CITATION: Riocan Real Estate Investment Trust v. 2455034 Ontario Limited Partnership, 2026 ONSC 2204
COURT FILE NO.: CV-25-00744295-00CL
DATE: 20260414

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: RIOCAN REAL ESTATE INVESTMENT TRUST, RIOCAN HOLDINGS INC., RIOCAN HOLDINGS (OAKVILLE PLACE) INC., RIOCAN PROPERTY SERVICES TRUST, RC HOLDINGS II LP, RC NA GP 2 TRUST and RIOCAN FINANCIAL SERVICES LIMITED

Applicants

AND:

2455034 ONTARIO LIMITED PARTNERSHIP, 2455034 ONTARIO INC., 2491815 ONTARIO LIMITED PARTNERSHIP, 2491815 ONTARIO INC., 2491816 ONTARIO LIMITED PARTNERSHIP, 2491816 ONTARIO INC., 2681842 ONTARIO LIMITED PARTNERSHIP, 2681845 ONTARIO INC., and 2681842 ONTARIO INC.

Respondents

IN THE MATTER OF AN APPLICATION UNDER 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

BEFORE: KIMMEL J.

COUNSEL: *Orestes Pasparakis, James Renihan, Nadine Tawdy & Evan Cobb*, for the Receiver FTI Consulting Canada Inc.

Julie Rosenthal, for the RioCan Applicants

Michael Schacter, for Fairweather Limited

D.J. Miller, Deborah E. Palter & Andrew Nesbitt, for Oxford Properties Group, OMERS Realty Management Corporation, Yorkdale Shopping Centre Holdings Inc., Scarborough Town Centre Holdings Inc., Montez Hillcrest Inc., Hillcrest Holdings Inc., Kingsway Garden Holdings Inc., Oxford Properties Retail Holdings Inc., Oxford Properties Retail Holdings II Inc., OMERS Realty Corporation, Oxford Properties Retail Limited Partnership, CPPIB Upper Canada Mall Inc., CPP Investment Board Read Estate Holdings Inc. (the "Oxford Parties")

HEARD: In Writing

COSTS ENDORSEMENT

[1] On February 9, 2026, the court released its decision on the motion by FTI Consulting Canada Inc. (the "Receiver"), the court-appointed receiver and manager of HBC YSS 1 Limited Partnership, now 2491815 Ontario Limited Partnership ("YSS 1") and other debtors, for approval of the Sublease Agreement dated August 12, 2025 (the "Fairweather Sublease"), and various ancillary relief: see *Riocan Real Estate Investment Trust v. 2455034 Ontario Limited Partnership*, 2026 ONSC 733 (the "Fairweather Sublease Approval Motion"). The Fairweather Sublease would have been between the Receiver and Fairweather Ltd. ("Fairweather"), for the premises located at Yorkdale Mall in Toronto ("Yorkdale") formerly occupied by Hudson's Bay Company ULC ("HBC") pursuant to a sublease between HBC and YSS 1 (the "HBC Sublease").

[2] The Receiver's Sublease Approval Motion was dismissed.

[3] The parties exchanged their Costs Outlines after the hearing and before the court released its decision. The court encouraged the parties to try to reach an agreement on the costs arising out of the court's February 9, 2026, endorsement. They were unable to do so. On March 4, 2026, a case conference was convened to set a timetable for the exchange of cost submissions.

[4] In accordance with the agreed timetable, the following submissions have now been received and considered:

(a) Oxford Properties Group Submissions on Costs dated March 14, 2026 and Costs Outline;

(b) Costs Submissions (Factum) of the Receiver FTI Consulting Inc. dated March 23, 2026; and

(c) Reply Costs Submissions of Oxford Properties Group dated March 25, 2026.

[5] Oxford seeks $707,229.66 in costs (inclusive of all fees, disbursements and applicable taxes) payable by the Receiver, based on its successful opposition of the Receiver's Fairweather Sublease Approval Motion. This is based on a claim for partial indemnity costs up to the date of an offer to settle that Oxford delivered on November 25, 2025 (the "Oxford Offer"), and substantial indemnity costs after the date of that offer. Alternatively, Oxford seeks $558,187.26 in partial indemnity costs.

[6] The Receiver urges the court not to award any costs of this motion, or in the alternative suggests that the costs claimed by Oxford are disproportionate and that an award of partial indemnity costs of $250,000 (inclusive of all fees, disbursements and applicable taxes) would be more consistent with the factors that r. 57 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, identifies for the court to consider when making costs awards.

