Court File No. CV-24-00715321-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

CONSTANTINE ENTERPRISES INC.

Applicant

- and -

MIZRAHI (128 HAZELTON) INC.
and MIZRAHI 128 HAZELTON RETAIL 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

ORAL COMPENDIUM OF MIZRAHI INC. AND SAM MIZRAHI

February 3, 2026

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ORAL COMPENDIUM INDEX

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REPLY AFFIDAVIT OF ROBERT HISCOX
(sworn December 22, 2025)

I, Robert Hiscox, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

I. OVERVIEW

1. I am the co-founder and Chief Executive Officer of Constantine Enterprises Inc. ("**CEI**"), the applicant in the within proceedings. As such, I have personal knowledge of the matters to which I hereinafter depose. Where I do not have personal knowledge of the matters set out herein, I have stated the source of my information and, in all such cases, believe it to be true.

2. Capitalized terms used in this affidavit and not otherwise defined have the meanings given to them in my affidavit sworn on October 29, 2025 (the "**First Hiscox Affidavit**").

31. Given the benefit to MI, the CMA and DMA terms, and the relationship between MI and CEI, I expected transparent disclosure through:

(a) the major assumptions in the August 26, 2020 Email, October 27, 2020 Email or October 28, 2020 Email;

(b) the Transition Plan (attached as Exhibit "J" to the Mizrahi Affidavit);

(c) the meetings leading up to the transition; or

(d) a response to David's October 28, 2020 email (Exhibit "M" to the Mizrahi Affidavit) noting CEI's understanding that MI "will continue to seek all opportunities to improve schedule and cost savings to substantial completion."

32. No such disclosure was provided.

33. Although MI and CEI agreed in late October 2020 to replace CCM, MI did not disclose that it was marking up labour rates until May 2022, and only in response to outstanding MI invoices that MI said urgently needed to be paid and for which I required back-up to approve.

34. Internal MI e-mails (attached as Exhibit "P" to the Mizrahi Affidavit) show MI considered, but chose against, transparency concerning mark-ups and CLM subcontracting. On May 5, 2022, Kilfoyle requested labour rates and the related contract and noted payment would follow if I received them:

> Can someone send me the contracted rates and the contract for 128 which shows the rates for labour.
>
> If Robert gets this he will pay the MI cheque.
>
> Best regards
> Mark

35. MI's Joshua Lax ("**Lax**") appears to have attached the CCM time-based labour rate sheet and responds as follows:

> These are the rates from the original CCM contract. The project has a contract with MI. MI previously had a contract with CCM and then took over that role directly.
>
> Sam – What do you want to share?

36. No response from Mizrahi is included.

37. In response to receiving the rate sheet from Kilfoyle on May 6, 2022 (Exhibit "Q" to the Mizrahi Affidavit), Donlan replies on May 6, 2022 (Exhibit "R" to the Mizrahi Affidavit) expressing continuing concern with MI's lack of transparency regarding labour mark-ups and MI's related profits.

38. Despite repeated requests for back-up, MI did not disclose the terms of its engagement with CLM or CLM's underlying invoices evidencing the extent of the mark-ups.

39. As set out at paragraphs 20-22 and 30 of the First Hiscox Affidavit,

(a) I approved invoices to avoid construction delay costs; and

(b) CEI learned through its own efforts on March 22, 2023 that MI used CLM and what CLM's rates were.

40. Given the mounting costs and projected losses for the Hazelton Project, and MI's cost-savings rationale for replacing CCM, CEI would not have agreed to the CCM to MI transition on the basis of the October GE Budget and October 2020 Cash Flow had MI disclosed the MI Hidden Profits, particularly as MI's compensation was already increasing due to additional project costs, as provided in the variance analysis in the October 28, 2020 Email.

41. CEI understood that MI's engagement terms, including compensation and reimbursable expenses, remained governed by the CMA. No new agreement was entered into. The CMA states that it is the entire agreement between the parties and requires any change to services be recorded in writing (see paragraph 2.2.6 of the Fifth Report and Section 5.2 of the General Conditions to the CMA).

42. Section 1.3.2 of the General Conditions also includes a no-waiver clause:

> No action or failure to act by [Hazelton] or [MI] shall constitute a waiver of any right or duty afforded [*sic*] either of them under this Contract, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically agreed in writing.

43. Hazelton (or CEI) never provided written approval or waiver authorizing MI to retain CLM or mark up labour, which the CMA did not permit or contemplate.

V. MI'S UNAUTHORIZED MARK-UPS UNILATERALLY INCREASED ITS CONSTRUCTION MANAGEMENT FEES

44. The CMA and the CCM Contract expressly set out the terms for compensation, summarized as follows:

Provision	CMA	CCM Contract
Section 5.2: Construction Manager's Fee	5% of the Construction Costs and an amount based on the time-based rates for personnel employed by the Construction Manager as described in Schedule C (set out at page 144 of the Receiver's motion record dated July 18, 2025).	2% of the Construction Costs and an amount based on the time-based rates for personnel employed by the Construction Manager as described in Schedule C and set forth in Appendix A (set out at page 216 of Mizrahi's motion record dated November 28, 2025 ("**MI's Motion Record**").
Section 5.3: Reimbursable Expenses	15% administrative charge above actual expenses specified in Schedules A2 and B2.	2% administrative charge above actual expenses specified in Schedules A2 and B2

using the amounts in the invoice summary attached as Appendix K to the Fifth Report, with a "mark-up" column added to show the MI labour mark-up on a percentage basis:

Period	CLM Invoices A	MI Site Labour Invoices B	Mark-up (B-A)/A
Nov 7 – Dec 31, 2020	42,133	105,696	151%
Jan 1 – Dec 31, 2021	372,038	976,074	162%
Jan 1 – Nov 12, 2022	226,818	593,540	162%
Construction Invoice	-	30,000	N/A
Total	640,989	1,705,310	166%

50. I disagree with Mizrahi's suggestion at paragraph 54 of the Mizrahi Affidavit that CEI agreed MI would supply labour at CCM's time-based labour rates. CEI did not agree to MI's excessive mark-ups. MI was already compensated under the CMA; time-based labour (other than for the five individuals set out in Schedule C of the CMA) was not part of MI's compensation. There was no basis for MI to increase its fee, especially given delays, expected losses, and MI's stated cost-savings rationale for the CCM to MI transition.

51. Given the extent of the mark-ups, it is unsurprising MI withheld the CLM invoices from CEI.

52. MI did not disclose its labour rates until May 2022, eighteen months post-transition, and the scale of the embedded mark-up was not revealed until March 2023 after repeated CEI requests; even then MI provided only one CLM invoice. As stated at paragraph 34 of the First Hiscox Affidavit, I learned the full extent of MI's mark-ups upon reviewing the Fifth Report.

VI. CEI DID NOT AUTHORIZE MI'S EXCESSIVE MARK-UPS

53. Mizrahi asserts at paragraphs 57 and 65 of the Mizrahi Affidavit that CEI authorized MI's marked-up labour costs because MI disclosed in May 2022 that its rates matched CCM's, and I thereafter signed cheques.

From: Chris Donlan <chris.donlan@constantineinc.com>
Subject: Re: 128 Payments
Date: May 6, 2022 at 9:19:35 AM EDT
To: Mark Kilfoyle <mark@mizrahidevelopments.ca>

Good morning, Mark.

You mentioned a contract on the call and that's what I asked for in my note. I also wanted to see the invoices that match the contract. You haven't given me either of those things. The attachment you sent says page 33 of 50. What document is it?

When you say that we've always paid these rates, you're missing my point. CEI trusted you the first few years and didn't challenge everything because we thought

you were going to deliver a profitable project. Instead, we're on pace to lose a massive amount of money on this project. In that situation, every expense should be challenged and optimized. You won't engage on this particular expense because you make a profit here on the back of a project with epic losses. The conflict of interest is obvious. Diego's report shows 2 people spending a full day cleaning. We can bring in cleaners that will do it at 1/3 the cost from our other properties.

If you want Robert to approve your cheque, you need to address his questions.

Thanks,

CMD

CONSTANTINE ENTERPRISES INC.
CHRIS DONLAN | Chief Financial Officer | www.constantineinc.com
chris.donlan@constantineinc.com | +1.416.543.9327
1235 Bay St., Suite 701, Toronto, Ontario, Canada M5R 3K4

> On May 6, 2022, at 09:01, Mark Kilfoyle <mark@mizrahidevelopments.ca> wrote:
>
> Good morning Chris,
>
> Please find attached the billing summary for the rates charged by Mizrahi since the beginning of time on the project. The only fluctuation in the rate is the annual increase.
>
> We have always charged these rates whether it was CCM doing the work or now.
>
> We have already discussed all of the costs these rates cover and I will restate those discussions we have had previously.
>
> My understanding was you were going to meet Sam here to sign 180 cheques. Please let me know when I can bring the cheques to you for signing, or if you are coming here, and pick up the cheque to despot it Duca for $172K. I have Mizrahi's cheques all prepared. I believe you said Edward would be available at 2pm but let me know.
>
> We are going to process Audex's cheque early next week, which we will each contribute $14.5K for that one. So I will deal with that on Tuesday as Remy is away until then.
>
> Best regards
> Mark
>
> <Pages from Supplementary General Conditions to CCDC 5A

Mizrahi Revised [executed].pdf>

Mark Kilfoyle
CFO and COO

125 Hazelton Avenue
Toronto, Ontario M5R 2E4

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--- This is the Cross-Examination of ROBERT HISCOX, on his affidavits (dated 29 October 2025 and 22 December 2025), herein, taken via Veritext Legal Solutions Virtual Platform (Zoom), on Tuesday, the 20th day of January, 2026.

A. Yes.

83 Q. And that CLM invoice and the time sheet showed you the name of the worker, the hours worked, and the hourly rate charged, correct?

A. Yes.

84 Q. And it included the contact information for CLM, correct?

A. Not sure about that.

85 Q. Okay. I'm happy to show you. I am showing you the photograph.

A. Yeah. Okay. Yeah.

86 Q. And so from a comparison of the Mizrahi Inc. invoice at that time and that CLM invoice, the markup that Mizrahi Inc. was charging would have been apparent, correct?

A. No. I mean, that was the first time we saw a CLM invoice and it was a surprise because it was handed to me directly and not to Sam, and I took photos of it because we were -- I was shocked that there was a third-party company.

87 Q. It would have been a matter of arithmetic for you to determine --

A. Oh, we went home and started to do that definitely.

88 Q. Okay. So, that's all I'm --

A. Definitely right after -- right after we saw that, we were like we never heard of this company. We didn't know what this was. And as soon as it was provided, we were leaning on Sam again about his unionized workers and all this business.

So, the lady provided that to me directly. I don't believe she was supposed to provide it to me directly. That's why I took photos of it, and then we went home to investigate, back to our offices to investigate.

89 Q. And just my question for you was, it would have been a matter of arithmetic to determine the markup that Mizrahi Inc. was charging to 128 Hazelton by subtracting the amount of the Mizrahi Inc. invoice from the amount of the CLM invoice, correct?

A. Yes. And that's what we'd done.

90 Q. So, by May -- by March 2022, we already know that CEI knew that MI was charging a markup for labour rate services. Excuse me, I misspoke.

By May 2022, the e-mails with Chris Donlan established that Constantine knew that Mizrahi Inc. was charging a markup on labour services to the project.

And by March 2023, Constantine knew of the arithmetic, the quantum of that markup, and the fact that CLM was the company that was providing the labour

services, correct?

A. When we got that invoice at that meeting, we became aware of CLM.

91 Q. Okay. Now, the communications between the parties drops off. You agree, in the record, we don't find any communications between CEI and Mizrahi Inc. following the March 2023 meeting where Constantine complained about the retention of a third party to provide labour services, correct?

