

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 C. C.43, AS AMENDED**

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

**COMFORT CAPITAL INC., THE BANK OF NOVA SCOTIA TRUST COMPANY, E. MANSON INVESTMENTS LTD., FENFAM HOLDINGS INC., 593651 ONTARIOLTD., 1031436 ONTARIO INC., ALRAE INVESTMENTS INC., BARRY SPIEGEL, SHARON NIGHTINGALE, DA YID SUGAR, PHYLLIS SUGAR, NATIONAL TIRE LTD., 1119778 ONTARIO LIMITED, 1415976 ONTARIO LIMITED, ALRAE INVESTMENTS INC., BAMBURGH HOLDINGS LTD., BEVERLEY GORDON, DIANE GRAFSTEIN, RICHARD GRUNEIR, B. & M. HANDELMAN INVESTMENTS LTD., RIDGEWAY OCCUPATIONAL CONSULTANTS INC., YER USHA INVESTMENTS INC., MIHAL TYLMAN, A. ELIEZER KIRSHBLUM, 593651 ONTARIO LIMITED, THE BANK OF NOVA SCOTIA TRUST COMPANY IN TRUST FOR BAILEY LEVENSON, THE BANK OF NOVA SCOTIA TRUST COMPANY IN TRUST FOR ROSEMONDE KELLY, ANNE HANDELMAN, YERUSHA INVESTMENTS INC., CELMAR INVESTMENTS CORP., BEVERLEY GORDON, PHILGOR INVESTMENTS LTD., BRILLIANT INVESTCORP INC., MAXOREN INVESTMENTS, 2227046 ONTARIO LIMITED, DAST PROPERTIES LIMITED, TOVA MARKOVZKI, JOSEPH SUCKONIC and B. & M. HANDELMAN INVESTMENTS LIMITED**

Applicants

- and -

**ANNIE YERETSIAN, 2399029 ONTARIO INC., 2457674 ONTARIO INC.,  
MOSS DEVELOPMENT LTD.  
and TERRY WILSON**

Respondent

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**FACTUM OF THE MOVING PARTY**

*(Returnable on June 1, 2018)*

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May 31, 2018

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**TO: THE SERVICE LIST**

**TABLE OF CONTENTS**

**PART I – THE NATURE OF THIS OBJECTION.....1**

**PART II – STATEMENT OF FACTS.....1**

**PART III – STATEMENT OF ISSUES, LAW & AUTHORITIES .....6**

    The Duties of Receivers in the Course of a Sale .....6

    (A) The Receiver has not discharged its duty to conduct sales in a commercially  
    reasonable manner .....7

    (B) The Receiver did not Consider the Interests of All Parties .....8

    (C) The Receiver has not discharged its duty to preserve the efficacy and integrity of the  
    sale process .....10

    (D) There has been Unfairness in the Working out of the Process.....11

**PART IV – RELIEF REQUESTED.....8**

**SCHEDULE “A” – LIST OF AUTHORITIES.....14**

**SCHEDULE “B” – STATUTORY AUTHORITIES .....15**

**SCHEDULE “C” – THE MORTGAGED PROPERTIES .....16**

## **PART I – THE NATURE OF THIS OBJECTION**

1. The moving parties, World Finance Corporation, Canada Capital Corporation Inc., 2399194 Ontario Inc., 22457647 Ontario Inc. and Terry Wilson (collectively, the “**Moving Parties**”) submit this factum in opposition to the motion of Rosen Goldberg Inc., in its capacity as receiver (the “**Receiver**”) of the Respondents for approval by this Court of the sale of the properties (collectively, the “**Mortgaged Properties**”) known as: 7 High Point Road, Toronto, Ontario (the “**Highpoint Property**”); 97 Bridge Street, Picton Ontario (the “**Bridge Property**”); 12497 Loyalist Parkway, Picton, Ontario (the “**Loyalist Property**”); and 13 vacant lots on Caldwell Drive in Oro-Medonte, Ontario (the “**Caldwell Property**”).

