cash Flow of the Trust [Fund] to Trust Unitholders resulting indirectly from the revenue produced by the Properties acquired by the Limited Partnership*."

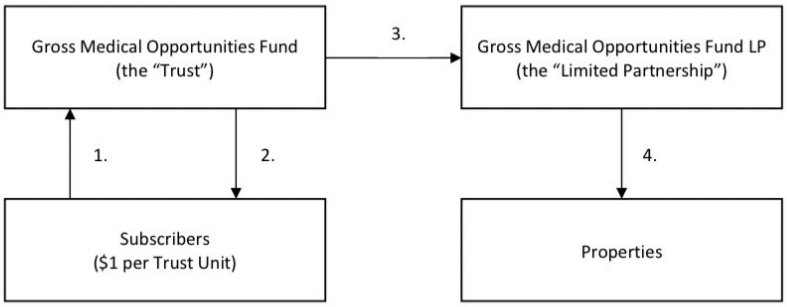
First Report, *supra* at section 3.0.

[2] The Most Recent Offering Memorandum states that Justin Di Ciano is a former trustee of the Trust Fund. The Bankruptcy Trustee understands that Justin Di Ciano also became the day-to-day operator of Prime Real Estate Group Inc. ("**Prime**") subsequent to the date of the Most Recent Offering Memorandum. Per page 15 of the Most Recent Offering Memorandum, "*The Limited Partnership may contract with a related party, Prime, to manage the ongoing day-to-day management of the Properties*." Both Mark Gross and Sheldon Gross are Prime's registered directors.

15. The Most Recent Offering Memorandum contains multiple diagrams illustrating the relationship and flow of funds between and amongst the Trust Fund, the Limited Partnership, the General Partner, the Properties, Prime (being the manager of one of the Properties) and the unitholders/subscribers of the Trust Fund. Three of these diagrams are reproduced directly below and on the next page of this factum, together with the explanatory notes that accompanied these diagrams in the Most Recent Offering Memorandum:

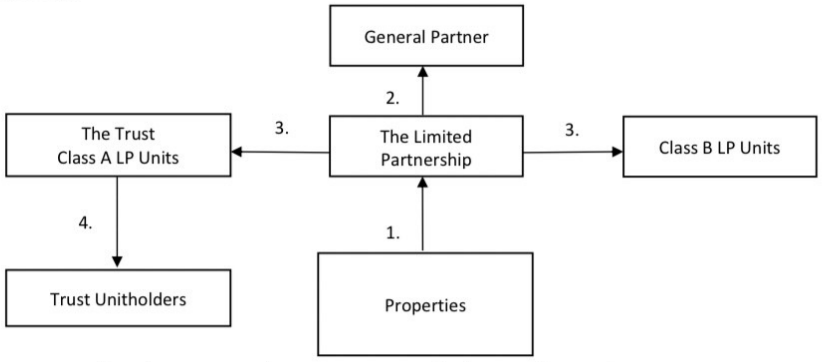
Investment Flow Charts

The following chart represents the proposed use of subscription proceeds of this Offering by the Trust and the Limited Partnership in the acquisition of the Properties:



1. Subscribers to this Offering advance subscription funds to the Trust using funds from Deferred Plans or cash.
2. The Trust issues Trust Units to Subscribers.
3. The Trust uses the Available Funds from this Offering to purchase Class A LP Units in the Limited Partnership.
4. The Limited Partnership uses funds received from the Trust, after the payment of the Offering costs and Selling Commissions associated with this Offering, to acquire Properties.

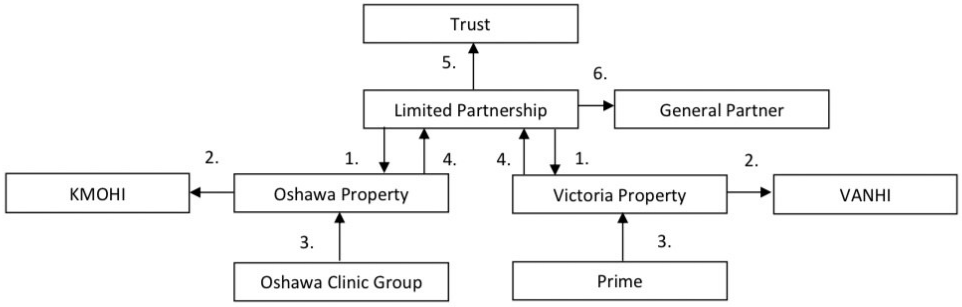
The following chart represents the proposed distribution of funds from the acquisition of the Properties to holders of LP Units and Trust Units:



1. Revenue arising from the acquisition of Properties is received by the Limited Partnership.
2. The Limited Partnership pays the Management Fee to the General Partner.
3. The Limited Partnership makes a distribution of Distributable Cash to the Limited Partners of the Limited Partnership pursuant to the terms of the Limited Partnership Agreement.
4. The Trust makes a distribution of Cash Flow of the Trust to the Trust Unitholders.

Investment Chart with respect to the Oshawa and Victoria Properties

The following is an illustration of the relationship between the Trust, the Limited Partnership and the Partnership Interest in the Oshawa and Victoria Properties:



1. The Limited Partnership owns a 12.5% Co-Tenancy Interest in the Oshawa Property and a 4.8564% interest in the Victoria Property.
2. Title to the Oshawa Property is held in the name of KMOHI and title to the Victoria Property is held in the name of VANHI.
3. Oshawa Clinic Group is the Property Manager of the Oshawa Property. Prime is the Property Manager of the Victoria Property.
4. The Limited Partnership's share of income from the Oshawa Property and the Victoria Property is distributed to the Limited Partnership by the managers of the respective properties.
5. The Limited Partnership distributes the above funds to investors as Cash Flow of the Trust after payment of the operating expenses of the Trust and the Limited Partnership.
6. The Limited Partnership pays the Victoria Asset Management Fee to the General Partner on a quarterly basis from the funds referenced in point 4 above.