Principles Governing Costs of Restructuring Proceedings

[7] The general principles governing costs on motions in restructuring proceedings were recently canvassed by this court in a decision in the HBC CCAA proceedings: see *In Re Hudson's Bay Company*, 2026 ONSC 1331 (the "HBC Costs Decision"), at paras. 10-12:

> [10] Costs are not typically sought under the CCAA because, as the court explained in *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 5478, 93 C.B.R. (6th) 154, at para. 9, a restructuring is often not a "classic adversarial civil proceeding", and the CCAA is intended to provide a "forum for stakeholder views to be brought forward, considered, and taken into account".
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> [11] However, the court has discretion to award costs in appropriate CCAA cases. CCAA Applicants are not immune from costs awards. There is no general principle that costs should not be awarded in CCAA proceedings, and there are examples of cases in which the normal rule that costs follow the event has been applied. Costs have been ordered payable out of the debtors' estate either directly by the applicants or as a result of an award made against the Monitor: see, for example, *Urbancorp Toronto Management Inc. (Re)*, 2019 ONCA 757, 74 C.B.R. (6th) 23, at paras. 80, 82; *Silver Streams Homes Inc. (Re)*, 2017 ONSC 314, at paras. 13-21; *Return On Innovation Capital Ltd. v. Gandi Innovations Ltd.*, 2011 ONSC 7465, 88 C.B.R. (5th) 320, at paras. 5-7, 14-15; *Re Calpine Canada Energy Ltd.*, 2008 ABQB 537, 46 C.B.R. (5th) 243, at para. 1; and *Jackpine Forest Products Ltd., Re*, 2004 BCSC 20, 27 B.C.L.R. (4th) 332, at para. 35.
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> [12] Costs awards are discretionary under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Costs are typically considered in three stages: entitlement, scale, and quantum. There is no reason to deviate from that approach in this case. This case raises the additional question of who should pay the costs, if any are awarded, and when they should be paid.

[8] These same principles regarding costs awards apply in a Receivership under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), such as this one involving YSS 1, as were applied in the HBC Costs Decision under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). Unlike in the HBC case, in this case costs are being sought against the Receiver (court officer) personally.

Costs Analysis

[9] I will address each of the three stages of the costs analysis, in turn.

Entitlement to Costs and Who is Liable to Pay

[10] It is not a given that a "successful" party on a motion in a receivership (or other restructuring proceeding) will be entitled to costs. As was explained in *YG Limited Partnership and YSL Residences (Re)*, at para. 9, a restructuring is often not a "classic adversarial civil proceeding"; rather, the CCAA (and, in this case, the BIA) is intended to provide a "forum for stakeholder views to be brought forward, considered, and taken into account". Where that occurs, just because the court eventually accepts one of the parties' views over others' does not mean that the party who put forward the accepted view is necessarily entitled to costs. This case is unusual in a number of respects, one of which is that Oxford, as the successful party opposing the Fairweather Sublease Approval Motion, should be awarded some costs.

[11] Here, while the Receiver entered into the Fairweather Sublease and was recommending that the court approve it, the *lis* or dispute about it was really between Oxford, the Landlord under the HBC Head Lease, and the RioCan Applicants (RioCan Real Estate Investment Trust, a significant secured creditor of YSS 1, and its affiliates, "RioCan") that were very much involved in the arrangements concerning the Fairweather Sublease that the Receiver was asking the court to approve: see para. 107, Fairweather Sublease Approval Motion. As was explained in that decision, RioCan had agreed to fund the rent deficiency between the amount owing to Oxford under the HBC Sublease and the amount Fairweather agreed to pay under the New Fairweather Sublease, for as long as it remained in Oxford's economic interests to do so: see Fairweather Sublease Approval Motion, paras. 23, 74, 111(a)(ii).

[12] Oxford and RioCan are direct competitors in the Canadian retail mall market. Oxford was engaged in a commercial dispute about its contractual rights and obligations and was at odds with, among others, one of its direct competitors that was propounding the Fairweather Sublease that Oxford was not willing to consent to. Both had economic interests at stake. Oxford's position prevailed, following an adjudication that was more in the nature of a "classic adversarial proceeding". That entitles Oxford to some award of costs.