## **PART II – STATEMENT OF FACTS**

2. On February 28, 2018, Rosen Goldberg Inc. was appointed as the Receiver over the assets, property and undertakings of the Respondents.<sup>1</sup>

3. The Respondent, Annie Yeretsian, is the owner of the High Point Property. The High Point Property comprises a 2-acre lot in the lucrative and desirable Bridle Path area of Toronto.<sup>2</sup>

4. The Respondent, 2457674 Ontario Inc., is the owner of 97 Bridge Street in Picton, Ontario.<sup>3</sup>

5. The Respondent, Terry Wilson, is the owner of the Loyalist Property.<sup>4</sup>

6. The Respondent, Moss Development Ltd., is the owner of the Caldwell Property.<sup>5</sup>

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<sup>1</sup> Affidavit of Troy Wilson, Responding Motion Record Tab 1 at para 5.

<sup>2</sup> Affidavit of Troy Wilson, supra at para 6.

<sup>3</sup> Affidavit of Troy Wilson, supra at para 8.

<sup>4</sup> Affidavit of Troy Wilson, supra at para 9.

7. Pursuant to the receivership order, the Receiver was authorized to market the Mortgaged Properties.<sup>6</sup>

8. On the Highpoint Property, the Moving Parties hold:

(a) the first mortgage through Canada Capital Corporation, in the amount of \$4,500,000; and

(b) the second mortgage through 2399194 Ontario Inc., which is owed approximately \$7,515,000.<sup>7</sup>

9. On the Caldwell Property, the Moving Parties hold the second mortgage through Canada Capital Corporation, in the amount of \$2,500,000.<sup>8</sup>

10. On the Bridge Property and the Loyalist Property, the Moving Parties are the owners of the properties.

11. With respect to the Highpoint Property:

(a) the Receiver marketed the Highpoint Property for only **eight days** before accepting a bid<sup>9</sup>;

(b) while there was no deadline for submission of offers, the Receiver accepted the offer of approximately \$9.5 million, after a very brief period of market exposure;<sup>10</sup>

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<sup>5</sup> Affidavit of Troy Wilson, supra at para 10.

<sup>6</sup> Affidavit of Troy Wilson, supra at para 17.

<sup>7</sup> Affidavit of Troy Wilson, supra at para 17.

<sup>8</sup> Affidavit of Troy Wilson, supra at para 17.

<sup>9</sup> Affidavit of Troy Wilson, supra at para 20 (a).

<sup>10</sup> Affidavit of Troy Wilson, supra at para 20 (a).

- (c) according to a report prepared by Remax Caccavella Margiotta (the “**Remax Report**”), the Receiver listed and marketed the Birchmount Property at below market value<sup>11</sup>;
- (d) based on the Remax Report and using comparables in the area, the Receiver should have listed and marketed the property for \$13.5-14 million;<sup>12</sup>
- (e) the below market list price, in combination with the way in which the property was marketed, and the extremely brief exposure of this property to the market resulted in the purchase price obtained by the Receiver for this property being lower than market value;<sup>13</sup> and
- (f) should the Highpoint Property transaction close, consummation of the transaction will provide cents on the dollar for the first mortgagee, Canada Capital Corporation, and the second mortgagee, 2399194 Ontario Inc.<sup>14</sup>

12. With respect to the Caldwell Property:

- (a) the Receiver marketed the Caldwell Property for only **twenty-three** days before accepting a bid<sup>15</sup>;
- (b) while there was no deadline for submission of offers, the Receiver accepted the offer of approximately \$2 million, only after a very brief period of market exposure<sup>16</sup>;
- (c) based on the Remax Report and using comparables in the area, the Receiver under listed the property. The Receiver should have listed and marketed the property for \$4-\$4.5 million<sup>17</sup>;

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<sup>11</sup> Remax Report, supra at page 7.

<sup>12</sup> Remax Report, supra at page 7.

<sup>13</sup> Affidavit of Troy Wilson, supra at para 20 (a).

<sup>14</sup> Affidavit of Troy Wilson, supra at para 7.