A. Sorry, can you ask that again? What are you asking?

92 Q. In your affidavit, you don't provide any written communication following the March 2023 meeting where Constantine voiced complaints to Mizrahi Inc. about it retaining a third party to provide labour services.

It's not there, sir. There is -- there is no letter that you have where you write to Mizrahi team, after this apparent revelation in March 2023, where you complain that it's not fair or it's not proper or it's inconsistent with the Construction Management Agreement whatsoever. You don't provide any such written communication.

A. We just took it all internally and decided what to do with the information because we were shocked by it.

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AFFIDAVIT OF SAM MIZRAHI

(Affirmed November 28, 2025)

I, Sam Mizrahi, of the City of Toronto in the Province of Ontario SOLEMNLY AFFIRM:

1. I am the directing mind of Mizrahi Inc. ("MI") which acted as general contractor and developer to the real estate development project at 128 Hazelton (the "Project") and was retained by Mizrahi (128 Hazelton) Inc. ("Hazelton"). As such I have knowledge of the facts in this affidavit. Where my knowledge is based upon information or belief, I have stated the source of such information or belief and verily believe it to be true.

2. I am delivering this affidavit in response to the motion brought by KSV Restructuring, the court-appointed receiver for Hazelton (the "Receiver") in which it alleges that I breached my fiduciary duties to Hazelton, and that MI breached the terms of the Construction Management Agreement, dated March 13, 2017 (the "CMA") and the Development Management Agreement,

19. During the time that CCM was retained to provide services to the Project, MI included the CCM invoices, including the CCM invoice 128-043-C included in the Fifth Report, [2] in its monthly invoices to Hazelton, such as MI invoice C896.[3]

20. Attached as **Exhibit G1 to G6** are MI invoices, C505, C511, C636, C798, C812 and C872, which are further examples of MI invoices for payment of the CCM costs for construction management and labour services incurred from February 2018 to October 2020. The MI invoices sought payment of site labour expenses as "Reimbursable Expenses" and appended the related CCM invoice and timesheets, which apply the time-based labour rates as set out in Appendix A to the CCM Contract. In addition, the CCM invoices, for which MI received reimbursement from Hazelton, apply overtime rates. For example, below is an excerpt of CCM invoice 128-022-C, appended to **Exhibit G3**, MI invoice C636:

Invoice

Clark Construction Management Inc
387124 20th Sideroad, Mono, ON L9W 6V5

Invoice #: 128-022-C

Bill To:
Mizrahi Inc.
125 Hazelton Avenue
Toronto, ON M5R 3E4

POSTED

Invoice Date: 2019-03-18
Due Date: 2019-03-28
Project: 128 Hazelton St
P.O. Number:
Terms: Net 10 Days

Description	Hours/Qty	Rate	Amount
Labour - Base (Robert Philips)	167	89.51	14,948.17
Labour - Overtime (Robert Philips)	30.5	134.27	4,095.24
Labour - Doubletime (Robert Philips)	0	179.02	0.00
Labour Flagman - Base (Carly DelBel)	145	83.82	12,153.90
Labour Flagman - Overtime (Carly DelBel)	17	125.74	2,137.58
Labour Flagman - Doubletime (Carly DelBel)	0	167.64	0.00

[2] Found at page 632 of the Receiver's Motion Record.
[3] Found at page 631 of the Receiver's Motion Record.

21. Included in the CCM invoices were timesheets for each specific labourer. Below I have excerpted the timesheet from CCM invoice 128-022-C (**Exhibit G3**):

128 Hazelton Employee	March 2019 Rate Description	Rate Amount	TTL Hours Regular	O/T	Dbl Time	Total Amounts Regular	Overtime	Dbl Time
Robert Phillips	General	89.51	167	30.5	0	$14,948.17	$4,095.08	$0.00
Carly DelBel	Flagman	83.82	145	17	0	$12,153.90	$2,137.41	$0.00
Nathan Grein	Foreman	94.55	0	0	0	$0.00	$0.00	$0.00
			312	47.5	0	$27,102.07	$6,232.49	$0.00

Grand Total $33,334.56

22. All of CCM's invoices (and MI's related invoices to Hazelton) followed a substantially similar format and were included in MI's monthly invoices to Hazelton.

23. CCM continued to provide construction management and labour services to Hazelton, through MI, pursuant to the CCM Contract until approximately October 2020 when I and CEI mutually agreed to terminate CCM and have MI begin to provide the same construction management and labour services under the CCM Contract.

24. CCM did not provide its construction management and labour services to Hazelton at cost. Included in the time-based labour rates is a profit margin for CCM to provide the construction management and labour services. I understand that CCM provided unionized labour. Based on my experience in the development industry and construction in the Greater Toronto Area, the CCM time-based labour rates were market rates and reasonable.

IV. CEI was Aware of and Approved of CCM's Involvement in the Project and Approved the Construction Draws

25. CEI and Mr. Hiscox were aware of and approved of CCM providing construction management and labour services to Hazelton. Attached as **Exhibit H** are copies of the cheques

signed by Mr. Hiscox for payment of the invoices enclosed as **Exhibit G**. These are just examples of CEI's approval of the CCM costs to Hazelton. CEI reviewed and approved the payment of all of CCM's invoices on the Project and signed all the cheques required to pay those invoices.

26. The processing of construction draw requests and the payment of invoices for Hazelton was a joint effort by the Mizrahi team and CEI. Every month my office would prepare the monthly construction draw requests and invoice listings.

27. The construction draw requests would be compiled and submitted to Altus, the cost quantity surveyor appointed by Hazelton's primary lender, DUCA. Copies of the Altus Reports in our possession are attached hereto as **Exhibits I1** to **I31**. At this time, we cannot locate Altus Report no. 25.

28. Upon a review of the construction draw request by Altus, the construction draw requests would be approved by DUCA. Once approved, my office would prepare the cheques for signature.

29. The cost of the Altus reports was paid for by Hazelton. Ultimately, Hazelton, at the insistence of CEI, stopped funding the cost of preparing for Altus reports because the DUCA loan had been exhausted.

30. Hazelton's cheques needed to be signed by myself and Mr. Hiscox. In advance of signing of the cheques, Mr. Hiscox, and CEI's Chief Financial Officer, Mr. Chris Donlan, would review the cheques and supporting invoices in detail. They often asked many questions and sought additional information before they would agree to release funds. In particular, they often and routinely sought further information and documentation before approving payment of MI's invoices.

31. When Mr. Hiscox and Mr. Donlan reviewed the cheques and supporting invoices, at the time of CCM's involvement in Hazelton, they were provided with the CCM invoices that were appended to the related MI invoice.

32. CEI, undisputedly, knew of and approved of MI having retained CCM to provide construction management and labour services to Hazelton. CCM provided these services and was paid for these services for years with CEI's direct, explicit approval, since Mr. Hiscox is the one who signed all the cheques. Mr. Hiscox and CEI knew and approved of MI having retained CCM and seeking reimbursement for the CCM costs as part of the monthly construction draw process.

33. The expense of CCM's invoices was always paid through MI as part of MI's monthly invoices. MI would then pay CCM upon receipt of payment from Hazelton.

V. October 2020: CEI Approves the Termination of Clark Construction Management

34. In October 2020, CEI and I mutually agreed to terminate CCM and its construction services. We agreed that MI would replace CCM and begin to provide the construction management and labour services that had been provided by CCM under its CCDC5A contract with MI.

35. By providing the construction management and labour services to Hazelton that had previously been provided by MI, MI had to bring on new staff and personnel as its role on the Project increased in scope.

36. The construction labour, as noted in the Receiver's Fifth Report, was provided by CLM. MI did not conceal or hide or mislead anyone that CLM was providing labour to Hazelton.

37. Mr. Hiscox and Mr. Donlan knew that MI does not have a staff of construction labourers. When the decision to replace CCM was made in October 2020, there were specific discussions about MI providing the labour services required to complete the Hazelton Project.

38. On October 26, 2020, MI provided CEI with a transition plan for the removal of CCM and its replacement with MI (the "Transition Plan"). A copy of the email dated October 26, 2020 enclosing a copy of the Transition Plan is attached as **Exhibit J**.

39. The Transition Plan notes the following:

- In July 2020, Mr. Esteban Yanquelevech was hired as Construction Manager;
- October 2020: bring on additional staff to replace CCM; and
- After termination of CCM: bring on additional labour and flagmen.

40. In addition, the Transition Plan, among other things, notes that the MI team would contact the site labour, flagmen, and handymen that were "previously engaged with" and that "we will be using Union staff on this project."

41. On October 27, 2020, Mizrahi Development's Chief Financial Officer, Mr. Mark Kilfoyle, provided Mr. Hiscox and Mr. Donlan with an updated GE Budget workbook for Hazelton, which analyzed the potential savings to the Project for replacing CCM with MI as the construction management and labour provider for Hazelton. A copy of Mr. Kilfoyle's email of October 27, 2020 is attached as **Exhibit K.**

42. As noted in Mr. Kilfoyle's October 27, 2020 email, the financial analysis assumed that MI would replace the labour provided by CCM using "union labour" and that savings would result if non-union labour was provided. Mr. Kilfoyle also notes that if non-union labour is provided it

"risks…that union workers might shut or slow down the site. GC-Mizrahi labour is flat rate fixed fee for the PM and overall site management for the period."

43. On October 28, 2020, Mr. Kilfoyle provided Mr. Hiscox and Mr. Donlan with an updated budget and cash flow analysis for Hazelton. The budget and cashflow analysis were, in part, meant to address the Project finances and the impact of the termination of CCM. Attached as **Exhibit L** is a copy of Mr. Kilfoyle's email of October 28, 2020.

44. On the same day, October 28, 2020, Mr. David Ho, Vice President of Development at CEI, emailed the MI team to confirm the agreement to, among other things, terminate CCM from Hazelton. In his email, Mr. Ho notes that Mizrahi Developments, which is likely a reference to MI, will, among other things:

- Execute formal notice of termination with CCM to occur on 29 October 2020;
- Mizrahi management staff to execute the Transition Plan as reviewed at this meeting;
- Mizrahi Project staff will assume management control of the Project; and
- Mizrahi management staff will continue to seek all opportunities to improve schedule and cost savings to substantial completion.

45. A copy of Mr. Ho's email, dated October 28, 2020 is attached as **Exhibit M.**

46. When MI took over from CCM and began to provide construction management and labour services to Hazelton, it used the exact same labour rates as provided for in the CCM Contract that Hazelton had been paying every month since construction on the Project began. The continued use

of the time-based labour rates in the CCM Contract was assumed in the Project budget and cashflow analyses that were exchange at the time of CCM's replacement.

VI. Post-CCM Termination: MI Provided Construction Management Services to Hazelton and Used CLM to Provide Construction Labour at the CCM Time-Based Labour Rates

47. After the termination of CCM, MI stepped into CCM's role in the Project and began to provide construction management and labour services. This was agreed to by CEI and was part of the transition plan following the termination of CCM.

48. As noted in the Receiver's Fifth Report, MI used CLM to provide the labour services for the Project.

49. Contrary to the position of the Receiver and Mr. Hiscox's evidence in the Hiscox Affidavit, MI to did not mislead CEI or hide the fact that it was retaining outside labour services. The intention when CCM was terminated was for MI to step into CCM's role in the Project and to provide construction management and labour services to Hazelton just as CCM had done. That is exactly what MI did.

50. MI charged Hazelton the exact same time-based labour rates as were charged by CCM pursuant to the CCM Contract. Like CCM, MI's direct costs for the labour services were not the same as the time-based labour rates. CCM did not charge its direct costs for time-based labour. Instead, it charged the time-based labour rates set out in the CCM Contract, which, of course, included a built-in profit margin.

51. In the Fifth Report, the Receiver identifies an alleged discrepancy of MI having charged Hazelton 41 more hours than were charged by CLM to MI. This discrepancy is a function of the

construction draw process on the Project and would (or should have) been subject to adjustment to ensure that the Project was only charged for labour that was provided.