16. As noted in explanatory note #5 in the above diagram, and as noted elsewhere in the Most Recent Offering Memorandum, the operating expenses of ***both*** the Trust Fund and the Limited Partnership are to be paid before investors of the Trust Fund are entitled to receive monetary distributions.

First Report, *supra* at section 3.0.

17. In this regard, the Most Recent Offering Memorandum specifically cautions (amongst many other risk factors) that:

(a) "*the ability of the Trust [Fund] to redeem the Trust Units is dependent on the distributions it receives from the Limited Partnership;*" and

(b) "*If the Trust [Fund] defaults in the repayment of any indebtedness that it may incur, the creditors holding such indebtedness will be entitled to exercise available legal remedies against the Trust [Fund]. There is no assurance that*

there will be assets available to recover any portion of a Trust Unitholder's investment."

First Report, *supra* at section 3.0.

Most Recent Offering Memorandum, item 8, subsections entitled "Default on Indebtedness – The Trust" and "Sole Asset of the Trust."

Audited Consolidated Obligations of the Trust Fund to the Bankrupt

18. The Trust Fund's most recent audited consolidated financial statements are for the period ended December 31, 2019 (the "**Most Recent Audited Consolidated Financial Statements**"). The Most Recent Offering Memorandum also includes the Trust Fund's historical audited consolidated financial statements for the periods ended December 31, 2015 and December 31, 2016 (together with the Most Recent Audited Consolidated Financial Statements, the "**Audited Consolidated Financial Statements**").

First Report, *supra* at section 4.0 and Appendix "G" thereto.

19. The Audited Consolidated Financial Statements state on their face that they were:

(a) audited by Segal LLP, a Toronto-based licensed accounting firm;

(b) "*approved by the Trustees*" (being Mark Gross and Sheldon Gross); and

(c) prepared on a consolidated basis, in that they "*include the accounts of the Trust [Fund] and the [Limited] Partnership. The Trust [Fund] owns 100% of the Class A LP units of the [Limited] Partnership. All inter-company accounts and transactions have been eliminated on consolidation.*"

First Report, *supra* at section 4.0.

20. Amongst other things, the balance sheets in the Audited Consolidated Financial Statements reflect two line items of current liabilities owing to the Bankrupt by the Trust Fund on a consolidated basis (i.e., inclusive of the Limited Partnership), as follows:

(a) first, an amount described as "*Due to Gross Capital Inc. [i.e., the Bankrupt]*," which is "*unsecured, non-interest bearing and due on demand*." The balance sheet in the Most Recent Audited Consolidated Financial Statements reflects this obligation in the amount of $453,240, which is the Audited Indebtedness that has given rise to this motion; and

(b) second, an amount described as "*Loan from Gross Capital Inc. (Co-tenancies)*," which is "*unsecured, bear[s] interest at 9% per annum and [is] due on demand*." The balance sheet in the Most Recent Audited Consolidated Financial Statements reflects this obligation in the amount of $189,904 (the "**Audited Co-Tenancies Amounts**"). Given the reference to the co-tenancies, the Audited Co-Tenancies Amounts are not part of the Bankruptcy Trustee's motion at this time.

First Report, *supra* at section 4.0.

Grounds to Believe that an Offence under the BIA Has Occurred

21. On March 8, 2022, Mark Gross' counsel (Tyr LLP) advised the Bankruptcy Trustee that Mark Gross believed certain monies reflected in the Most Recent Audited Consolidated Financial Statements were not owing to the Bankrupt. The following day, the Bankruptcy Trustee sent a follow-up email, attaching the Most Recent Audited Consolidated Financial Statements and asking for an explanation from Mark Gross as to why such monies would not be owing.

First Report, *supra* at section 5.0 and Appendix "H" thereto.

22. On March 22, 2022, the Bankruptcy Trustee received a responding letter from Mark Gross' counsel, marked "*without prejudice*."

First Report, *supra* at section 5.0.
Gross Affidavit, *supra* at para. 9 and Exhibit "D" thereto.

23. Not satisfied with the content of this "*without prejudice*" response, the Bankruptcy Trustee proceeded to made formal demand on the Trust Fund in respect of both the Audited Indebtedness and the Audited Co-Tenancies Amounts on April 11, 2022.

First Report, *supra* at section 5.0 and Appendix "I" thereto.

24. On April 18, 2022, counsel for Mark Gross advised that it was also now representing the Trust Fund and provided a formal response to the Bankruptcy Trustee's demand. The response contained the following positions that the Bankruptcy Trustee considers to be untenable:

(a) a purported undocumented intention between the common management of the Trust Fund and the Bankrupt (i.e., Mark Gross and himself) that "*the amounts owing directly from [the Trust Fund] to the Bankrupt, if any, would not become due and payable until the unitholders of [the Trust Fund] were ensured that their principal would be returned to them*" (i.e., equity somehow gets repaid before the debt owing to the Bankrupt), when, in fact, both the Most Recent Offering Memorandum and the Audited Consolidated Financial Statements confirm the exact opposite (i.e., the debt owing to the Bankrupt gets repaid in priority to investors' equity in the Trust Fund);

(b) "*the financial statements of [the Trust Fund] were prepared for the purposes of [the Trust Fund] for its own internal reporting purposes*," when, in fact, the Trust Fund's prior years' audited financial statements are appended to the Trust Fund's offering memoranda (the "**OMs**") made available to the investing public. These

OMs (including the Most Recent Offering Memorandum) contain certificates from Mark Gross and Sheldon Gross certifying that the OMs do "*not contain a misrepresentation*;" and

(c) accusing the Bankruptcy Trustee of "*attempting to get execution before judgment by interfering with the [Trust Fund]'s relationship with its counsel, Fogler, by writing to them directly and asking them not to give [the Trust Fund] its own money*" and purporting to reserve "*all rights with respect to any damages arising from the [Bankruptcy] Trustee's attempt to prevent [the Trust Fund]'s counsel from transferring [the Trust Fund]'s funds to it*," when, in fact, the Bankruptcy Trustee did no such thing (as is evident on the face of the demand letter).