<sup>15</sup> Affidavit of Troy Wilson, supra at para 20 (b).

<sup>16</sup> Affidavit of Troy Wilson, supra at para 20 (b).

<sup>17</sup> Remax Report, supra at page 8.

- (d) the below market list price in combination with the way in which the property was marketed and the extremely brief exposure of this property to the market resulted in the purchase price obtained by the Receiver for this property being lower than market value;<sup>18</sup>
- (e) based on the Remax Report, the purchase price obtained by the Receiver for the Caldwell Property is equivalent to the tax assessed value of the lots;<sup>19</sup> and
- (f) should the Caldwell Property transaction close, the proceeds from the sale will only pay out the first mortgagee and the Applicants, however if the consummation of the transaction will provide cents on the dollar for the second mortgagee, Canada Capital Corporation.<sup>20</sup>

13. With respect to the Loyalist Property:

- (a) the Receiver marketed the Loyalist Property for only **twenty-two** days before accepting a bid<sup>21</sup>.
- (b) while there was no deadline for submission of offers, the Receiver accepted the offer of approximately \$810,000, after a very brief period of market exposure<sup>22</sup>; and
- (c) in 2008, the Loyalist Property sold for approximately \$880,000. Notwithstanding this, property values in this area have increased significantly in the intervening years<sup>23</sup>

14. With respect to the Bridge Property:

- (a) the Receiver marketed the Bridge Property for only **twenty-nine** days before accepting a bid;<sup>24</sup>

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<sup>18</sup> Remax Report, *supra* at page 7-8; Affidavit of Troy Wilson, *supra* at para 20 (b).

<sup>19</sup> Remax Report, *supra* at page 8.

<sup>20</sup> Affidavit of Troy Wilson, *supra* at para 10 and 24.

<sup>21</sup> Affidavit of Troy Wilson, *supra* at para 20 (c).

<sup>22</sup> Affidavit of Troy Wilson, *supra* at para 20 (c).

<sup>23</sup> Affidavit of Troy Wilson, *supra* at para 20 (c).

- (b) the Receiver accepted the offer of approximately \$2.5 million, after a very brief period of market exposure;<sup>25</sup> and
- (c) the Bridge Property is a heritage destination property. Property of this kind typically requires a market exposure of at least 6 months.<sup>26</sup>

15. In a May 30, 2018 report prepared by Grant Thornton Limited (the “**Grant Thornton Report**”), the report describes several steps that should be taken by a Receiver when selling real estate in the context of a Court appointed Receivership, which steps were not taken by the Receiver. These steps include having a six-month listing period.<sup>27</sup>

16. Despite being fulcrum secured creditors with an economic interest in the Mortgaged Properties, at no point did the Receiver or its counsel:

- (a) consult any representative of the Moving Parties;
- (b) consult with legal counsel to the Moving Parties as to the sale process, including the length of time to market the properties, the list price, an acceptable purchase price or the degree of exposure to the market; or
- (c) take any steps to identify the appropriate person to consult with in respect of these matters.<sup>28</sup>

17. The sale process for the Mortgaged Properties, as well as other properties sold by the Receiver disproportionately benefits the Applicants.

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<sup>24</sup> Affidavit of Troy Wilson, supra at para 20 (d).

<sup>25</sup> Affidavit of Troy Wilson, supra at para 20 (d).

<sup>26</sup> Affidavit of Troy Wilson, supra at para 20 (d).

<sup>27</sup> Grant Thornton Report, Motion Record Tab 1B, para 8

<sup>28</sup> Affidavit of Troy Wilson, supra at para 18.



**PART III – STATEMENT OF ISSUES, LAW & AUTHORITIES**

18. The issue to be determined at this motion is whether the Receiver has discharged its duties in the course of the sale of the Mortgaged Properties.

19. The Moving Parties respectfully submit that the Receiver has not met the *SoundAir* test for approval of a sale of assets in a receivership. In addition, the Receiver has not discharged its duty to act in a fiduciary and impartial manner with respect to the interests of the Moving Parties on the sale of these properties.