52. It was not possible to know how many hours of labour would be incurred in any given month until the month ended. The construction draw process, however, began in the middle of the month. As a result, MI's accounting staff were directed to estimate the number of labour hours that would be incurred in any given month. These estimates have resulted in the 41-hour alleged discrepancy identified by the Receiver. In my experience, discrepancies of this kind are adjusted at or near the conclusion of the Project.

53. The Receiver also takes issue with MI having charged Hazelton overtime rates. After the termination of CCM, MI continued the practice followed by CCM of charging overtime rates. CCM's practice of charging overtime rates is evident from the CCM invoices included in **Exhibit G**. I also do not know if CCM paid its workers for overtime hours. Similarly, I do not know whether CLM paid its workers for overtime hours.

54. The fact is that the agreement for MI to take over CCM's role on the Project was that MI would step into CCM's role and provide the same services to Hazelton that CCM provided at the same time-based labour rates as CCM.

55. The MI invoices that post-date the termination of CCM follow the same general format as the CCM invoices and include a labour rate sheet that identifies the labourer's name, their designation, and the applicable hourly rate. For example, MI invoice C909, which is the first MI

invoice for site labour after the termination of CCM, follows the same general format as the CCM invoices which were submitted and approved by CEI. An excerpt of MI invoice C909 is below:[4]

Timesheet Summary
Mizrahi Inc.
Project: 128 Hazelton
Site Labour
For the period from: 22-Nov-20 To: 19-Dec-20
*cut off on Saturdays

			Week Ending				Total Period SUM		
			2020-11-28	2020-12-05	2020-12-12	2020-12-19			
Employee Name	Occupation	Type	TTL Hours	TTL Hours	TTL Hours	TTL Hours	Hours	Rate	Amount
Alix Pere	General Labour	Total Reg Hrs	-	-	8.50	9.00	17.50	96.35	1,686.13
	General Labour	Total OT Hrs	-	-	-	-	-	144.53	-
		SUM	-	0	8.5	9	17.5		1,686.13
Amante Emil	General Labour	Total Reg Hrs	44.00	32.50	44.00	44.00	164.50	96.35	15,849.58
	General Labour	Total OT Hrs	4.50	-	-	10.50	15.00	144.53	2,167.88
		SUM	48.5	32.5	44	54.5	179.5		18,017.45

56. MI's accounting staff were instructed to prepare MI's staff labour invoices using the exact same time-based labour rates as provided for in the CCM Contract that had been paid by Hazelton prior to the termination of CCM.

VII. CEI and Mr. Hiscox Knew that MI was Charging the CCM Time-Based Labour Rates

57. As noted above, MI charged Hazelton the exact same time-based labour rates as had been charged to Hazelton by CCM (through MI). This was evident from the rate sheets included in every MI invoice. By no later than May 2022 CEI was specifically advised of the rates MI was using to prepare its invoices and was provided with a copy of the rate sheet from the CCM Contract.

58. In May 2022, MI had outstanding invoices for construction labour services that had not been paid. Mr. Hiscox was refusing to release payment for these invoices.

59. On May 4, 2022, Mr. Kilfoyle wrote to Mr. Donlan to seek payment for the outstanding invoices, and some additional invoices. A copy of the email dated May 4, 2022 is attached as **Exhibit N**. A copy of MI invoice C1115, dated February 15, 2022 is attached as **Exhibit O**. Like

[4]Fifth Report, Appendix J, Motion Record page 645.

all MI labour invoices (and the CCM invoices that predated them), attached to MI invoice C1115 is a timesheet that sets out the name of the employee, the total number of hours worked (whether regular or overtime) and the rate amount.

60. MI invoice C1115 sought the payment of site labour to the Project for the period of January 16 to February 12, 2022 in the sum of $61,302.69 plus HST. The rates used in MI Invoice C1115, like all MI invoices to Hazelton for site labour, were consistent with the labour rates set out in the CCM Contract.

61. From a review of internal email correspondence, I have learned that on May 5, 2022, in an effort to get MI Invoice C1115 paid, Mr. Kilfoyle sought and requested a copy of the CCM labour rate sheet from the CCM Contract and noted that Mr. Hiscox would sign the cheques for MI's invoice if they sent "the contracted rates and the contract for 128 which shows the rates for labour". A copy of this email chain is enclosed as **Exhibit P**.

62. On May 6, 2022, Mr. Kilfoyle wrote to Mr. Donlan at CEI. He attached Appendix A to the CCM Contract. The document was titled "Supplementary General Conditions to CCDC 5A Mizrahi Revised" and set out the time-based labour rates MI, like CCM, was charging to the Project. Mr. Kilfoyle noted, "We have always charged these rates whether it was CCM doing the work or now". A copy of Mr. Kilfoyle's email of May 6, 2022 is attached as **Exhibit Q**.

63. The same day, Mr. Donlan responded to Mr. Kilfoyle. From a review of Mr. Donlan's May 6, 2022 email it is clear that he and Mr. Kilfoyle had a telephone conversation. In the email, Mr. Donlan asks where the time-based rate sheet comes from and notes CEI's position that MI should not being making a profit on labour costs. He concludes that if you want "Robert [Mr. Hiscox] to

approve your cheque, you need to address his questions". A copy of Mr. Donlan's email dated May 6, 2022 is attached as **Exhibit R**.

64. From a review of MI's email servers, my team has not been able to locate a written response. Mr. Kilfoyle is no longer an employee of Mizrahi Developments or MI (or any company affiliated with Mizrahi).

65. Nonetheless, the fact is that the MI invoice C1115 was paid, and Mr. Hiscox did sign the cheque. The outstanding MI Invoice C1115 was paid. Attached as **Exhibit S** is a May 2022 bank statement for Hazelton, which shows a funding deposit dated May 6, 2022 and a cheque, numbered 2964, paid to MI the same day.

66. As of May 2022, therefore, CEI was aware that MI was earning a profit on the labour rates and was employing the same time-based labour rates as had been charged to Hazelton when CCM was providing construction management and labour services to Hazelton.

VIII. The March 22, 2023 Meeting with Mr. Hiscox

67. As noted in the Hiscox Affidavit, there was a meeting on March 22, 2023 where Mr. Hiscox was provided with copies of the CLM invoices. This meeting was one of our routine meetings where I and the MI team would meet with Mr. Hiscox and Mr. Donlan and provide them with updates on the Project.

68. During the meeting, Mr. Hiscox requested copies of the invoices to MI for the labour that was provided to the Project. In response, I requested Ms. Taline Melkonian, Controller of Mizrahi Developments, to provide copies of the most recent CLM invoices. MI did not hide or conceal the fact that it was using CLM to provide labour services to the Project. At that time, Mr. Hiscox and

CEI already knew that MI was providing labour through a third-party and was charging a mark-up consistent with the time-based labour rates set out in the CCM Contract. The photographs of the CLM invoices attached to the Hiscox Affidavit at Exhibit F are copies of some of the CLM invoices that were provided to Mr. Hiscox during the March 22, 2023 meeting.

69. In the Hiscox Affidavit, Mr. Hiscox alleges that MI represented that "the cost of labour set out in the Invoices was MI's cost, without mark-up". I disagree. As noted above, Mr. Donlan already knew as of May 2022 that MI was charging a mark-up and earning a profit on labour for Hazelton.

70. MI never indicated to CEI that it was providing labour without any mark-up. MI agreed to significantly expanded the scope of its services since the parties, undisputedly, had agreed that CCM would initially provide construction management and labour to the Project. CEI no doubt knew and understood that CCM was earning a profit when providing labour to Hazelton and as reviewed above, knew that MI was earning a profit when providing labour to Hazelton.

71. The Hiscox Affidavit recounts investigations apparently undertaken by Mr. Hiscox and his team at CEI, such as Mr. David Ho, in March 2023. Not once did Mr. Hiscox or any member of CEI speak to me about these investigations or raise any concerns, including after the March 22, 2023 meeting when Mr. Hiscox was provided copies of the CLM invoices. There was never any concern raised that CLM may be providing labour from non-unionized labourers. I expected that if Mr. Hiscox and CEI had such concerns that they would have raised them with me. Instead of raising these concerns with me, Mr. Hiscox and CEI allowed MI to continue to provide construction management and labour services to the Project. MI's invoices for site labour were not paid by Hazelton on the basis that the Project did not have the funds to do so.

72. In the Receiver's Fifth Report, it suggests that MI was paying CLM in cash. This is patently false. There were no cash payments. I have no knowledge of how CLM paid its workers.

IX. CEI Agreed to Pay MI's Site Labour Invoices

73. As noted above, following the March 22, 2023 meeting, MI's invoices for site labour were not paid owing to a lack of funding. In late 2023, as reviewed in more detail below in response to the claim made by the Receiver pursuant to the DMA, I arranged for financing of Hazelton and the completion of the Project from Third Eye Capital ("TEC").

74. As part of the process for the closing of the TEC financing, Mr. Kilfoyle and Mr. Donlan exchanged draft schedules that set out the proposed payments upon closing of the financing.

75. On January 15, 2024, 2024 Mr. Kilfoyle and Mr. Donlan have an email exchange referring to the draft schedule for payments to be made upon closing, in which Mr. Donlan references to outstanding MI invoices, writing:

> Your schedule should also be adjusted for the $400k owing to Mizrahi. It is in AP but we agreed that it would be credited against Sam's contribution requirements. Based on that, you have too much in AP and too much for Mizrahi contributions at the start of the project.

76. A copy of this email chain is enclosed as **Exhibit T**.

77. Later on January 15, 2024, again as part of the TEC financing efforts, Mr. Kilfoyle sent an email to Mr. Donlan attaching an excel spreadsheet titled *Cash Flow Projections – Dec282023v5* (the "Cash Flow Projection"), which addressed the concerns raised by Mr. Donlan about the amounts payable on closing. A copy of the email and enclosed spreadsheet is attached as **Exhibit U**.

78. In the Cash Flow Projection, the excel sheet named "AP" lists the accounts payables that would have been paid upon closing of the TEC financing, including all of MI's outstanding site labour invoices (at that time):

Mizrahi Inc							
	12/15/2022	Bill	C1291	01/31/2023	50,518.23	50,518.23	50,518.23
	01/16/2023	Bill	C1292	02/28/2023	42,352.57	42,352.57	92,870.80
	02/15/2023	Bill	C1308	03/31/2023	35,928.92	35,928.92	128,799.72
	03/17/2023	Bill	C1320	04/30/2023	43,332.45	43,332.45	172,132.17
	04/15/2023	Bill	C1335	05/31/2023	56,724.14	56,724.14	228,856.31
	05/15/2023	Bill	C1350	06/30/2023	29,831.89	29,831.89	258,688.20
	06/15/2023	Bill	C1351	07/31/2023	27,599.94	27,599.94	286,288.14
	07/02/2023	Bill	C1379	08/31/2023	32,771.53	32,771.53	319,059.67
	08/14/2023	Bill	C1390	09/30/2023	18,726.59	18,726.59	337,786.26
	09/13/2023	Bill	C1404	10/31/2023	21,775.10	21,775.10	359,561.36
	10/12/2023	Bill	C1414	11/30/2023	42,679.20	42,679.20	402,240.56
Total for Mizrahi Inc					**$ 402,240.56**	**$ 402,240.56**	

79. On January 16, 2024, I sent an email to Mr. Hiscox, copied to Mr. Donlan and others, enclosing a copy of the Cash Flow Projection. A copy of my email dated January 16, 2024 is attached as **Exhibit V.**

80. On January 16, 2024, Mr. Donlan responded to Mr. Kilfoyle and confirmed that he "reviewed it with Robert [Hiscox] and asked a question about Land Transfer Tax for unit 701. In the same email chain on January 17, 2024, Mr. Donlan wrote to Mr. Kilfoyle and confirmed that the Cash Flow Projection can be sent to TEC so long as an issue with respect to Land Transfer Tax had been corrected. A copy of the email chain between Mr. Donlan and Mr. Kilfoyle ending January 17, 2024 is attached as **Exhibit W**.