First Report, *supra* at section 5.0 and Appendix "J" thereto.

25. The Bankruptcy Trustee, via its counsel, identified the aforementioned concerns to counsel for Mark Gross and the Trust Fund by way of a reply letter dated April 22, 2022, which included a reminder of the duties owed under the BIA. A response was received on May 1, 2022, but did not modify or retract the positions of concern identified by the Bankruptcy Trustee. Indeed, the response continued to advance the theory that investors of the Trust Fund are entitled to a return of their equity investment in priority to the debt owing to the Bankrupt, and that their clients' concern was "*ensuring that [the Trust Fund]'s investors are not disadvantaged by the clever arguments raised after the fact that do not reflect the understanding and intention between those entities at the time*."

First Report, *supra* at section 5.0 and Appendices "K" and "L" thereto.

26. Subsequent without prejudice discussions and communications over several months amongst the Bankruptcy Trustee, its counsel and counsel for Mark Gross and the Trust Fund did not result in a modification or retraction of the positions of concern identified by the Bankruptcy Trustee.

First Report, *supra* at section 5.0.

27. In light of the foregoing, the Bankruptcy Trustee could not identify any legitimately arguable basis put forward by the Trust Fund entitling it to withhold any of the Audited Indebtedness from the Bankruptcy Trustee (despite giving the Trust Fund multiple opportunities to explain). Accordingly, the Bankruptcy Trustee concluded that its duty pursuant to section 205(1) of the BIA had been triggered, requiring the Bankruptcy Trustee to report this matter to Court.

First Report, *supra* at sections 1.0 and 5.0.
BIA, s. 205(1).

Procedural History

28. On August 24, 2022, the Bankruptcy Trustee served its notice of motion on counsel for Mark Gross and the Trust Fund, advising that the First Report would be provided once it was ready and enquiring whether Sheldon Gross was also being represented by the same counsel.

Bankruptcy Trustee's Notice of Motion dated August 24, 2022.
First Report, *supra* at section 1.0 and Appendix "M" thereto.

29. On September 21, 2022, Tyr LLP wrote to the Bankruptcy Trustee's counsel (without addressing the enquiry regarding Sheldon Gross). In substance, the letter:

(a) refers to the Trust Fund in quotation marks, as if it does not exist (despite Tyr LLP representing the Trust Fund), falsely substitutes the General Partner for the Trust Fund and then purports to advise that the Limited Partnership "*cannot pay the amounts owing to [the Bankrupt] by a different entity, [the General Partner];*"

(b) offers payment, for the first time, of the full amount owing by the Limited Partnership only, being $355,357 (i.e., approximately $100,000 less than the Audited Indebtedness owing by the Trust Fund and the Limited Partnership at the consolidated Trust Fund level);

(c) fails to acknowledge the existence of the Audited Indebtedness owing on a consolidated basis at the Trust Fund level (which, as set out in the Audited Consolidated Financial Statements that Mark Gross and Sheldon Gross approved, constitute "*Liabilities before net assets attributable to redeemable Trust Unitholders*"); and

(d) fails to acknowledge the express responsibility of the Limited Partnership in the Most Recent Offering Memorandum (which Mark Gross and Sheldon Gross also certified) that the "*Limited Partnership distributes the above funds [in the last diagram on page 5 of this factum] to investors as Cash Flow of the Trust [Fund]* ***after payment of the operating expenses of the Trust [Fund] and the Limited Partnership***" [emphasis added].

First Report, *supra* at section 5.0 and Exhibit "N" thereto.

30. On October 31, 2022, the Bankruptcy Trustee served its motion record, inclusive of the First Report. The Bankruptcy Trustee and Tyr LLP then agreed upon a timetable, which was reflected in the Endorsement of The Honourable Madam Justice Kimmel dated December 6, 2022. Her Honour directed that the parties adhere to this timetable.

Endorsement dated December 6, 2022 [Endorsement].

31. On January 10, 2023, Tyr LLP served a purported "*Responding and Cross Motion Record of Mark Gross*." Tyr LLP did not previously advise that it intended to bring a cross-motion, and, as such, the agreed upon Endorsement did not contemplate a cross-motion. The purported cross-motion seeks, in substance, an Order:

(a) removing the Bankruptcy Trustee, and appointing a substitute bankruptcy trustee;

(b) removing the Bankruptcy Trustee's counsel, or, in the alternative, ordering that the Bankruptcy Trustee's counsel "*no longer act on any matter directly or indirectly concerning Mark Gross*;"

(c) removing the inspectors of the Bankrupt's estate;

(d) requiring the Bankrupt's estate "*to pay the full indemnity costs of Mark Gross and for advice and direction with respect to the conduct of [the Bankruptcy Trustee and its counsel]*;

(e) authorizing the cross-examination of the Bankruptcy Trustee, and, in the alternative, of the inspectors of the Bankrupt's estate;

(f) declaring that only $355,357 is owing from the Limited Partnership to the Bankrupt; and

(g) declaring that Mark Gross is not guilty of an offence under the BIA.

Purported Notice of Cross Motion of Mark Gross dated January 10, 2023.

32. Mark Gross' materials: (i) make multiple unsubstantiated and patently false allegations against the Bankruptcy Trustee, its counsel and the inspectors (including, without limitation, that these parties "*are no longer in a position where they can be trusted with the administration of the estate,*" are "*not interested in carrying out their duties … in a bona fide way*" and are

"*threaten[ing]*" and "*coercing*" him with "*criminal or quasi-criminal sanction*" and asking him "*to violate the duties [he] owe[s]*"); (ii) attach multiple communications that his counsel had previously marked "*without prejudice*;" and (iii) repeat the same untenable positions regarding the Audited Indebtedness as put forward in the previous communications from Mark Gross' counsel.