[13] The Receiver asserts that it would be unusual for costs to be awarded when a court declines to approve a transaction proposed by a court-appointed officer. Oxford complains that there is no authority for this assertion, however, having sat on the Commercial List now for more than four years, I have no hesitation in taking judicial notice that this is, indeed, the case. This is at least, in part, because the court encourages court officers to explore value maximizing transactions and would not want an adverse costs award to serve as a disincentive to the court officer or to other market participants to explore these transactions. However, as already noted, this is an unusual case. Nor am I concerned in the particular circumstances of this case that imposing a costs award against the YSS 1 estate would act as a deterrent for future court officers to take similarly creative approaches to managing difficult mandates and exploring solutions to challenging problems with other market participants.

[14] The result of ordering the estate of YSS 1 to pay the costs forthwith could be to take any funds that might have otherwise been available to distribute to the first secured creditor (RioCan) and pay them to Oxford. In *Re: 144 Park Ltd.*, 2015 ONSC 6864, 32 C.B.R. (6th) 125, at paras. 10, 20, Newbould J. sent further and held that the Trustee`s motion to terminate agreements were in the mortgagees' (Laurentian Bank and MarshallZehr Group) interests, and therefore held the

mortgagees directly liable for the costs award. While it may be open to the court to order a receiver to pay costs and pursue indemnification from the estate (assuming there was no misconduct on their part), requiring the creditors to pay the costs directly (or, in this case, indirectly) is also an avenue available to the court to deal with costs where fairness dictates that some costs be paid to a successful litigant: see *Par*k at para. 11.

[15] RioCan is the first secured and primary economic stakeholder in the YSS 1 receivership. It has been funding the receivership and stood to benefit if the Receiver's motion had been successful. It is also the economic stakeholder that will indirectly pay any costs awarded on this motion if paid out of the YSS 1 estate. That is entirely appropriate in this case given the role it played in developing and advocating for the Receiver to enter into and seek court approval of the New Fairweather Sublease. The Receiver was doing its job, but RioCan is a commercial stakeholder just like Oxford and it is appropriate in this case for RioCan to bear the indirect responsibility for some of Oxford's costs incurred to respond to this motion.

[16] RioCan has litigated with Oxford through its direct participation in the Fairweather Sublease Approval Motion and indirectly through its funding of the receivership. It also agreed to back stop the Fairweather Sublease, if approved. In these circumstances, it would be unfair to then require the successful litigant (Oxford, an unsecured creditor in respect of any costs awarded in its favour) to have to line up behind RioCan (the first secured creditor) for recovery of its costs of this motion from the YSS 1 estate.

[17] Given these circumstances, I am not concerned in this case (as I was in the HBC Costs Decision, see e.g., paras. 24, 30) about making an order that these costs be ordered payable by the debtor's estate forthwith. There is no evidence or argument here that making such an order will disrupt the priorities as between creditors of the estate of YSS 1, given RioCan's position as the first secured creditor and the amounts owing to it. This motion specifically concerned the lease held by YSS 1, not all the entities subject to the receivership. It is a liability of the estate of YSS 1 and should be paid as such, forthwith.

[18] Not every costs award in an insolvency proceeding will be dealt with in this manner. Costs are discretionary and each award depends on the particular circumstances of the case. This is what I consider to be fair and reasonable in this case.

[19] Oxford goes further than this, and seeks not only an order for the costs to be paid forthwith, but to hold the Receiver personally liable for the costs, relying on other cases that I do not consider to be applicable to these circumstances.

(a) In *Haunert-Faga v. Faga*, 2013 ONSC 1581, 100 C.B.R. (5th) 52, the receiver was seeking, and was denied, advance costs immunity in connection with litigation that it was pursuing in the course of its duties. The court determined that the receiver's request did not meet the exception to the general rule that receivers are not awarded advanced cost immunity orders at the beginning of litigation that the receiver is pursuing as a party litigant outside of the bankruptcy proceeding: see e.g. at para. 18, where the receiver acknowledged this was a novel request. The court found that the creditor's undertaking regarding costs to the defendants would likely fall short of potential cost exposures: at para. 22. Further, where the receiver relied heavily

on *Farlow v. Hospital for Sick Children* (2009), 100 O.R. (3d) 213 (S.C.), the court held that the situation in *Faga* was not exceptional and that pursuing litigation is a business decision to be made by a receiver: see paras. 23-28. In these circumstances, and having regard to other protections available to the receiver, the court was not prepared to grant an advance blanket immunity to the receiver from exposure to costs if its litigation was unsuccessful.