X. Mizrahi Inc. Understood that CLM was Providing Unionized Labour to the Project

81. I do agree with Mr. Hiscox that MI had explained to him and CEI that it was providing unionized labour to the Project. I always understood that MI was providing unionized labour to the Project. Unfortunately, I have since learned that CLM may have misrepresented that it was providing unionized labour.

94. MI was incapable of meeting its obligations under the DMA owing to the actions and conduct of CEI (and therefore Hazelton).

95. The Receiver claims that $500,000 is payable to Hazelton by MI because the DMA was terminated before the "Project Completion Date" as defined in the DMA. The DMA was terminated and the Project was not completed at the time of termination because CEI blocked all reasonable efforts to finance the construction of the Project.

96. CEI's conduct on the Project is directly raised in the CEI Application and the Mizrahi Civil Claim. I am not able to completely set out my evidence on CEI's wrongful conduct and how it prevented MI from completing the DMA without the exchange of affidavits of documents and the completion of examinations for discovery in the Mizrahi Civil Claim, but I have set out below a general overview of my evidence on this issue, despite my significant concerns of inconsistent findings between this matter, the CEI Application and the Mizrahi Civil Action.

97. As noted by Mr. Hiscox in the Hiscox Affidavit by late 2022 and early 2023, construction activity for Hazelton slowed due to a lack of funding. The lack of funding had a material impact on MI's ability to conclude the development of the Project. The failure of Hazelton to have proper funding necessary to complete the Project is not a failure by MI as developer or general contractor (under the CMA).

98. Under the terms of the DMA, MI agreed, among other things, in section 6(b)(iii) to "negotiate the terms of required construction loan commitments for approval by the Owner and all final loan documentation in connection therewith". MI completed this obligation, but CEI (and therefore Hazelton, as Owner, within the meaning of the DMA) refused to close on the financing

required to complete the development, thereby preventing MI from seeing the Project through to the Project Completion Date.

99. By the fall of 2023, the Project was in deadlock and in need of funding. As noted above, I arranged for financing from TEC with an inventory loan. On November 21, 2023, CEI signed a Non-Binding Proposal with TEC for the inventory loan. Item (f)(viii) of Appendix A of the proposal specified the usual lender requirement of execution of definitive documentation satisfactory to TEC of postponement, subordination, and standstill of claims of credit parties in respect of other credit parties. A copy of the November 21, 2023 Non-Binding Proposal with TEC is attached as **Exhibit Z**.

100. On December 21, 2023, Mr. Hiscox wrote to Mr. Ivan Bogdanovich at DUCA, which was, at that time, Hazelton's prime lender, after DUCA delivered a Notice of Intention pursuant to s. 244 of the *Bankruptcy and Insolvency Act* and to propose a forbearance agreement. In his email, Mr. Hiscox notes, among other things, that the Project is "quite close to finalizing a refinancing of the Commitment with a third party lender", which is a reference to TEC. A copy of this email dated December 21, 2023 is attached as **Exhibit AA**. On the same day I wrote to Mr. Rogers, Mr. Donlan and Mr. Hiscox to raise my concern that I was not consulted on the email to Mr. Bogdanovich. A copy of this email is attached as **Exhibit BB**.

101. The finalization of the TEC financing was vital to the success of the Project. Without sufficient financing, it would be impossible to finish the development. CEI unreasonably refused to close on the TEC financing, which had a cascading effect of preventing MI from completing the development and reaching the Project Completion Date.

102. For example, section 3.5 of TEC's standard form of guarantee, in keeping with usual lender requirements, provided that the guarantor will not exercise any rights of indemnification, contribution, or subrogation, so long as the guarantee is in effect and such rights are terminated in the event of sale, foreclosure, or other disposition, of any equity securities. CEI sought from TEC changes to S. 3.5 to permit CEI guarantors to pursue indemnification, contribution, or subrogation, against the Mizrahi guarantors. On January 11, 2024, predictably TEC refused to make the changes. Attached as **Exhibit CC** is a copy of the email from Mykala Way, counsel for TEC dated January 11, 2024.

103. On January 19, 2024, DUCA served a Notice of Application for the appointment of a receiver over the Project, largely owing to a lien placed on the Project property by CEC Mechanical Inc. ("CEC"). The DUCA receivership application was scheduled to be heard on March 4, 2024.

104. On January 22, 2024, Mr. Rogers and Mr. Hiscox demanded that the TEC financing proceed on the condition that I execute a contribution agreement requiring me to personally pay 50% of whatever capital CEI decided was required to fund the Project and a guarantee indemnity agreement with interest paid at 28%. In the Mizrahi Civil Claim, I alleged that this demand was a breach of the Contribution Agreement, which set out the terms and obligations with respect to the payment of capital for the Project. A copy of the January 22, 2024 email is attached as **Exhibit DD**.

105. On January 24, 2024, I wrote to Mr. Rogers and Mr. Hiscox urging them to proceed with the TEC financing, which would avoid the appointment of a receiver over the Project. It would also enable Mr. Rogers and Mr. Hiscox to recover approximately $11.6 million from the Project. A copy of this email dated January 24, 2024 is attached as **Exhibit EE**.

106. On January 25, 2024, counsel for CEI advised that Mr. Rogers and Mr. Hiscox were unwilling to proceed with an all hands call to discuss the TEC financing. A copy of the January 25, 2024 email is attached as **Exhibit FF**.

107. On January 27, 2024, when no plan was forthcoming from CEI, I emailed Mr. Hiscox and Mr. Rogers and outlined a way forward to bond off the CEC lien that was the cause of the default DUCA relied upon for its contended right to a receivership, pay down of the DUCA loan with immediate closings of suite 701 and the balance of all other units that are available and have occupancy under APS so that DUCA could be paid out in advance of its March 4 return date of its receivership application.

108. On January 29, 2024, Mr. Rogers and Mr. Hiscox rejected the suggested plan and instead suggested a meeting to discuss options to take place Friday February 2, 2024. A copy of this email dated January 29, 2024 is attached as **Exhibit GG**.

109. On or about February 2, 2024, with no warning, CEI announced on a telephone call that it had acquired the DUCA loan by buying out DUCA and taking an assignment of its rights to include my personal guarantee. Attached as **Exhibit HH** is a copy of my email chain with Mr. Hiscox ending February 3, 2024 in which I repeatedly request CEI's plan and confirm its acquisition of the DUCA loan without notice.

110. On February 14, 2024, CEI purported to make a capital call for the Project pursuant to the Contribution Agreement. On February 15, 2024, I responded that no additional capital was required to exit the Project since the assets of the Project were well in excess of the DUCA loan (by approximately $14.5M) and all other ongoing obligations were met as eight units with a value

of $15.5M were ready to close. A copy of the email communication of February 14 and 15, 2024 is attached as **Exhibit II**.

111. On February 22, 2024, CEI proceeded with a Notice of Application for the appointment of a receiver over Hazelton.

XIII. The Project Budget and the Altus Reports

112. The Receiver relied on, among other things, section 7(b) of the DMA for its purported termination of the DMA and, specifically, a claim that MI has failed to exercise its duties such that all costs and expenses expended by Hazelton are within the limits of the Budget (as defined in the DMA). I disagree with this basis for the termination. As set out in the Altus reports, the Project budget was consistently changing owing largely to delays and increased expenses caused by COVID-19, and, importantly, Hazelton's inability to secure adequate financing, such as the proposed financing with TEC. In addition, as alleged in the Fresh as Amended Statement of Claim in the Mizrahi Civil Action, there were instances of self-dealing by CEI and Mr. Hiscox, which reduced revenue in Hazelton, which resulted in a corresponding financing cost, and there were unreasonable refusals by CEI and Mr. Hiscox to agree to closing on units in Hazelton, which deprived Hazelton of the revenue and, again, increased interest costs.

113. The last Altus report, No. 31, June 30, 2022, issued August 25, 2022 identifies a Project budget of $85,958,812 and confirms that the overage of the budget based on the DUCA loan was to be funded by equity. CEI approved of this budget increase over and above the DUCA loan. As noted above, Altus stopped providing reports because CEI did not want to incur the expense.

Adam Beyhum

Subject: RE: Mizrahi (128 Hazelton) Inc. (Court File No.: CV-24-00715321-00CL)

From: Jennifer Stam (she/her) <jennifer.stam@nortonrosefulbright.com>
Sent: December 16, 2024 12:47 PM
To: SWeisz@cozen.com
Cc: Harvey Chaiton <harvey@chaitons.com>; george@chaitons.com; Sean Zweig (ZweigS@bennettjones.com) <ZweigS@bennettjones.com>; bkofman@ksvadvisory.com; jwong@ksvadvisory.com; James Renihan (he/him) <james.renihan@nortonrosefulbright.com>; David Trafford <DTrafford@morsetrafford.com>; Jerome Morse <jmorse@morsetrafford.com>
Subject: Mizrahi (128 Hazelton) Inc. (Court File No.: CV-24-00715321-00CL)

Steve,

I am following up on our conversation from a few weeks ago. The Receiver intends to bring a claim related to the Hazelton receivership against Mizrahi Inc. As you requested, I have attached the notice of motion which is in substantially final form. We understand that in the context of the Wellington CCAA there is a broad stay that goes beyond the scope of claims related to that project. In our view, that stay should not prevent a claimant in unrelated projects from pursuing claims. It appears the stay may be lifted with the consent of the Applicant, the Monitor and the DIP Lender (or Order of the Court).

We hereby request that the Applicant provide its consent to the lifting of the stay for the purposes of bringing this claim in the receivership. I have copied counsel to the monitor the DIP lender and would request the same.

I understand that you have a stay extension motion scheduled for this Thursday. If we cannot resolve this on a consensual basis, I will likely appear to ask to have this addressed at that hearing. I look forward to hearing from you.

Jennifer Stam
Partner

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NORTON ROSE FULBRIGHT

Law around the world
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Court File No. CV-24-00715321-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

CONSTANTINE ENTERPRISES INC.

Applicant

- and -

MIZRAHI (128 HAZELTON) INC. and
MIZRAHI 128 HAZELTON RETAIL INC.

Respondents

IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 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

NOTICE OF MOTION

The Receiver will make a Motion to a Judge presiding over the Commercial List on a date to be determined at 10:00 a.m., or as soon after that time as the motion can be heard.

PROPOSED METHOD OF HEARING: The motion is to be heard

[ ] In writing under subrule 37.12.1(1) because it is [insert on consent, unopposed or made without notice];

[ ] In writing as an opposed motion under subrule 37.12.1(4);

[ ] In person;

[ ] By telephone conference;

[ ] By video conference.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

(gg) the **[third]** report of the Receiver, dated **December X, 2024**; and

(hh) such further and other evidence as the lawyers may advise and this Honourable Court may permit.

December **X**, 2024

NORTON ROSE FULBRIGHT CANADA LLP
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Lawyers for the Receiver

Court File No. CV-24-00715321-00CL

CONSTANTINE ENTERPRISES INC. Applicant	-and-	MIZRAHI (128 HAZELTON) INC. et al. Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

NORTON ROSE FULBRIGHT CANADA LLP
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Lawyers for the Receiver

CAN_DMS: \1008062600

NORTON ROSE FULBRIGHT

December 23, 2024

Sent By Email

Morse Trafford LLP
100 King Street West, Suit 5700
Toronto, ON M5X 1C7

Attention: Jerome Morse

Norton Rose Fulbright Canada LLP
222 Bay Street, Suite 3000, P.O. Box 53
Toronto, Ontario M5K 1E7 Canada

F: +1 416.216.3930
nortonrosefulbright.com

Jennifer Stam
+1 416.202.6707
jennifer.stam@nortonrosefulbright.com

Dear Mr. Morse:

Re: Constantine Enterprises Inc. and Mizrahi (128 Hazelton) Inc., et al. (Court File No. CV-24-00715321-00CL)

We are in receipt of your letter dated December 19, 2024.