***The Duties of Receivers in the Course of a Sale***

20. Section 247 of the *Bankruptcy and Insolvency Act* (the “**BIA**”) provides that a receiver shall deal with the property of the bankrupt in a commercially reasonable manner.<sup>29</sup>

21. In conducting a sale process and recommending an offer to the court, the duties of the Receiver have been summarized in the four principles set out by Galligan J.A. in *Royal Bank of Canada v. Soundair*:

- (a) It should consider whether the receiver has made a sufficient effort to obtain the best price and has not acted improvidently;
- (b) It should consider the interests of all parties;
- (c) It should consider the efficacy and integrity of the process by which offers have been obtained; and,
- (d) It should consider whether there has been unfairness in the working out of the process.<sup>30</sup>

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<sup>29</sup> *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 274(b) [*BIA*].

***(A) The Receiver has not made Sufficient Efforts to Obtain the Best Price***

22. The Receiver's duty to conduct sales in a 'commercially reasonable' manner obliges him to do everything in the circumstances to obtain the best price.<sup>31</sup>

23. The Receiver did not make sufficient efforts to obtain the best price for the Mortgaged Properties. In fact, the Receiver listed and marketed the Mortgaged Properties at significantly lower than market value and marketed these properties for very short periods of time.

24. The Receiver's duty to conduct sales in a commercially reasonable manner obliges him to do everything in the circumstances to obtain the best price.<sup>32</sup>

25. With respect to the Highpoint Property, the land value alone should be \$9-10 million with the house structure at \$3-4 million. The purchase price obtained by the Receiver ascribes zero value to the physical home.<sup>33</sup>

26. With respect to the Caldwell Property, the collective value of the land should be approximately \$3 million. The purchase price obtained by the Receiver is equivalent to the tax assessed value of the lots.<sup>34</sup>

27. With respect to the Loyalist property, the list price did not account for historical sales data and an increase in the value over time.<sup>35</sup>

28. The below market list prices and the way in which the Mortgaged Properties were marketed, including an extremely brief exposure of these properties to the market, resulted in the

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<sup>30</sup> *Royal Bank of Canada v. Soundair Corp.*, [1991] OJ No 1137 at para 16 [Soundair].

<sup>31</sup> *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, [1999] OJ No 4300 at para 4.

<sup>32</sup> *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, [1999] OJ No 4300 at para 4.

<sup>33</sup> Remax Report, supra at page 7.

<sup>34</sup> Remax Report, supra at page 8.

<sup>35</sup> Affidavit of Troy Wilson, supra at para 20 (c).

purchase prices of the properties being lower than the Mortgaged Properties' fair market values.<sup>36</sup>

**(B) *The Receiver did not Consider the Interests of All Parties***

29. A Court appointed Receiver stands as an officer of the Court and owes fiduciary duties to all parties concerned with the assets under receivership.<sup>37</sup>

30. As an officer of the Court, the standard required of a Receiver has been characterized as “one of meticulous correctness”.<sup>38</sup> In *Alta. Treasury Branches v. Invictus Fin. Corp.*, Stratton J. (as he then was) said that the Receiver’s obligations “reach further than merely acting honestly and in good faith”.<sup>39</sup> He quoted Wilson J. in *Fotti v. 777 Management Inc.* at paragraph 16:

...the Receiver is an officer of the Court and in his discharge of that office he may not, in the name of the Court, lend his power to defeat the proper claims of those on whose behalf those powers are exercised. Clothed as he is with the mantle of this Court, his duties are to be approached not as the mere agent of the debenture holder, but as trustee for all parties interested in the fund of which he stands possessed.<sup>40</sup>

31. On the Mortgaged Properties, the Receiver did not consult with any of the Moving Parties, despite each being a fulcum creditor in these proceedings.<sup>41</sup>

32. In particular, the Receiver failed to consult or consider the interests of the Moving Parties in designing or implementing the sale process, in the selection of a real estate broker, the length of time on the market, the list price or as to an acceptable purchase price for these properties.