> **Purported Notice of Cross Motion of Mark Gross dated January 10, 2023.**
> **Gross Affidavit, *supra* at paras. 13, 17, 19, 22, 25-33.**

33. Substantively, nowhere in Mark Gross' materials is there any attempt to address or acknowledge what is owing to the Bankrupt by the Trust Fund (as opposed to what is owing by just the Limited Partnership). Moreover, the communications marked "*without prejudice*" provide further insight into how and why the Bankruptcy Trustee arrived at its views and concerns.

PART III – ISSUES

34. The interconnected issues to adjudicate at this time are the requested:

(a) approval of the First Report and the actions and activities of the Bankruptcy Trustee and its counsel described therein;

(b) timetabling of an advice and directions motion to determine whether there are grounds to believe that Mark and/or Sheldon Gross is guilty of a bankruptcy offence, and, if there are such grounds, whether the Bankruptcy Trustee ought to proceed to initiate proceedings for prosecution, or whether such a decision should be deferred until later in this bankruptcy proceeding;

(c) interim direction to release the Audited Indebtedness to the Bankruptcy Trustee;

(d) dismissal of the purported cross-motion of Mark Gross in its totality; and

(e) costs.

PART IV – LAW AND ARGUMENT

35. Section 158 of the BIA imposes multiple duties on a bankrupt. Pursuant to this section, "*A bankrupt* ***shall***" (amongst other things) [emphasis added]:

(a) "*make discovery of and deliver all his property that is under his possession or control to the trustee or to any person authorized by the trustee …;*"

(b) "*make or give all the assistance within his power to the trustee in making an inventory of his assets;*"

(c) "*aid to the utmost of his power in the realization of his property and the distribution of the proceeds among his creditors;*" and

(d) "*generally do all such acts and things in relation to his property and the distribution of the proceeds among his creditors as may be reasonably required by the trustee …*"

BIA, *supra*, s. 158(a), (e), (k) and (o).

36. The BIA further provides that, where a bankrupt is a corporation (i.e., the Bankrupt), the officer executing the assignment in bankruptcy (i.e., Mark Gross) or such other officer of the corporation or person who factually controlled the corporation (i.e., Mark and/or Sheldon Gross) "*shall perform all of the duties imposed on a bankrupt by section 158.*"

BIA, *supra*, ss. 159 and 198(2).

37. Section 205(1) of the BIA imposes a statutory duty on the Bankruptcy Trustee to report any matter to Court if there are grounds to believe that an offence under the BIA has been committed, including, without limitation, the Bankrupt's officers or controlling persons failing to do any of the things required of them pursuant to sections 158 and 159 of the BIA.

BIA, *supra*, s. 205(1).

***Bresssi (Trustee of) v. 1418146 Ontario Inc.* (2003), 44 C.B.R. (4th) 178 (Ont. S.C.J. [Comm. List, Greer J.]) (CanLII: https://canlii.ca/t/6m71) [*Bressi*] at para. 31.**

38. Given the multiple opportunities that the Bankruptcy Trustee gave Mark and Sheldon Gross to either: (i) acknowledge that the Audited Indebtedness is due and owing; or (ii) put forward some explanation with an air of reality as to why the Bankruptcy Trustee is mistaken, the Bankruptcy Trustee came to the conclusion by late August 2022 that its duty under section 205(1) of the BIA had been triggered, requiring the Bankruptcy Trustee to report this matter to Court.

First Report, *supra* at section 5.0.

BIA, *supra*, ss. 2 ("property"), 67, 158, 159, 198(2) and 205(1).

39. In arriving at this conclusion, the Bankruptcy Trustee is mindful of the comments of The Honourable Mr. Justice Penny in *TRP Realty*, which bear a striking factual similarity to the Audited Consolidated Financial Statements of the Trust Fund (and the steps taken by its trustees and auditors):

> [50] There is a gravity and a formality to the presentation of audited financial statements which transcends ambiguity or inference. TRP Realty's management (Mr. Gidamy) was required to represent and confirm to the auditors that the information provided was accurate and not misleading. The auditors performed a review of the books and records of TRP Realty and provided a professional opinion that the financial statements fairly represent the financial position of TRP Realty. These financial statements were approved by the TRP Realty Board of Directors.
>
> [51] What could be a clearer statement of TRP Realty's intention than the representations to the world in its audited financial statements … ?

***Firepower Debt GP Inc. v. TheRedPin, Inc.*, 2018 ONSC 7182 [Comm. List] (CanLII: https://canlii.ca/t/hwwzk) [*TRP Realty*] at paras. 50-51, aff'd 2019 ONCA 903 (CanLII: https://canlii.ca/t/j3dd4).**

40. The Bankruptcy Trustee is concerned about the shifting, inconsistent, ungrounded and undocumented positions communicated on behalf of the Trust Fund (and Mark Gross, in particular) to the Bankruptcy Trustee when compared with the objective "*representations to the world in [the Trust Fund's] audited financial statements*" (and OMs). These positions can be categorized into four broad chronological periods:

(a) initially, prior to being presented with the Audited Consolidated Financial Statements, Mark Gross did not identify the existence of the Audited Indebtedness at all (be it when he swore the Bankrupt's statement of affairs, or otherwise);

(b) when he was presented with the Audited Consolidated Financial Statements, Mark Gross then acknowledged that some amount may be owing, but claimed that the Audited Consolidated Financial Statements were meant for internal purposes only, and that the real intention was undocumented and was for any such debt to be postponed to investors' equity in the Trust Fund;

(c) when he was presented with the Most Recent Offering Memorandum posted to SEDAR, inclusive of the Audited Consolidated Financial Statements, the without prejudice communications appended to Mark Gross' materials reflect that he then asked the Bankruptcy Trustee to compromise more than half of the Audited Indebtedness (now agreeing to pay the remaining balance in priority to investors' equity in the Trust Fund), failing which he would "*resign his positions from [the Trust Fund], and new trustees and managers will be appointed who will have to decide what approach to take*," which resignation has evidently not occurred; and

(d) when he was served with the Bankruptcy Trustee's notice of motion (but prior to the release of the First Report), Mark Gross then substituted the General Partner for the Trust Fund, and took the position that the Bankruptcy Trustee was therefore only entitled to receive the Limited Partnership's component of the Audited Indebtedness.