We entirely disagree with the characterizations and baseless accusations in your letter. In particular, we strongly disagree with the unwarranted assertion that KSV Restructuring Inc.'s conduct, as the court-appointed receiver (in such capacity, the "**Receiver**") in these proceedings, is anything other than consistent with its mandate under the Order of Justice Cavanagh dated June 4, 2024, the other Orders in the proceedings, and the applicable legislation. We also strongly disagree with the suggestion that the Receiver is not acting in good faith.

The stay in favour of Mizrahi Inc. ("**MI**") in the Wellington proceedings is inappropriately broad given MI's involvement in multiple unrelated matters. The provision of the notice of motion was solely necessitated because of the breadth of the stay which, in order to lift, requires not only the consent of the Applicant, but also the consent of the Monitor, the Lender, or an order of the Court. Mr. Weisz had refused to otherwise provide consent to the lifting of the stay prior to being provided the draft notice of motion.

With respect to your position on the motion, we do not propose to respond in substance to your position. While we reserve all rights in respect of any position taken by your client on the motion, we are prepared to provide the underlying documents related to the claim relating to the CLM General Enterprises Ltd. invoices and to give you until January 13, 2025 to respond. We will arrange for those documents to be sent to you today.

With respect to the claim for repayment of the management fee, demand for repayment was made by your client on June 21, 2024, and no response was ever provided.

We look forward to receiving your client's position in response.

Yours very truly,

Jennifer Stam

Copy to: Bobby Kofman, KSV Restructuring Inc.

Court File No. CV-24-00715321-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

CONSTANTINE ENTERPRISES INC.

Applicant

- and -

MIZRAHI (128 HAZELTON) INC. and
MIZRAHI 128 HAZELTON RETAIL INC.

Respondents

IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 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

NOTICE OF MOTION

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PROPOSED METHOD OF HEARING: The motion is to be heard

[ ] In writing under subrule 37.12.1(1) because it is [insert on consent, unopposed or made without notice];

[ ] In writing as an opposed motion under subrule 37.12.1(4);

[ ] In person;

[ ] By telephone conference;

[ ] By video conference.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

(gg) the Fifth Report of the Receiver, dated July 16, 2025; and

(hh) such further and other evidence as the lawyers may advise and this Honourable Court may permit.

July 18, 2024

NORTON ROSE FULBRIGHT CANADA LLP
222 Bay Street, Suite 3000
Toronto ON M5K 1E7

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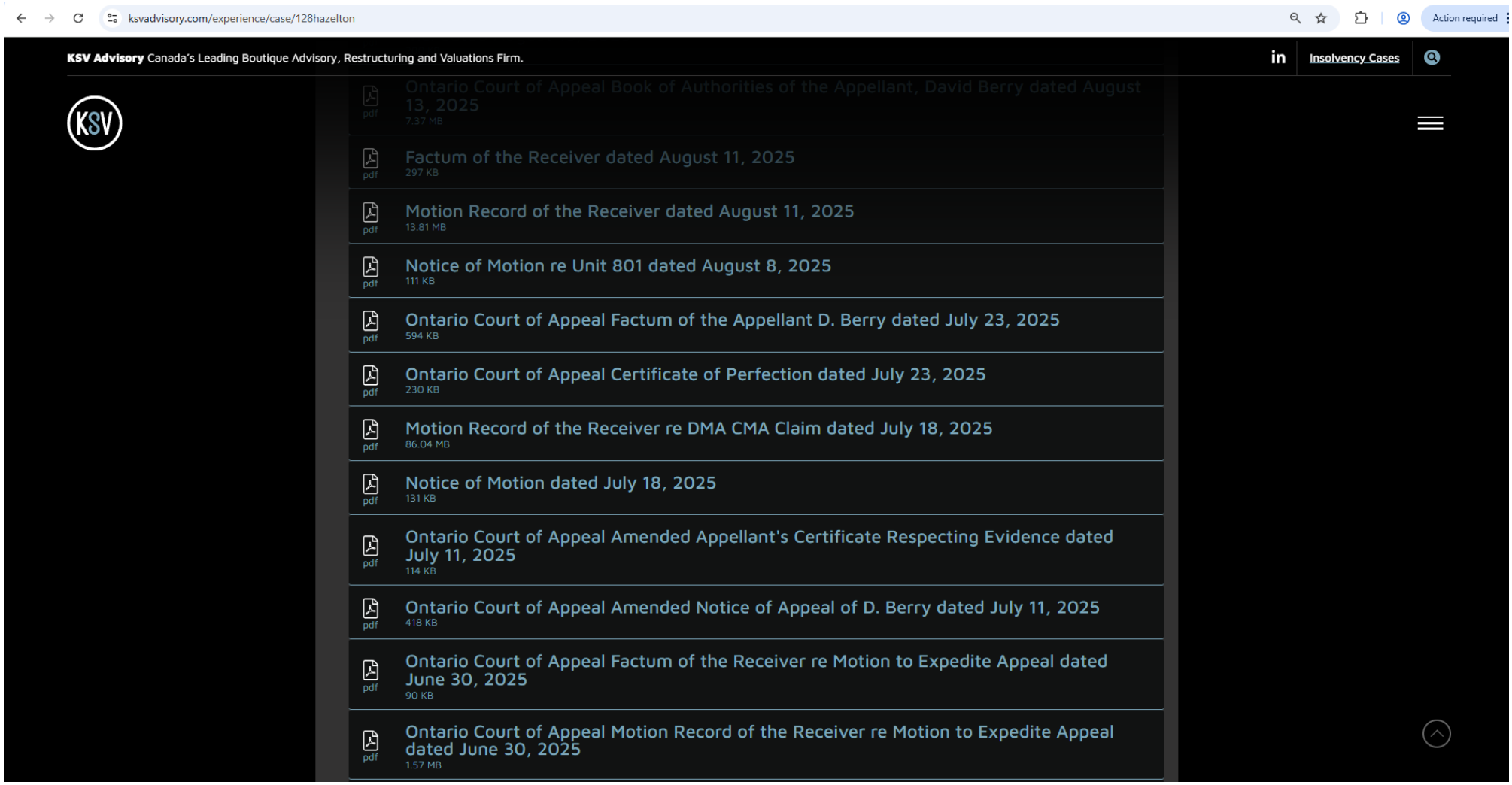
Lawyers for the Receiver


ksvadvisory.com/experience/case/128hazelton
Action required
KSV Advisory Canada's Leading Boutique Advisory, Restructuring and Valuations Firm.
Insolvency Cases
Ontario Court of Appeal Book of Authorities of the Appellant, David Berry dated August 13, 2025
7.37 MB
Factum of the Receiver dated August 11, 2025
297 KB
Motion Record of the Receiver dated August 11, 2025
13.81 MB
Notice of Motion re Unit 801 dated August 8, 2025
111 KB
Ontario Court of Appeal Factum of the Appellant D. Berry dated July 23, 2025
594 KB
Ontario Court of Appeal Certificate of Perfection dated July 23, 2025
230 KB
Motion Record of the Receiver re DMA CMA Claim dated July 18, 2025
86.04 MB
Notice of Motion dated July 18, 2025
131 KB
Ontario Court of Appeal Amended Appellant's Certificate Respecting Evidence dated July 11, 2025
114 KB
Ontario Court of Appeal Amended Notice of Appeal of D. Berry dated July 11, 2025
418 KB
Ontario Court of Appeal Factum of the Receiver re Motion to Expedite Appeal dated June 30, 2025
90 KB
Ontario Court of Appeal Motion Record of the Receiver re Motion to Expedite Appeal dated June 30, 2025
1.57 MB

EXECUTION VERSION

UNANIMOUS SHAREHOLDERS AGREEMENT

BETWEEN

MIZRAHI ENTERPRISES INC.
CONSTANTINE ENTERPRISES INC.
as Shareholders

- and -

MIZRAHI (128 HAZELTON) INC.
as Corporation

June 19, 2015

CASSELS BROCK
LAWYERS

2100 Scotia Plaza
40 King Street West, Toronto, Ontario M5H 3C2

"The shares represented by this certificate are subject to restrictions on transfer and all the other terms and conditions of a unanimous shareholders' agreement dated June 16, 2015 made between the Corporation and each and all of the holders of shares, as such agreement may from time to time be amended in accordance with its provisions. A copy of the agreement is on file at the registered office of the Corporation and available for inspection on request and without charge. Any transfer made in contravention of such restrictions shall be null and void."

Section 2.5 Unanimous Shareholders Agreement.

This Agreement shall constitute a unanimous shareholders agreement within the meaning of the Act. Each Shareholder and each Person who becomes a Shareholder through a Transfer of Shares or issue of additional Shares in accordance with this Agreement shall execute and deliver to the Corporation before becoming a Shareholder, a counterpart copy of this Agreement or a written agreement in form and substance satisfactory to the Parties, pursuant to which it agrees to be bound by these terms and conditions.

Section 2.6 Actions in Accordance with Agreement.

(1) Each Shareholder shall exercise the votes attaching to its Shares at all times and use its best efforts to cause its nominees to the Board of Directors to act at all times in order that the provisions of this Agreement shall govern the affairs of the Corporation to the maximum extent permitted by Law. In the event of any conflict between the provisions of this Agreement and the provisions of the Articles or By-Laws, each of the Shareholders shall take or cause to be taken such steps and proceedings as may be required under the Act or otherwise to amend the Articles and By-Laws to resolve such conflict so that the provisions of this Agreement shall at all times prevail to the maximum extent permitted by Law.

(2) The Corporation consents to the provisions of this Agreement and covenants that it will, at all time during the term of this Agreement, be governed by its provisions in carrying on its business and affairs.

Article 3
Management Of The Corporation

Section 3.1 Management and Corporate Action.

(1) The powers of the directors of the Corporation to manage or supervise the management of the business and affairs of the Corporation, whether such powers arise from the Act, the articles or by-laws of the Corporation, or otherwise, are hereby wholly restricted with the effect that, to the maximum extent permitted by law, the Shareholders shall have all the rights, powers, duties and liabilities of the directors of the Corporation to manage or supervise the management of the business and affairs of the Corporation whether arising under the Act or otherwise, and the directors of the Corporation are hereby relieved of their duties and liabilities to the same extent.

(2) The taking of any of the following decisions or actions or the implementation of any of the following matters by the Corporation shall, in addition to any other approval required by Law, require the unanimous approval of the Shareholders:

Corporate Changes

(a) The amending of the Articles;

(b) The amending or revocation of the By-laws in whole or in part or the enactment of any additional By-law;

Share Capital

(c) The allotment, reservation, setting aside or issue of any Shares or other securities of the Corporation or the granting of any rights, warrants or options to purchase, acquire or otherwise obtain any unissued Shares or other securities of the Corporation;

(d) The declaration or payment of any dividend or other distribution on or in respect of any Shares or other securities of the Corporation;

(e) The purchase, redemption or acquisition by the Corporation of any Shares or other securities of the Corporation other than the purchase for cancellation of Shares from a Shareholder in accordance with the provisions of this Agreement or the redemption of Shares in accordance with the Articles;

(f) Any payment or distribution out of any stated capital account of the Corporation or any reduction of any stated capital account of the Corporation;

Debt Financing

(g) The incurring of (i) any Debt by the Corporation, (ii) any obligation on behalf of any Person pursuant to any agreement, commitment or understanding, direct or indirect, contingent or otherwise, the practical effect of which is to assure in any way the payment or performance (or payment of damages in the event of non-performance) of any part or all of any indebtedness of such Person for borrowed money;

(h) The granting of any Encumbrance over the assets of the Corporation other than Permitted Encumbrances.