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<sup>36</sup> Remax Report, *supra* at page 6-10; Affidavit of Troy Wilson, *supra* at para 15.

<sup>37</sup> *Toronto-Dominion Bank v. Crosswinds Golf & Country Club Ltd.*, (2002), 59 O.R. (3d) 376 at para 15.

<sup>38</sup> *Panamericana v. Northern Badger Oil & Gas Ltd.*, [1991] ABCA 181 at para 40; quoted with approval by Austin J.A. in *Toronto-Dominion Bank v. Usarco Ltd.*, (2001), 196 D.L.R. (4th) 448 at para. 29.

<sup>39</sup> *Alberta Treasury Branches v. Invictus Financial Corporation*, 42 Alta. LR (2d) 181 at para 42.

<sup>40</sup> *Fotti v. 777 Management Inc.*, [1981] 5 WWR 48 at para 16.

<sup>41</sup> Affidavit of Troy Wilson, *supra* at para 18.

***(C) The Receiver has not discharged its duty to preserve the efficacy and integrity of the sale process***

33. The Receiver's duty to scrutinize and ensure standards of integrity and fairness are met, is not relieved or discharged simply because the main creditor has approved or agreed to the process. This is because the Receiver, as an officer of the Court, owes fiduciary duties to all parties interested in the assets.<sup>42</sup>

34. In *Sullivan v. Letnik*, Cameron J. described 'minimum' procedural requirements for conducting a sale of land:

A sale in a commercially reasonable manner requires marketing the sale to more than two people, if one of them is not likely to purchase. It requires a reasonable effort to find competing offers to purchase with a view to obtaining a fair price. This requires discussions with people familiar with the [industry] to identify potential buyers or groups which would include potential buyers. This should be followed by contacting these people to obtain expressions of interest and proving those interested a package of information sufficient to encourage bids. This normally takes more than 13 days.<sup>43</sup>

35. The sale processes for the Mortgaged Properties were very brief:

- (a) for the Highpoint Property, the sale process was only 8 days;<sup>44</sup>
- (b) for the Caldwell Property, the sale process was only 23 days;<sup>45</sup>
- (c) for the Bridge Property, the sale process was only 29 days;<sup>46</sup> and
- (d) for the Loyalist Property, the sale process was only 22 days.<sup>47</sup>

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<sup>42</sup> *Royal Bank v. Denco Industries Ltd.*, [1988] BCWLD 1391 at para 7, quoted with approval in *Bank of Nova Scotia v. Yoshikuni Lumber Ltd.*, [1992] BCJ No 2664 at para 23 and *Westcott Savings Credit Union v. Wachal*, [1989] BCWLD 177 at para 6.

<sup>43</sup> *Sullivan v. Letnik*, [2002] OJ No 4037 at para 33 and 35.

<sup>44</sup> Affidavit of Troy Wilson, *supra* at para 20 a.

<sup>45</sup> Affidavit of Troy Wilson, *supra* at para 20 (b).

<sup>46</sup> Affidavit of Troy Wilson, *supra* at para 20 (d).

<sup>47</sup> Affidavit of Troy Wilson, *supra* at para 20 (c).

36. Such an abridged sale process did not permit sufficient time for bidding rounds, such that the full value of these unique properties could be realized in the market.

37. Grant Thornton, in exercising its duties as court appointed receiver on mandates, typically executes listing agreements for a period of six months.<sup>48</sup>

38. With respect to the Mortgaged Properties, the Receiver attempts to justify the short sale process on the basis of accrual of property taxes and realty costs as eroding further value should a longer sale process be undertaken. However, these costs are minimal in comparison to the potential additional recovery if the properties were exposed to a longer time on the market.

***(D) There has been Unfairness in the Working out of the Process***

39. Where there is unfairness in the sale process, the Receiver's duty will not have been met, even if the unfairness was not the Receiver's fault. It is respectfully submitted, the relevant question is not whether the Receiver is at fault, but whether the requisite duty has been discharged.<sup>49</sup>

40. The Receiver did not consult with the Moving Parties as to the sale process, the list price or an acceptable purchase price. The Receiver only consulted with the Applicants.