***TRP Realty*, *supra* at paras. 48-51.**
First Report, *supra* at section 5.0 and Appendices "B" and "J" thereto.
Gross Affidavit, *supra* at Exhibits "J" and "M" thereto.

41. None of the above is consistent with the objective "*representations to the world in [the Trust Fund's] audited financial statements*" (and OMs). Rather, when taken together, the above actions (like those proposed in Mark Gross' purported cross-motion) "*are not intended to benefit the best interests of the bankrupt estates but to promote his own [interests],*" including those interests in a separate non-bankrupt business. Investors in that separate business "*took calculated risks based upon OMs that disclosed the [subject] loan,*" which is properly due and owing in its entirety to the Bankrupt's estate. As such, there is no reason why Mark or Sheldon Gross should be causing the Trust Fund to withhold any of the Audited Indebtedness from the Bankruptcy Trustee.

> ***TRP Realty, supra* at paras. 48-51.**
>
> ***Re Sangha*, 2022 BCSC 286 (CanLII: https://canlii.ca/t/jmnb0) [*Sangha*] at para. 35.**
>
> ***Re Redstone Investment Corporation*, 2016 ONSC 4453 [Comm. List, Morawetz R.S.J.] (CanLII: https://canlii.ca/t/gv1mk), at paras. 65, 72-73 and 87-88.**

42. While the Bankruptcy Trustee is statutorily obligated to report when it has grounds to believe that an offence under the BIA has been committed, section 205(3) of the BIA provides that decisions regarding prosecution of any such offence (if one has been committed) are discretionary.

> **BIA, *supra*, s. 205(3).**
>
> ***Rex. v. Feldman*, [1933] O.R. 254 (C.A.) (CanLII: https://canlii.ca/t/g17pp) at para. 6.**
>
> ***Re Cowan* (2009), 56 C.B.R. (5th) 133 (Ont. S.C.J.) (CanLII: https://canlii.ca/t/24qjq) [*Cowan*] at paras. 32-33.**
>
> ***Re White* (2010), Toronto 31-428403 (S.C.J.) (CanLII: https://canlii.ca/t/27mcg) at paras. 10-12 [*White*].**

43. The Bankruptcy Trustee has repeatedly emphasized that it: (i) is desirous of the Grosses complying with their BIA duties; and (ii) subject to the Court's views, would be prepared to defer the motion for advice and directions to determine whether there are grounds to believe Mark and/or Sheldon Gross are guilty of an offence "*until later in this bankruptcy proceeding* ***if so warranted by the go-forward conduct of Mark Gross and Sheldon Gross in this bankruptcy proceeding***" [emphasis added].

> **Bankruptcy Trustee's Notice of Motion dated August 24, 2022.**
>
> **First Report, *supra* at section 6.0.**

44. Rather than acknowledging his shortcomings to date in this bankruptcy proceeding, Mark Gross has instead elected to launch multiple unsubstantiated and patently false allegations against the Bankruptcy Trustee, its counsel and the inspectors. At a bare minimum, the Bankrupt's creditors ought to be protected from at least a portion of the costs that Mark Gross has needlessly, if not vexatiously, inflicted upon them. The Court should "*not tolerate conduct aimed at undermining the efforts of its officers to maintain an efficient process that is transparent and accountable to all interested parties in accordance with their duties.*"

Purported Notice of Cross Motion of Mark Gross dated January 10, 2023.

Gross Affidavit, *supra* at paras. 13, 17, 19, 22, 25-33.

***The Superintendent of Financial Services v. Textbook Student Suites (525 Princess Street)*, 2017 ONSC 2694 [Comm. List, Myers J.] (CanLII: https://canlii.ca/t/h3j5d) at paras. 22, 25 and 30-31.**

***Sangha, supra* at para. 48.**

45. As part of its duties under section 205(1) of the BIA, the Bankruptcy Trustee is to state "*the names of the witnesses who should in his opinion be examined*" in connection with the alleged offence(s). The First Report states that, should the matter proceed to prosecution, it is the Bankruptcy Trustee's opinion that Mark and Sheldon Gross and the applicable auditor at Segal LLP should be examined as part of any such prosecution. Given that the Bankruptcy Trustee already intends to examine Mark and Sheldon Gross under section 163(1) of the BIA, it is the Bankruptcy Trustee's intention to conduct these section 163(1) examinations first.

BIA, *supra*, ss. 163(1) and 205(1).

***Bressi, supra* at para. 31.**

***Cowan, supra* at para. 15.**

***White, supra* at para. 2.**

First Report, *supra* at section 2.

PART V – RELIEF REQUESTED

46. The Bankruptcy Trustee respectfully requests that the Court:

(a) approve the First Report and the actions and activities of the Bankruptcy Trustee and its counsel described therein;

(b) timetable an advice and directions motion to determine whether there are grounds to believe that Mark and/or Sheldon Gross is guilty of a bankruptcy offence, and, if there are such grounds, whether the Bankruptcy Trustee ought to proceed to initiate proceedings for prosecution, or whether such a decision should be deferred until later in this bankruptcy proceeding;

(c) in the interim, direct Mark and Sheldon Gross (and, for greater certainty, any other trustee that may be appointed over the Trust Fund) to cause the Audited Indebtedness of $453,240 to be released to the Bankruptcy Trustee;

(d) dismiss the purported cross-motion of Mark Gross in its totality; and

(e) grant costs in favour of the Bankruptcy Trustee, against such respondent(s) to the Bankruptcy Trustee's motion as this Court deems just, and in such scale(s) as this Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of February, 2023.