Financial Matters

(i) The approval of (i) the Budget or any modification to it, and (ii) the manner of obtaining any additional funds required for any purpose specified in the Budget;

(j) The approval of the Financial Statements;

(k) A change in the Auditors;

Fundamental Changes

(l) The taking of any act, step or proceeding including any sale or disposition of any property or assets of the Corporation for the purpose of, or leading to, the liquidation, dissolution or winding-up of the Corporation;

(m) The sale, lease, exchange or other disposition of all or substantially all of the assets of the Corporation;

(n) The acknowledging of the insolvency of the Corporation, the making of a voluntary assignment under the *Bankruptcy and Insolvency Act* (Canada), or the consenting to the appointment of a receiver, receiver-manager or other Person acting in a similar capacity by any secured creditor of the Corporation;

Other

(o) The taking of any act or proceeding, or the entering into of any transaction, agreement, or instrument that is prohibited by the Credit Agreement;

(3) Notwithstanding any other provision herein, the taking of any act, step, or proceeding or the giving of any consent, approval or instruction, in respect of or pursuant to either the Construction Management Agreement or the Development Management Agreement will require the approval of Constantine alone. For greater certainty, the preceding sentence is not intended to amend or modify either of the Construction Management Agreement and the Development Management Agreement.

Section 3.2 Directors of the Corporation.

(1) The Board of Directors shall consist of two Directors. Each Shareholder shall have the right to elect as a member of the Board of Directors, one individual who is qualified to act as a director under the Act. Each Shareholder shall vote at all meetings of Shareholders, and shall use its best efforts to cause its nominee Directors on the Board of Directors to act in such manner as to ensure that each nominee is elected or appointed and maintained in office as a Director in accordance with this Agreement.

(2) If a vacancy on the Board of Directors arises for any reason whatsoever, such vacancy shall be filled by the election or appointment of a Director nominated by the Shareholder entitled to nominate a replacement in accordance with Section 3.2(1). Until such vacancy is filled, the Board of Directors shall not transact any business or exercise any of its powers or functions, save and except as may be necessary to elect or appoint the new Director and preserve the business and assets of the Corporation. If a replacement Director is not elected within ten days of such vacancy occurring because of the failure of the Shareholder who is entitled to nominate a replacement Director to do so, the Directors then in office shall be entitled to transact business and exercise all of the powers and functions of the Board of Directors. A decision or action of the majority of the Directors then in office shall be deemed to be a decision or action of the majority of the Board of Directors.

(3) The quorum for a meeting of the Board of Directors shall be all Directors. At least 48 hours' prior written notice of any meeting of the Board of Directors must be given unless all of the Directors waive such notice.

(4) No amount shall be payable by way of salary, bonus or otherwise to any Director for acting as director of the Corporation. Each Director shall be entitled to be reimbursed for reasonable out-of-pocket expenses incurred while attending meetings of, or otherwise being engaged in the business of, the Board of Directors.

CITATION: Philippine v. Portugal, 2010 ONSC 956
DIVISIONAL COURT FILE NO.: 93/09
DATE: 20100217

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

B E T W E E N:	
PHILIPPINE/FILIPINO CENTRE TORONTO, DR. GUILLERMO DeVILLA, DR. VICTORIA SANTIAGO, ROSALINDA JAVIER, DR. MARIO ANDRES, WENDY ARENA, EVELYN BIRONDO, JULITA CORPUZ, AIDA D'ORAZIO, EFREN DE VILLA, MERCY MALIGLIG, LAURA TIAMZON, SUZETTE CRESENCIA, IRENE TURNER, LOLITA TABLANG and FELINO JAVIER	*Douglas G. Christie*, for the Appellants, Respondents in Cross-Appeal
Plaintiff (Appellants, Respondents on Cross-Appeal)	
– and –	
FRANCISCO PORTUGAL, CAMILLA JONES, CHITO COLLANTES, ORES TING, MINDA LONGKINES, ERLINDA GALLARDO, NOBELLA TUMBOKON, DARIO MERIALES, MONCHING OLIVEROS, GLENDA GAMU IDOLOR, JOHN DOE, JANE DOE, THE PHILIPPINE COURIER PUBLISHING & ENTERTAINMENT and RAMON DATOL	*Ronald Lachmansingh*, for the Respondents, Appellants in Cross-Appeal
Defendants (Respondents, Appellants in Cross-Appeal)	
	HEARD at Toronto: January 19, 2010

) **HEARD at T**

REASONS FOR JUDGMENT

FERRIER J.:

[1] This is an appeal from the order of Master Haberman dated January 21, 2009 whereby she dismissed a motion by the plaintiffs seeking to amend their statement of claim to allege conspiracy against the defendants.

[2] This action arises in the context of a number of proceedings between some or all of the plaintiffs and some or all of the defendants, primarily concerning governance and control of a community centre known as The Filipino Centre, Toronto ("the FCT"). There is considerable animosity between the "camps" represented by the plaintiffs and the defendants in this action.

[3] It is alleged that the defendants orchestrated and carried out a rally which took place in November, 2005, at which the plaintiffs were defamed by, *inter alia*, slogans on placards and statements made over the public address system. It is also alleged that subsequently, the defendant Ramon Datol published an article and photographs arising from the rally and a "Manifesto" concerning the plaintiffs in the defendant newspaper, The Philippine Courier ("the Paper") in December 2005. Coincidentally with the rally, some of the defendants launched an application in which they sought sanctions against many of the plaintiffs for their alleged inappropriate conduct in the management of the FCT. The defendant Francisco Portugal ("Portugal"), also launched a defamation suit against some or all of the plaintiffs in respect of an article which had been published in a community paper.

[32] However, in *Joseph*, *supra*, the Court made it clear that under the newly enacted *Limitations Act*, there is no longer discretion to permit the new claim to be added: *Joseph*, *supra*, paras. 12, 27 and 28.

[33] Thus, the sole question embodied in the third issue is whether the rights of the parties (both the appellants' and the respondents') are determined as of the date of service of the motion (within the limitation period) or as of the date of hearing the motion (after the period expired).

[34] In my view, the law is clear that the parties' rights are determined as of the date of service of the motion.

[35] In *Graystone Properties Ltd. v. Smith et al.* (1982), 39 O.R. (2d) 709 (C.A.), a mortgagor applied for a partial discharge. As of the date of service of the application, the mortgagor was not in default, but later fell into default and was in default at the time of hearing of the application. The Court held that the rights of the parties crystallized as of the date of the request for the discharge and of the application being launched. Not then being in default, the mortgagor was entitled to a partial discharge.

[36] In my view, the foregoing is trite law, indeed so clear that Blair J.A. writing for the Court in *Graystone*, *supra*, cited no authority for this principle (p.712).

[37] Of like effect is *Bruce v. John Northway & Son Ltd.*, [1962] O.W.N. 150 (Master); *Cafissi v. Vana*, [1973] 1 O.R. 654 (Master) and *Leblanc v. York Catholic District School Board*, 2002 CanLII 37923 (Ont. S.C.).

CITATION: Ranganathan v. Wasim, 2024 ONSC 7211
COURT FILE NO.: CV-22-544
DATE: 2024 12 23

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Vijaya Prabakaran Sree Ranganathan and Keerthana Raguraman, Plaintiffs

AND:

Azhar Wasim, Right At Home Realty Inc. Brokerage, and Real Estate Council of Ontario, Defendants

BEFORE: Justice Ranjan K. Agarwal

COUNSEL: Preet Wadhwa, for the plaintiffs and the putative third party Saaral South Indian Restaurant Corp. o/a Saaral South Indian Restaurant

Darrell Paul, for the defendant Azhar Wasim

No one appearing for the defendants Right At Home Realty Inc. Brokerage and Real Estate Council of Ontario

No one appearing for the putative third party Wasim Investments Ltd.

HEARD: December 6, 2024

ENDORSEMENT

I. INTRODUCTION

[1] The defendant Azhar Wasim moves for leave to issue a third party claim. The putative third parties Vijaya Ranganathan and Keerthana Raguraman (who are also the plaintiffs), and Saaral South Indian Restaurant Corp. o/a Saaral South Indian Restaurant oppose the motion on several grounds, including that it's limitations-barred.

[2] I agree. Wasim's motion for leave to issue a third party claim was started after the limitation period for that claim expired. As a result, there's non-compensable prejudice to the plaintiffs and an absolute bar to adding Saaral as a party.

[3] The motion is dismissed. I endorse an order that Wasim shall pay the plaintiffs' and Saaral's costs, fixed in the amount of $5500, within 30 days of this order.

II. BACKGROUND

[4] The plaintiffs sued Wasim and the other defendants Right at Home Realty Inc. Brokerage and Real Estate Council of Ontario in February 2022. The plaintiffs allege that Wasim, their realtor, defrauded them into buying a house:

- the plaintiffs told Wasim that they were looking for a house with a legal basement so they could lease it to support their monthly mortgage payment
- Wasim told them that the house at 31 Tina Court, Brampton, had a legal basement and they could earn $1500 per month
- he persuaded them to offer more than the vendor's asking price
- Wasim intentionally omitted information from the Agreement of Purchase and Sale that would've alerted the plaintiffs to the fact that the house didn't have a legal basement
- the plaintiffs learned about the illegal basement just before closing, but Wasim convinced them that they could still lease it

their claim was suspended from the date of Justice Mandhane's order to the date of the Court of Appeal's decision. In effect, they weren't required to start a third party claim during that period because Wasim Investments's claim might have been allowed to proceed. But once the Court of Appeal affirmed Justice Mandhane's order, the limitations clock started running again. That finding means that Wasim had until July 29, 2024, to move for leave to amend his defence or start a third party claim.[1]

[35] Wasim served the draft third party claim on plaintiffs' lawyer on July 22, 2024. But service of the draft third party claim isn't enough to stop the limitations clock. In *Bank of Nova Scotia v. PCL Constructors Canada Inc.*, 2009 CanLII 56303, Associate Judge Glustein (as he was then) held that "a letter requesting consent to a proposed draft pleading is not sufficient to stop the limitation period from running" (at para 94). He left open the possibility that the service of a notice of motion might stop the limitations clock. See also *Philippine/Filipino Centre Toronto v Datol*, 2009 CanLII 2909 (Sup Ct), at para 65. But that isn't what happened here. There's no evidence that Wasim served a notice of motion or motion record, or tried to schedule this motion hearing before the limitation period expired on July 29th. The motion record wasn't served until November 3, 2024.

[1] The limitation period is two years, or 730 days. From December 24, 2021 (date of default), to November 17, 2023 (Justice Mandhane's decision), 693 days had run. The remaining 37 days continued to run starting June 22, 2024 (ONCA decision).

COURT FILE NO.: 05-CV-303118PD3
DATE: 20091020

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: The Bank of Nova Scotia et al. v. PCL Constructors Canada Inc. et al.

BEFORE: Master Glustein

COUNSEL: Jane Langford and Erica Richler for the plaintiffs

Valerie Dyer for the defendants PCL Constructors Canada Inc., PCL Constructors Eastern Inc., and the proposed defendants PCL Construction Resources Inc. and PCL Construction Group Inc.

Robert Falby, Tom Whitby and Nafisah Choudhury for the defendants WZMH Architects and The Webb Zerafa Menkes Housden Partnership

Charles Chang for the defendant Sayers & Associates Ltd.

HEARD: September 18, 2009

REASONS FOR DECISION

Nature of the motion

[1] The plaintiffs The Bank of Nova Scotia ("BNS"), Scotia Realty Limited and SPE Operations Ltd. bring a motion for leave to amend their Statement of Claim in the form attached as an "Amended Fresh Statement of Claim" at Schedule "A" to the Notice of Motion (the "Proposed Claim").

[2] The motion arises from litigation brought by the plaintiffs in relation to alleged defects in the water pipe riser system at Scotia Plaza, a complex of lands and premises located at 40 King Street West, 11 Adelaide Street West, and 104 Yonge Street, in Toronto.