41. The Receiver ran sale processes and obtained purchase prices for the Mortgaged Properties which only ensured that the Applicants were paid in full and gave no consideration to subsequent debt holders, including the fact that a longer sale process would almost certainly have brought greater value.

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<sup>48</sup> Report of Grant Thornton Limited, Motion Record Tab 1B, para 8

<sup>49</sup> Re Selkirk, [1987] O.J. No. 2006 at para 4-6, 10-11; Cameron v. Bank of Nova Scotia, [1981] N.S.J. No. 43 at para. 28, 37 and 39

42. The Receiver has not demonstrated its duty to act impartially and in fiduciary duty to all stakeholders.

**PART V – RELIEF REQUESTED**

43. Based on the foregoing, it would be appropriate for this court to:

- (a) refuse the sale proposed by the Receiver;
- (b) discharge Rosen Goldberg Inc., as receiver;
- (c) appoint Grant Thornton Limited as receiver;
- (d) order a new sale process, including that the properties be re-listed for a four to six month listing period, such that the properties may obtain a more commercially reasonable price; and
- (e) order such further and other relief as this Honorable court deems just.

May 31, 2018

**ALL OF WHICH IS RESPECTFULLY  
SUBMITTED**



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2457674 Ontario Inc. and Terry Wilson

## SCHEDULE "A"

### List of Authorities

1. *Alberta Treasury Branches v. Invictus Financial Corporation*, 42 Alta LR (2d) 181
2. *Bank of Montreal v. On-Stream Natural Gas Ltd. Partnership*, [1995] BCWLD 036
3. *Bank of Nova Scotia v. Yoshikuni Lumber Ltd.*, [1992] BCJ No 2664
4. *Canadian Imperial Bank of Commerce v. Morrison*, [1985] NSJ No 52
5. *Cameron v. Bank of Nova Scotia*, [1981] NSJ No 43
6. *Fotti v. 777 Management Incorporated*, [1981] 5 WWR 48
7. *Jeanette B.B.Q. Ltée v. Caisse populaire de Tracadie Ltée*, [1991] NBJ No 556
8. *Panamericana v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181
9. *Polar Bear Water Distiller Mfg. Co. v. 590863 Alberta Ltd.*, [2001] AWLD 501
10. *Re Selkirk*, [1987] OJ No 2006
11. *Royal Bank v. Soundair Corp.*, [1991] OJ No 1137
12. *Salima Investments Ltd. v. Bank of Montreal*, [1985] AWLD 1418
13. *Skyepharm PLC v. Hyal Pharmaceutical Corp.*, [1999] OJ No 4300
14. *Sullivan v. Letnik*, [2002] OJ No 4037
15. *Toronto Dominion Bank v. Agriborealis Ltd.*, [1988] NWTJ No 26
16. *Toronto Dominion Bank v. Crosswinds Golf & Country Club Ltd.*, [2002] OJ No 1398
17. *Toronto Dominion Bank v. Usarco Ltd.*, [1997] OJ No 2240



## **SCHEDULE "B"**

### **Statutory Authorities**

*Bankruptcy and Insolvency Act, RSC 1985, c B-3*

#### **Good faith, etc.**

**247** A receiver shall

- (a) act honestly and in good faith; and
- (b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

## **SCHEDULE "C"**

### **The Mortgaged Properties**

1. Seven (7) High Point Road, Toronto ON M3B 2A3
2. Ninety-Seven (97) Bridge Street, Picton ON K0K 2T0
3. Multiple Lots: thirteen (13x) lots located on Caldwell Drive, Oro-Mendonite ON

**COMFORT CAPITAL INC. et al.**  
Applicants

-and-

**ANNIE YERETSIAN et al**  
Respondents

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

Proceedings commenced at Toronto

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**FACTUM OF THE MOVING PARTY**  
*(Returnable on June 1, 2018)*

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