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Lawyers for the Bankruptcy Trustee

SCHEDULE "A"

AUTHORITIES CITED

Jurisprudence

1. *Xie v. Gross*, 2022 ONSC 7343.
2. *In the Matter of the Registration of Gross Securities Corp.*
3. *Bresssi (Trustee of) v. 1418146 Ontario Inc.* (2003), 44 C.B.R. (4th) 178 (Ont. S.C.J. [Comm. List, Greer J.]).
4. *Firepower Debt GP Inc. v. TheRedPin, Inc.*, 2018 ONSC 7182 [Comm. List, Penny J.], aff'd 2019 ONCA 903.
5. *Re Sangha*, 2022 BCSC 286.
6. *Re Redstone Investment Corporation*, 2016 ONSC 4453 [Comm. List, Morawetz R.S.J.].
7. *Rex. v. Feldman*, [1933] O.R. 254 (C.A.).
8. *Re Cowan* (2009), 56 C.B.R. (5th) 133 (Ont. S.C.J.).
9. *Re White* (2010), Toronto 31-428403 (S.C.J.).
10. *The Superintendent of Financial Services v. Textbook Student Suites (525 Princess Street)*, 2017 ONSC 2694 [Comm. List, Myers J.].

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, ss. 2 ("*property*"), 67, 158, 159, 163, 190, 197, 198 and 205.**

Definitions

2 In this Act, …

property means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property; (*bien*)

…

R.S., 1985, c. B-3, s. 2R.S., 1985, c. 31 (1st Supp.), s. 691992, c. 1, s. 145(F), c. 27, s. 31995, c. 1, s. 621997, c. 12, s. 11999, c. 28, s. 146, c. 31, s. 172000, c. 12, s. 82001, c. 4, s. 25, c. 9, s. 5722004, c. 25, s. 72005, c. 3, s. 11, c. 47, s. 22007, c. 29, s. 91, c. 36, s. 12012, c. 31, s. 4142015, c. 3, s. 6(F)2018, c. 10, s. 82.

Property of bankrupt

67 (1) The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person;

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;

(b.1) goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b);

(b.2) prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b); or

(b.3) without restricting the generality of paragraph (b), property in a registered retirement savings plan, a registered retirement income fund or a registered disability savings plan, as those expressions are defined in the Income Tax Act, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the

bankrupt under the Income Tax Act in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that

(i) is not subject to the operation of this Act, or

(ii) in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the Family Orders and Agreements Enforcement Assistance Act, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

Deemed trusts

(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.

R.S., 1985, c. B-3, s. 671992, c. 27, s. 331996, c. 23, s. 1681997, c. 12, s. 591998, c. 19, s. 2502005, c. 47, s. 572007, c. 36, s. 322019, c. 29, s. 134.

Duties of bankrupt

158 A bankrupt shall

(a) make discovery of and deliver all his property that is under his possession or control to the trustee or to any person authorized by the trustee to take possession of it or any part thereof;

(a.1) in such circumstances as are specified in directives of the Superintendent, deliver to the trustee, for cancellation, all credit cards issued to and in the possession or control of the bankrupt;

(b) deliver to the trustee all books, records, documents, writings and papers including, without restricting the generality of the foregoing, title papers, insurance policies and tax records and returns and copies thereof in any way relating to his property or affairs;

(c) at such time and place as may be fixed by the official receiver, attend before the official receiver or before any other official receiver delegated by the official receiver for examination under oath with respect to his conduct, the causes of his bankruptcy and the disposition of his property;

(d) within five days following the bankruptcy, unless the time is extended by the official receiver, prepare and submit to the trustee in quadruplicate a statement of the bankrupt's affairs in the prescribed form verified by affidavit and showing the particulars of the bankrupt's assets and liabilities, the names and addresses of the bankrupt's creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as may be required, but where the affairs of the bankrupt are so involved or complicated that the bankrupt alone cannot reasonably prepare a proper statement of affairs, the official receiver may, as an expense of the administration of the estate, authorize the employment of a qualified person to assist in the preparation of the statement;

(e) make or give all the assistance within his power to the trustee in making an inventory of his assets;

(f) make disclosure to the trustee of all property disposed of within the period beginning on the day that is one year before the date of the initial bankruptcy event or beginning on such other antecedent date as the court may direct, and ending on the date of the bankruptcy, both dates included, and how and to whom and for what consideration any part thereof was disposed of except such part as had been disposed of in the ordinary manner of trade or used for reasonable personal expenses;

(g) make disclosure to the trustee of all property disposed of by transfer at undervalue within the period beginning on the day that is five years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included;

(h) attend the first meeting of his creditors unless prevented by sickness or other sufficient cause and submit thereat to examination;

(i) when required, attend other meetings of his creditors or of the inspectors, or attend on the trustee;

(j) submit to such other examinations under oath with respect to his property or affairs as required;

(k) aid to the utmost of his power in the realization of his property and the distribution of the proceeds among his creditors;

(l) execute any powers of attorney, transfers, deeds and instruments or acts that may be required;

(m) examine the correctness of all proofs of claims filed, if required by the trustee;

(n) in case any person has to his knowledge filed a false claim, disclose the fact immediately to the trustee;

(n.1) inform the trustee of any material change in the bankrupt's financial situation;

(o) generally do all such acts and things in relation to his property and the distribution of the proceeds among his creditors as may be reasonably required by the trustee, or may be prescribed by the General Rules, or may be directed by the court by any special order made with reference to any particular case or made on the occasion of any special application by the trustee, or any creditor or person interested; and

(p) until his application for discharge has been disposed of and the administration of the estate completed, keep the trustee advised at all times of his place of residence or address.