[3] On October 25, 2005, the plaintiffs issued a statement of claim (the "First Claim") against the defendants PCL Constructors Canada Inc. ("PCL Canada")[1], Sayers & Associates Ltd.

[1] In the First Claim, the plaintiffs alleged that PCL Canada was the construction manager for the project and was responsible for ensuring that the building was constructed in accordance with the approved plans, drawings and specifications and the standards of good workmanship. The plaintiffs alleged that PCL Canada was negligent with respect to its role in the construction of the water pipe riser system.

("Sayers"), WZMH Architects[2], The Mitchell Partnership Inc. ("TMP")[3], and Quinn Dressel Associates ("Quinn Dressel")[4].

[4] The plaintiffs were subsequently advised by counsel to PCL Canada that it was improperly named, and should be substituted with PCL Constructors Eastern Inc. ("PCL Eastern"). The plaintiffs were also advised of a name change with WZMH Architects. Consequently, on December 28, 2005, the plaintiffs issued a second statement of claim (the "Second Claim") against PCL Eastern[5], Sayers, The Webb Zerafa Menkes Housden Partnership ("WZMH Partnership")[6], TMP, and Quinn Dressel.

[5] The two actions were consolidated in February 2006, and the plaintiffs served a Fresh Statement of Claim on or about February 9, 2006 (which I define for the purposes of this motion as the "Existing Claim"). The Existing Claim names as defendants PCL Canada, PCL Eastern[7], Sayers, WZMH Architects, WZMH Partnership[8], TMP, and Quinn Dressel. The plaintiffs allege

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[2] In the First Claim, the plaintiffs alleged that WZMH Architects carries on the business of architectural design and consultation, and that WZMH Architects provided the architectural design of the building and acted as the prime consultant to the owner before and during its construction. The plaintiffs alleged that WZMH Architects was negligent with respect to its role in the construction of the water pipe riser system.

[3] In the Existing Claim (and in the predecessor claims), the plaintiffs allege that TMP carries on the business of consulting engineering and was formed on or about September 30, 1993 through the amalgamation of The Mitchell Partnership Limited ("TMP Limited") and several other corporations. The plaintiffs allege that TMP Limited acted as the consulting mechanical engineer in relation to the project and was responsible for the design of the mechanical components of the building, and was negligent with respect to its role in the construction of the water pipe riser system. The plaintiffs allege that TMP has assumed, and/or is a successor to, the liabilities of TMP Limited. The plaintiffs seek no amendments against TMP in the Proposed Claim. TMP did not appear on the motion.

[4] In the Existing Claim (and in the predecessor claims), the plaintiffs allege that Quinn Dressel carries on the business of consulting engineering and acted as the consulting structural engineer in relation to the construction. The plaintiffs allege that Quinn Dressel was responsible for the structural components of the building, and was negligent with respect its role in the construction of the water pipe riser system. The plaintiffs seek no amendments against Quinn Dressel in the Proposed Claim. Quinn Dressel did not appear on the motion.

[5] In the Second Claim, the plaintiffs alleged that PCL Eastern was the construction manager for the project and was responsible for ensuring that the building was constructed in accordance with the approved plans, drawings and specifications and the standards of good workmanship. The plaintiffs alleged that PCL Eastern was negligent with respect to its role in the construction of the water pipe riser system.

[6] In the Second Claim, the plaintiffs alleged that WZMH Partnership carries on the business of architectural design and consultation, and that WZMH Partnership provided the architectural design of the building and acted as the prime consultant to the owner before and during its construction. The plaintiffs alleged that WZMH Partnership was negligent with respect to its role in the construction of the water pipe riser system.

[7] In the Existing Claim, the plaintiffs allege that PCL Eastern was the construction manager for the project and was responsible for ensuring that the building was constructed in accordance with the approved plans, drawings and specifications and the standards of good workmanship. The plaintiffs allege that PCL Eastern was negligent with respect to its role in the construction of the water pipe riser system. The plaintiffs further allege that PCL Canada has assumed, and/or is a successor to, the liabilities of PCL Eastern.

[8] In the Existing Claim, the plaintiffs allege that WZMH Partnership carries on the business of architectural design and consultation, and that WZMH Partnership provided the architectural design of the building and acted as the prime consultant to the owner before and during its construction. The plaintiffs allege that WZMH Partnership was negligent with respect to its role in the construction of the water pipe riser system. The plaintiffs further allege that WZMH Architects has assumed, and/or is a successor to, the liabilities of WZMH Partnership.

[92] In *Philippine/Filipino Centre Toronto v. Datol*, [2009] O.J. No. 388 (S.C.J.–Mast.) ("*Datol*"), Master Haberman commented that "perhaps there may be some wiggle room in a case where the notice of motion is served on the eve of the expiry of the applicable limitation period and the motion, though heard on the first available court date, slips passed the deadline" (*Datol*, at para. 65).

[93] In *Wong* (decided before *Joseph* and *Meady*), Master Dash considered the time period "more than two years before the motion to amend" (*Wong*, at para. 45), although he did not address the issue of the appropriate date for the limitation period to stop running, since it was not necessary to his reasons.

[94] I agree with the Existing Defendants that in the present case, it is not necessary for me to determine the issue of whether a notice of motion, a motion record, a hearing on the motion, a court order, or the actual issuance of the amended proceeding must take place in order to stop the running of the two-year limitation period under section 4 of the *Limitations Act, 2002*. I make this finding because I agree with the Existing Defendants that a letter requesting consent to a proposed draft pleading is not sufficient to stop the limitation period from running.

[95] Section 4 of the *Limitations Act, 2002* requires that a proceeding be brought within two years. Even if a court would find that service of a notice of motion to amend a statement of claim constitutes either (i) a "proceeding" which would stop the limitation period from running or (ii) an "agreement" to suspend a limitation period,[39] a letter requesting consent to a proposed draft pleading would not do so.

[96] The plaintiffs could have taken steps to stop the limitation period from running as of September 2008 through several means:

(i) The plaintiffs could have sought consent from the Existing Defendants and the Proposed Defendants to suspend the limitation periods while the pleadings amendments were being considered by the defendants or until the motion was argued (which is permitted under section 22(3) of the *Limitations Act, 2002*); or

(ii) The plaintiffs could have stopped the limitation period from running by issuing a new claim (i) against the Proposed Defendants, based on the Guarantee and (ii) against the Existing Defendants, based on the contractual claims. [40]

[97] With no consent to the proposed amended claim (since the PCL Defendants responded to the Letter within a week and clearly stated their position), no agreement to suspend limitation periods, nor a new claim to ensure that a "proceeding" was brought within two years, I find that a letter requesting consent to a proposed amendment which is rejected by an adverse party cannot stop a limitation period from running.

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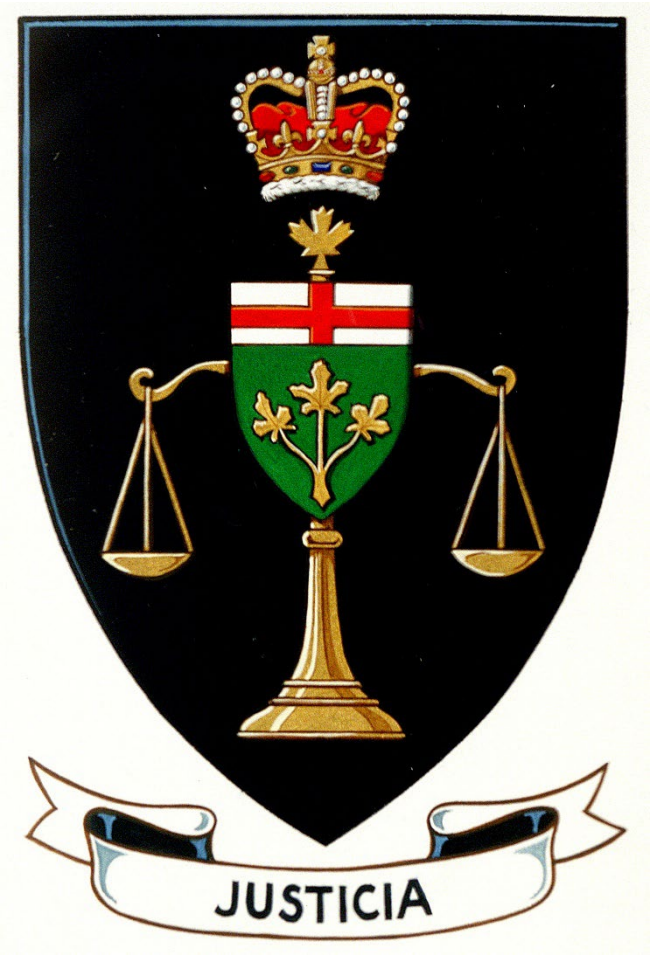
[39] (issues I do not decide)

[40] (in a similar manner to which the plaintiffs issued the Second Claim on December 28, 2005 when they were advised that certain of the defendants were not properly named)

The Guide Concerning Commercial List E-Service

EFFECTIVE JULY 1, 2014



6. Except as otherwise provided herein, Email service is a sufficient mode of service of Court Documents without duplicating service by facsimile, hard copy delivery or other method of service.

7. Court Documents should be served by Email by way of HTML link or PDF files. If the party serving the Court Document can create an HTML link to the Court Document prior to serving the Court Document, service of such document by PDF file shall not be necessary. The HTML link must be a link directly to the document being served.[8]

8. To the extent practicable, Court Documents shall be in a format which is compliant with the Guide Concerning e-Delivery.

9. Where a party is serving more than one document by Email of HTML links, the Email shall specify each document being served and shall include a separate HTML link for each document being served.

10. If a Court Document is being served by way of an Email of a PDF file, the party serving the Court Document shall be cognizant of the size of the file and send the Court Document in multiple Emails if the PDF file would appear to be too large to serve in a single Email.

11. If the party serving the Court Document by Email receives notification of a transmission failure, the party serving the Court Document shall make reasonable efforts to ensure that successful Email transmission of the Court Document occurs or that the Email comes to the attention of the intended recipient or his or her firm. [9]

12. Any Court Document served by Email should clearly state in the subject line of the Email: (i) notification that a Court Document is being served; (ii) a recognizable short form name of the Commercial List Proceeding; (iii) the nature of the proceeding; and (iv) the nature of the Court Document.[10] The body of the Email should contain a description of the party serving the Court Document, a brief description of the nature of the Court Document being served, the date of the proceeding and any other specific information with respect to the proceeding such as, for example, a specific commencement time or court location if known.

13. In accordance with Rule 3.01(1)(d), a Court Document served by Email before 4:00 p.m. shall be deemed to be received that day and Court Documents served after 4:00 p.m. or at any time on a holiday shall be deemed to be received on the next day that is not a holiday.

14. Each party serving a Court Document in a Commercial List Proceeding is responsible for complying with the E-Service Guide. Nothing herein, however, is intended to change the substantive law about who is required to be served with materials in respect of any particular motion or proceeding brought within a Commercial List Proceeding.

Zeppa et al. v. Woodbridge Heating & Air-Conditioning Ltd.
[Indexed as: Zeppa v. Woodbridge Heating & Air-Conditioning Ltd.]

Ontario Reports

Court of Appeal for Ontario

Strathy C.J.O., K.N. Feldman and D.M. Brown JJ.A.

January 25, 2019

144 O.R. (3d) 385 | 2019 ONCA 47

Case Summary

Limitations — Discoverability — Defendant installing HVAC system in plaintiffs' residence in 2006 — Plaintiffs experiencing problems with system almost immediately but accepting defendant's assurance that problems would be solved if they entered into maintenance contract with defendant — Plaintiffs concluding in fall of 2009 that defendant was lying about maintenance — Plaintiffs no longer relying on defendant's expertise by fall of 2009 and therefore being aware that proceeding would be appropriate means to remedy problem — Plaintiffs not needing to know why system was not working properly in order to discover claim against defendant — Defendant's alleged concealment of information about improper installation of system not postponing commencement of limitation period — Action commenced in February 2012 statute-barred.