(b) In *Akagi v. Synergy Group (2000) Inc*, 2015 ONCA 771, 128 O.R. 64, costs were awarded against a Receiver when the receivership orders were discharged and after the court had determined that the receiver must bear the cost consequences of the orders having been set aside in circumstances where it acted as a "real litigant" (because it had taken the investigative receivership too far, essentially on the theory that an investigative receivership was akin to a criminal investigation or a public inquiry): see paras. 17-25. The receiver here turned its receivership over a "relatively small" claim, into a "litigant for the cause". As a litigant, it was subject to the 'loser pays' costs regime. The Court of Appeal held that receivers only rarely incur personal liability for costs, but that this "does not apply where the receiver turns itself into a 'real litigator', impermissibly drawing others into the fray and forcing them to defend themselves in what amounts to a process that is extraneous to the creditor-driven receivership": at para. 18.

[20] I do not consider there to be any basis on which to hold the Receiver in this case, acting in the normal course of its duties to bring forward a potential transaction for the court's approval, even if at the behest of a significant secured creditor, to be held personally liable to Oxford for its costs. There has been no finding that the Receiver was not acting in good faith or that it stepped outside of the bounds of its mandate, nor was the Receiver pursuing litigation outside of the restructuring proceeding.

[21] To the contrary, the court noted in the February 9, 2026 endorsement dismissing the Fairweather Sublease Approval Motion that the Receiver was doing its job, taking steps to identify a transaction that might reduce the losses suffered by creditors of YSS 1, one of the debtors in receivership. This was a unique and challenging case, because the debtors held what appeared to be highly valuable assets (leases) that proved to be very difficult to monetize. The Receiver proposed the Fairweather Sublease in an attempt to accomplish its goal of preserving the ability to monetize a valuable asset for creditors that would otherwise soon be forfeited. The court recognized, at para. 114, that the Receiver had "gone to great and creative lengths to try to preserve and maximize any value that may exist in the leasehold interests," consistent with its mandate.

[22] The fact that the court found, when considering whether to approve the Fairweather Lease under the principles in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.), that there may have been an unfairness in the working out of the sale (or, in this case, subletting) process and that the proposed Fairweather Sublease did not adequately account for the interests of all parties (e.g., not Oxford's interests, see Fairweather Sublease Approval Motion, at para. 105), does not warrant an award of costs against a Receiver personally. If that were the case, court officers could face costs awards against them personally any time they came to court for approval of a transaction and were not able to satisfy the *Soundair* principles. That could serve as a disincentive to court officers exploring value maximizing transactions and could have a chilling effect on the very activities that the court officers are appointed to engage in.

[23] In the circumstances, the costs awarded should be paid forthwith from the debtor's estate, and not by the Receiver itself.

Scale of Costs

[24] Partial indemnity is the usual scale of costs that is awarded to a successful party, absent special circumstances or egregious conduct. One special circumstance that can result in an enhanced scale of costs is where the winning party has made a settlement offer prior to the hearing that it "beat" in the end result of the motion. The Oxford Offer does not qualify as an offer that attracts the mandatory cost consequences of a higher scale of substantial indemnity costs from and after the date of the offer under r. 49.10.

[25] The Oxford Offer was that it would pay $5 million before cross-examinations, or $2.5 million after, if the Receiver ended the litigation between the parties by terminating the HBC Sublease and abandoning its motion. Oxford points out that this offer was not only for a payment of some millions of dollars but, depending on the timing of its acceptance, YSS 1 could have avoided the payment of approximately $970,000 in further rent that was paid under the HBC Sublease to keep it in place, as well as hundreds of thousands of dollars in professional fees, and the costs of this motion.

[26] The Oxford Offer was made more than seven weeks before the hearing and remained open for acceptance until after the hearing began. However, the Receiver rightly points out that Oxford's offer was not r. 49 compliant, in two respects:

(a) It was incapable of being accepted by the Receiver alone. The offer was explicit that it had to be accepted by *both* the Receiver and RioCan in order to have effect.

(b) It contained terms beyond the scope of the motion. Specifically, Oxford's offer required both RioCan and the Receiver to grant Oxford a full and final mutual release of uncertain scope *and* required them to surrender and terminate all leases and related agreements in respect of Yorkdale Mall, which would have the impact of precluding the Receiver from exploring any other transactions. It also required the deletion of instruments from title to the property. None of this was in issue or available in the motion.