R.S., 1985, c. B-3, s. 1581992, c. 27, s. 591997, c. 12, s. 942004, c. 25, s. 732017, c. 26, s. 9.

Where bankrupt is a corporation

159 Where a bankrupt is a corporation, the officer executing the assignment, or such

(a) officer of the corporation, or

(b) person who has, or has had, directly or indirectly, control in fact of the corporation

as the official receiver may specify, shall attend before the official receiver for examination and shall perform all of the duties imposed on a bankrupt by section 158, and, in case of failure to do so, the officer or person is punishable as though that officer or person were the bankrupt.

R.S., 1985, c. B-3, s. 1591992, c. 27, s. 60.

Examination of bankrupt and others by trustee

163 (1) The trustee, on ordinary resolution passed by the creditors or on the written request or resolution of a majority of the inspectors, may, without an order, examine under oath before the registrar of the court or other authorized person, the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt or any person who is or has been an agent or a mandatary, or a clerk, a servant, an officer, a director or an employee of the bankrupt, respecting the bankrupt or the bankrupt's dealings or property and may order any person liable to be so examined to produce any books, documents, correspondence or papers in that person's

possession or power relating in all or in part to the bankrupt or the bankrupt's dealings or property.

Examination of bankrupt, trustee and others by a creditor

(2) On the application to the court by the Superintendent, any creditor or other interested person and on sufficient cause being shown, an order may be made for the examination under oath, before the registrar or other authorized person, of the trustee, the bankrupt, an inspector or a creditor, or any other person named in the order, for the purpose of investigating the administration of the estate of any bankrupt, and the court may further order any person liable to be so examined to produce any books, documents, correspondence or papers in the person's possession or power relating in all or in part to the bankrupt, the trustee or any creditor, the costs of the examination and investigation to be in the discretion of the court.

Examination to be filed

(3) The evidence of any person examined under this section shall, if transcribed, be filed in the court and may be read in any proceedings before the court under this Act to which the person examined is a party.

R.S., 1985, c. B-3, s. 1631997, c. 12, s. 962004, c. 25, s. 77(E).

Evidence of proceedings in bankruptcy

190 (1) Any document made or used in the course of any bankruptcy proceedings or other proceedings had under this Act shall, if it appears to be sealed with the seal of any court having jurisdiction in bankruptcy, purports to be signed by any judge thereof or is certified as a true copy by any registrar thereof, be admissible in evidence in all legal proceedings.

Documentary evidence as proof

(2) The production of an original document relating to any bankruptcy proceeding or a copy certified by the person making it as a true copy thereof or by a successor in office of that person as a true copy of a document found among the records in his control or possession is evidence of the contents of those documents.

R.S., c. B-3, s. 160.

Costs in discretion of court

197 (1) Subject to this Act and to the General Rules, the costs of and incidental to any proceedings in court under this Act are in the discretion of the court.

How costs awarded

(2) The court in awarding costs may direct that the costs shall be taxed and paid as between party and party or as between solicitor and client, or the court may fix a sum to be paid in lieu of taxation or of taxed costs, but in the absence of any express direction costs shall follow the event and shall be taxed as between party and party.

Personal liability of trustee for costs

(3) Where an action or proceeding is brought by or against a trustee, or where a trustee is made a party to any action or proceeding on his application or on the application of any other party thereto, he is not personally liable for costs unless the court otherwise directs.

When costs payable

(4) No costs shall be paid out of the estate of the bankrupt, excepting the costs of persons whose services have been authorized by the trustee in writing and such costs as have been awarded against the trustee or the estate of the bankrupt by the court.

(5) [Repealed, 2005, c. 47, s. 110]

Priority of payment of legal costs

(6) Legal costs shall be payable according to the following priorities:

(a) commissions on collections, which are a claim ranking above any other claim on any sums collected;

(b) when duly authorized by the court or approved by the creditors or the inspectors, costs incurred by the trustee after the bankruptcy and prior to the first meeting of creditors;

(c) the costs on an assignment or costs incurred by an applicant creditor up to the issue of a bankruptcy order;

(d) costs awarded against the trustee or the estate of the bankrupt; and

(e) costs for legal services otherwise rendered to the trustee or the estate of the bankrupt.

Costs of discharge opposed

(6.1) If a creditor opposes the discharge of a bankrupt, the court may, if it grants the discharge on the condition that the bankrupt pay an amount or consent to a judgment to pay an amount, award costs, including legal costs, to the opposing creditor out of the estate in an amount that is not more than the amount realized by the estate under the conditional order, including any amount brought into the estate under the consent to the judgment.

Costs where opposition frivolous or vexatious

(7) If a creditor opposes the discharge of a bankrupt and the court finds the opposition to be frivolous or vexatious, the court may order the creditor to pay costs, including legal costs, to the estate.

(8) [Repealed, 2005, c. 47, s. 110]

R.S., 1985, c. B-3, s. 1971997, c. 12, s. 1062004, c. 25, s. 892005, c. 47, s. 110.