[27] An offer which incorporates demands beyond the scope of the proceeding does not comply with r. 49: see *NorthStar Earth & Space Inc. v. Spire Global Subsidiary, Inc.*, 2024 ONSC 5060, at para. 90.

[28] As Oxford notes, the court is entitled to consider an offer to settle even if it is not compliant with r. 49. However, the Oxford Offer only afforded a 10-day window to accept and receive $5 million (November 25, 2025 to the commencement of cross-examinations on December 4, 2025), after which it dropped to $2.5 million. This is contrasted with the dispute that both sides acknowledge in their cost submissions involved "hundreds of millions of dollars' in value".

[29] The Receiver made no counter-offer. I agree with Oxford that parties to disputed, high stakes litigation ought to be incentivized to make meaningful efforts to settle, with cost consequences that follow. However, the Oxford Offer, while in hindsight would have achieved a better practical outcome for the Receiver than what was achieved in the unsuccessful pursuit of its

motion for approval of the Fairweather Sublease (after which the HBC Sublease was terminated), when evaluated at the time it was made in November 2025 did not achieve the objective of monetizing anything approximating the estimated value of the HBC Sublease that the Receiver was attempting to unlock through its motion.

[30] This court has already determined in its decision on the Sublease Approval Motion that the Receiver did not act in bad faith with respect to the Fairweather Sublease, and it was not faulted for having pursued this potential opportunity to unlock value for the YSS 1 stakeholders. There is nothing else about the conduct of the Receiver (or RioCan, for that matter) that has been identified that would warrant an elevated scale of costs, beyond the typical partial indemnity scale of costs.

[31] Accordingly, costs are awarded in favour of Oxford on a partial indemnity scale.

Quantum of Costs

[32] Oxford's claimed partial indemnity costs are $558,187.26 (inclusive of all fees, disbursements and applicable taxes).

[33] The Receiver submits that an appropriate costs award is $250,000, all inclusive. This amounts to approximately $210,000 in partial indemnity costs plus the full $38,438.30 in disbursements Oxford claims. The Receiver points out that this is $40,000 more than the Receiver's certified partial indemnity costs, although those did not include the costs incurred by the Receiver to prepare its report for the motion or any costs incurred by RioCan, who supported the Receiver's motion. Nonetheless, the Receiver maintains that this is a fair and reasonable amount of partial indemnity costs, consistent with its reasonable expectations of what an adverse costs award might be for this type of motion.

[34] Further, the Receiver is critical of the number of lawyer hours reflected in Oxford's Costs Outline and the time they spent, collectively, preparing for this motion, and in particular the time they devoted to the cross-examinations. The Receiver contends that the docketed hours of Oxford's lawyers are excessive and disproportionate. Even if some of the discrepancy between Oxford's claimed costs and those of the Receiver can be explained by the time that the Receiver did not include in its Costs Outline (for the preparation of its report and for time spent by RioCan's lawyers to support the motion that alleviated some work for the Receiver's counsel), it is hard to conceive of how that could account for why Oxford's claimed costs are more than twice the claimed costs of the Receiver.

[35] The fact that the motion was important and of significant financial impact still has to be balanced with other r. 57 considerations, such as proportionality and the objectively reasonable expectation about the magnitude of costs that might be awarded to the opposing party, if successful. The determination of the quantum of costs is not a scientific or formulaic exercise. Motion judges are mandated to fix the costs of a motion and order them to be paid within 30 days, unless satisfied that a different order would be more just under r. 57.03 because, among other reasons, the motion judge is considered to be best situated to balance all of the competing factors and come up with a costs award that is fair and appropriate in the circumstances of the particular case.

[36] In this case, having considered the applicable r. 57 factors, and in the exercise of my discretion under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, I have determined that an award of partial indemnity costs in favour of Oxford fixed in the all-inclusive amount of $400,000 is fair, reasonable and appropriate in the circumstances. This represents approximately the mid-point between the two partial indemnity amounts claimed: $558,00 vs. $250,000.

Disposition: Costs

[37] For the foregoing reasons, Oxford shall be paid its partial indemnity costs fixed in the all-inclusive amount of $400,000 forthwith (within 30 days) out of the debtor estate of HBC YSS 1 Limited Partnership (now 2491815 Ontario Limited Partnership).

Jessica Kimmel

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Kimmel J.

Date: April 14, 2026