Bankruptcy offences

198 (1) Any bankrupt who

(a) makes any fraudulent disposition of the bankrupt's property before or after the date of the initial bankruptcy event,

(b) refuses or neglects to answer fully and truthfully all proper questions put to the bankrupt at any examination held pursuant to this Act,

(c) makes a false entry or knowingly makes a material omission in a statement or accounting,

(d) after or within one year immediately preceding the date of the initial bankruptcy event, conceals, destroys, mutilates, falsifies, makes an omission in or disposes of, or is privy to the concealment, destruction, mutilation, falsification, omission from or disposition of, a book or document affecting or relating to the bankrupt's property or affairs, unless the bankrupt had no intent to conceal the state of the bankrupt's affairs,

(e) after or within one year immediately preceding the date of the initial bankruptcy event, obtains any credit or any property by false representations made by the bankrupt or made by any other person to the bankrupt's knowledge,

(f) after or within one year immediately preceding the date of the initial bankruptcy event, fraudulently conceals or removes any property of a value of fifty dollars or more or any debt due to or from the bankrupt, or

(g) after or within one year immediately preceding the date of the initial bankruptcy event, hypothecates, pawns, pledges or disposes of any property that the bankrupt has obtained on credit and has not paid for, unless in the case of a trader the hypothecation, pawning, pledging or disposing is in the ordinary way of trade and unless the bankrupt had no intent to defraud,

is guilty of an offence and is liable, on summary conviction, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year or to both, or on conviction on indictment, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding three years, or to both.

Failure to comply with duties

(2) A bankrupt who, without reasonable cause, fails to comply with an order of the court made under section 68 or to do any of the things required of the bankrupt under section 158 is guilty of an offence and is liable

(a) on summary conviction, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both; or

(b) on conviction on indictment, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding three years, or to both.

R.S., 1985, c. B-3, s. 1981992, c. 27, s. 711997, c. 12, s. 1072004, c. 25, s. 90(F).

Report on offences to be made by trustee

205 (1) Whenever an official receiver or trustee has grounds to believe that an offence under this Act or under any other statute, whether of Canada or a province, has been committed with respect to any bankrupt estate in connection with which he has been acting under this Act, or that for any special reason an investigation should be had in connection with that estate, it is the duty of the official receiver or trustee to report the matter to the court, including in the report a statement of all the facts or circumstances of the case within his knowledge, the names of the witnesses who should in his opinion be examined and a statement respecting the offence or offences believed to have been committed, and to forward a copy of the report forthwith to the Superintendent.

Report by inspectors and others

(2) The Superintendent or a creditor, inspector or other interested person who believes on reasonable grounds that a person is guilty of an offence under this Act or under any other statute, whether of Canada or a province, in connection with a bankrupt, his property or his transactions, may file a report with the court of the facts on which that belief is based, or he may make such further representations supplementary to the report of the official receiver or trustee as he may deem proper.

Court may authorize criminal proceedings

(3) Whenever the court is satisfied, on the representation of the Superintendent or any one on his behalf, of the official receiver or trustee or of any creditor, inspector or other interested person, that there is ground to believe that any person is guilty of an offence under this Act or under any other statute, whether of Canada or a province, in connection with the bankrupt, his property or transactions, the court may authorize the trustee to initiate proceedings for the prosecution of that person for that offence.

Initiation of criminal proceedings by the trustee

(4) Where a trustee is authorized or directed by the creditors, the inspectors or the court to initiate proceedings against any person believed to have committed an offence, the trustee shall institute the proceedings and shall send or cause to be sent a copy of the resolution or order, duly certified as a true copy thereof, together with a copy of all reports or statements of the facts on which the order or resolution was based, to the Crown Attorney or the agent of the Crown duly authorized to represent the Crown in the prosecution of criminal offences in the district where the alleged offence was committed.

R.S., c. B-3, s. 176.

SCHEDULE "C"
EXCERPT FROM THE MOST RECENT LIFT STAY ORDER

1. Stayed by receivership order in Court File No. CV-21-00656098-CL (Deloitte as receiver)
    a. Gross Properties Inc., as it relates to any "Property" as defined in the aforementioned receivership order dated March 9, 2021
    b. 249 Ontario Street Holdings Inc., as it relates to any "Property" as defined in the aforementioned receivership order dated March 9, 2021
2. Stayed by receivership order in Court File No. CV-21-00664273-00CL (KPMG as receiver)
    a. Gross Properties Inc., as it relates to any "Property" as defined in the aforementioned receivership order dated June 29, 2021
    b. 2009 Long Lake Holdings Inc.
    c. 65 Larch Holdings Inc.
    d. 100 Colborne Holdings Inc.
    240 Old Penetanguish Holdings Inc.
    e. 2478658 Ontario Ltd.
3. Stayed by receivership order in Court File No. CV-21-00665375-00CL (KPMG as receiver)
    a. Gross Capital Inc., as it relates to any "Property" as defined in the aforementioned receivership order dated August 3, 2021
    b. Victoria Avenue North Holdings Inc.
4. Stayed by s.69.3 of the *BIA* (KPMG as trustee)
    a. 100 Colborne Holdings Inc. (Estate/Court File No. 31-2842640)
    b. 240 Old Penetanguish Holdings Inc. (Estate/Court File No. 31-2842641)
    c. 2478658 Ontario Ltd. (Estate/Court File No. 31-2842635)
    d. 2009 Long Lake Holdings Inc. (Estate/Court File No. 31-2869843)
    e. 65 Larch Holdings Inc. (Estate/Court File No. 31-2869845)
5. Stayed by s.69.3 of the *BIA* (KSV as trustee)
    a. Gross Capital Inc. (Estate/Court File No. 31-2747949)
    b. Sheldon Gross Ltd. (Estate/Court File No. 31-2810419)

NOTE: *In addition to the two entities listed at point #5, KSV is also the Licensed Insolvency Trustee of Claireville Property Holdings Inc. ("**Claireville**"), which is another Nominee entity. As no lifting of the stay of proceedings was sought against Claireville in the Most Recent Lift Stay Order, Claireville is not listed in the Most Recent Lift Stay Order.*

IN THE MATTER OF THE BANKRUPTCY OF GROSS CAPITAL INC.,
of the City of Toronto, in the Province of Ontario

Court No. 31-2747949

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
IN BANKRUPTCY AND INSOLVENCY

Proceedings commenced at Toronto

FACTUM OF KSV RESTRUCTURING INC., IN ITS CAPACITY AS LICENSED INSOLVENCY TRUSTEE.

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