The defendant installed an HVAC system in the plaintiffs' residence in 2006. The plaintiffs began experiencing problems with the system almost immediately. The defendant told them that the problems were caused by improper maintenance and would be fixed if they entered into a maintenance contact with the defendant. The plaintiffs did so in 2007, but did not renew the contract in 2009 as the problems were getting worse. By the fall of 2009, the plaintiffs had concluded that the defendant had been lying to them about maintenance from the start. They contacted the manufacturer of the HVAC system's boilers and were told that the manufacturer had advised the defendant that the system had not been properly installed. The plaintiffs obtained a report in December 2010 that identified deficiencies in the installation of the system. They commenced an action against the defendant in February 2012 for damages for negligence, breach of contract, misrepresentation and unjust enrichment. The defendant moved successfully for summary judgment dismissing the action as statute-barred. The central issue on the motion was the application of the discoverability principle in s. 5 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. The motion judge held that the plaintiffs had discovered their claim against the defendant well prior to February 2010; they did not need to know the reason why the HVAC system was not working properly in order to discover their claim; time did not run during the two-year term of the maintenance contract because during that period the plaintiffs could reasonably maintain that they were relying on the defendant's superior knowledge and expertise; by the fall of 2009, the plaintiffs were no longer relying on the defendant's expertise, so at that point a proceeding would be an appropriate means to remedy the problem for the purposes of s. 5(1)(*a*)(iv) of the Act; and the defendant's alleged concealment of information

about the improper installation of the system that it received from the manufacturer did not postpone the commencement of the limitation period. The plaintiffs appealed.

Held, the appeal should be dismissed.

Per D.M. Brown J.A. (Strathy C.J.O. concurring): The motion judge did not err in finding that the plaintiffs did not need to know why the HVAC system was not working properly in order to discover a claim against the defendant. The question [page386] of precise causation would be revealed through the legal proceeding and did not need to be known in advance for limitation purposes. There was no error in the motion judge's factual finding that the plaintiffs knew long before February 2010 that the HVAC system was not functioning properly and that the defendant was clearly responsible since it had installed the system. Nor did the motion judge err in his analysis of "appropriate means" under s. 5(1)(*a*)(iv) of the Act. His finding that the plaintiffs were no longer relying on the defendant's expertise to remedy their concerns by the fall of 2009 was firmly anchored in the evidence. The motion judge's discoverability analysis was not flawed because he failed to take into account that the defendant had falsely represented to the plaintiffs that the problem was only one of maintenance. Finally, the motion judge did not err by failing to take into account the issue of fraudulent concealment. There is no statutory provision for fraudulent concealment in relation to the basic two-year limitation period in the Act. There is no need for such a provision, because the discoverability principle achieves the same result. If a defendant's concealment of facts results in a lack of actual or objective knowledge by the plaintiff of the elements set out in s. 5(1) (*a*) of the Act, then the plaintiff does not discover his or her claim until the date the concealed facts are revealed to or known by the plaintiff, at which point time begins to run. Even if the defendant had been told by the manufacturer that the HVAC system had been installed improperly and had concealed that information from the plaintiffs, that would not postpone the running of the limitation period because all that was required was that the plaintiffs had discovered their claim, and it was not necessary that they knew why or how the claim arose. The action was statute-barred.

Per K.N. Feldman J.A. (dissenting): Time only began to run on the plaintiffs' claims for negligence and breach of contract in November 2010, when the plaintiffs learned from the manufacturer that the reason the system never worked was because the defendant had installed it incorrectly. That information was fraudulently concealed from the plaintiffs by the defendant. It was neither discovered nor reasonably discoverable before the plaintiffs were told by the manufacturer that it had advised the defendant that the system was installed improperly. Moreover, the motion judge erred in law by failing to address the plaintiffs' misrepresentation claim based on assurances given by the defendant at a meeting in the fall of 2010. The claim for misrepresentation was brought within the limitation period.

Presidential MSH Corp. v. Marr, Foster & Co. LLP (2017), 135 O.R. (3d) 321, [2017] O.J. No. 2059, 2017 ONCA 325, 2017 D.T.C. 5049, [2017] 6 C.T.C. 93, 413 D.L.R. (4th) 391, 277 A.C.W.S. (3d) 852, **distd**

Dhaliwal v. Lindsay, [2010] O.J. No. 2907, 2010 ONCA 493, 418 N.R. 396, 198 A.C.W.S. (3d) 835, affg [2009] O.J. No. 4621, 2009 CanLII 60415, 181 A.C.W.S. (3d) 1017 (S.C.J.) [Leave to

not a permitted one; (ii) Woodbridge did not disclose to the Zeppas that it had received information from Quietside that the installation was improper; as a result of which, (iii) such concealment of facts by Woodbridge should have led the motion judge to conclude that the limitation period did not begin to run until [page399] November 2010, on the basis of the equitable principle of fraudulent concealment.

[60] I am not persuaded by this submission.

The governing legal principles

[61] The equitable principle of fraudulent concealment was described by Dickson J. in *Guerin v. Canada*, [1984] 2 S.C.R. 335, [1984] S.C.J. No. 45, at p. 390 S.C.R.:

> [W]here there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it. The fraudulent concealment necessary to toll or suspend the operation of the statute need not amount to deceit or common law fraud.

[62] A succinct, but comprehensive, summary of the elements of the principle is found in the decision of Perell J. in *Colin v. Tan*, [2016] O.J. No. 810, 2016 ONSC 1187, 81 C.P.C. (7th) 130 (S.C.J.), at paras. 44-47:

> Fraudulent concealment will suspend a limitation period until the plaintiff can reasonably discover his or her cause of action.
>
> The constituent elements of fraudulent concealment are threefold: (1) the defendant and plaintiff have a special relationship with one another; (2) given the special or confidential nature of the relationship, the defendant's conduct is unconscionable; and (3) the defendant conceals the plaintiff's right of action either actively or the right of action is concealed by the manner of the wrongdoing.
>
> Fraudulent concealment includes conduct that having regard to some special relationship between the parties concerned is unconscionable. For fraudulent concealment, the defendant must hide, secret, cloak, camouflage, disguise, cover-up the conduct or identity of the wrongdoing. The word fraudulent is used in its equitable (not common law) sense to denote conduct by the defendant such that it would be against conscience for him or her to avail himself of the lapse of time.
> There is a causative element to the doctrine of fraudulent concealment because the legal policy behind fraudulent concealment is that if the plaintiff was unaware of his or her cause of action because of the wrong of the defendant, then the court will refuse to allow a limitation defence; i.e., *the plaintiff must be ignorant of the cause of action because of the misconduct of the defendant*.

(Citations omitted; emphasis added)

[63] This equitable principle is not a rule of construction of limitations statutes. It is a principle that can take a case outside of the effect of a limitation provision and suspend the running of the limitation clock until such time as the injured party can reasonably discover the cause of action: *Giroux Estate v. Trillium Health Centre* (2005), 74 O.R. (3d) 341, [2005] O.J. No. 226 (C.A.), at para. 28. [page400]

[64] This court has held that the principle of fraudulent concealment is available in cases involving limitation periods contained in statutes other than the Act, including s. 38(3) of the *Trustee Act*, R.S.O. 1990, c. T.23: *Giroux Estate*; *Roulston v. McKenny* (2017), 135 O.R. (3d) 632, [2017] O.J. No. 26, 2017 ONCA 9; the limitation period under the *Real Property Limitations Act*, R.S.O. 1990, c. L.15: *Anderson v. McWatt*, [2015] O.J. No. 3442, 2015 ONSC 3784 (S.C.J.), at para. 77, affd [2016] O.J. No. 3740, 2016 ONCA 553; and the limitation period created by s. 82(2) of the former *Employment Standards Act*, R.S.O. 1990, c. E.14: *Halloran v. Sargeant*, [2002] O.J. No. 3248, 217 D.L.R. (4th) 327 (C.A.), at para. 35.

[65] As to claims governed by the Act,s. 15 of the Act expressly addresses the effect of the concealment of facts on the running of the 15-year ultimate limitation period. Specifically, s. 15(4)(*c*) provides that the ultimate limitation period does not run during any time in which

> (*c*) the person against whom the claim is made,
>
> (i) wilfully conceals from the person with the claim the fact that injury, loss or damage has occurred, that it was caused by or contributed to by an act or omission or that the act or omission was that of the person against whom the claim is made, or
>
> (ii) wilfully misleads the person with the claim as to the appropriateness of a proceeding as a means of remedying the injury, loss or damage.

[66] No similar language is found in relation to the basic two-year limitation period in ss. 4 and 5 of the Act. Mew, Rolph and Zacks offer the view, at 6.103 of their text, that:

> There is no statutory provision for "wilful concealment" or "fraudulent concealment" in relation to the basic two-year limitation period set out in the Act, nor was there any such provision contained in the *Limitation Act, 2002* predecessor statute. There is no need for such a provision, because the discoverability principle achieves the same result.

[67] The jurisprudence supports this view. The intersection of the principle of fraudulent concealment with the basic two-year limitation period in ss. 4 and 5 of the Act received some consideration in the case of *Dhaliwal v. Lindsay*, [2009] O.J. No. 4621, 2009 CanLII 60415 (S.C.J.), affd [2010] O.J. No. 2907, 2010 ONCA 493, leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 401. In that case, the plaintiff commenced a 2008 medical malpractice action against doctors who had treated her at the end of 2003. In December 2005, the plaintiff had obtained documents concerning her treatment. She contended that the notes for December 2003 in the hospital records attempted to conceal the [page401] involvement of the defendant doctors and amounted to fraudulent concealment. However, the documentation received by the plaintiff in December 2005 also included OHIP statements that disclosed the involvement of the defendant doctors in her care.

[68] The motion judge granted summary judgment dismissing the action as statute-barred under ss. 4 and 5 of the Act. As part of her analysis, she commented, at paras. 18 and 19, on the interplay between the Act and the principle of fraudulent concealment:

> The Plaintiffs argue, in effect, that an allegation of fraudulent concealment would operate to defeat a limitation period altogether. This interpretation cannot be sustained in light of the fact that the common law doctrine of fraudulent concealment is an equitable principle which operates to "stay the operation of a limitation period by the invocation of the Court's equitable jurisdiction to prevent an injustice" (*Giroux Estate v. Trillium Health Centre*, [2004] O.J. No. 557 (Ont. C.A.) at para. 22; See also: *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 60). When applicable, it will "suspend the running of the limitation clock until such time as the injured party can reasonably discover the cause of action" (*Giroux Estate*, *supra*, at para. 28).
> Assuming for the sake of this motion that the Defendants did fraudulently conceal their involvement, the effect of this on discoverability was to defer the date upon which their involvement could reasonably be said to have been discoverable until the date upon which the Plaintiffs (though counsel) had the decoded OHIP statements that indicated that they had treated Ms. Dhaliwal on the dates in issue. As indicated above, there can be no dispute that the decoded OHIP statements were in the hands of Plaintiffs' then-counsel by December 7, 2005.

[69] In a brief endorsement dismissing the appeal from the motion judge's decision, this court did not accept the appellants' contention that the motion judge had improperly conflated the equitable principle of fraudulent concealment with the distinct doctrine of discoverability stating, at para. 3: "[T]he motion judge's analysis of the intersection of these two principles in this case was entirely consistent with the current governing case law."

[70] Then, in *Kim v. Manufacturers Life Insurance Co.*, [2014] O.J. No. 4481, 2014 ONCA 658, this court rejected the appellant's argument that the basic limitation period under the Act should be suspended because of the respondent's alleged fraudulent concealment of documents. On the facts of that case, any fraudulent concealment of documents would not have prevented the appellant from knowing he had a cause of action: at paras. 3-5.

[71] The decisions in *Dhaliwal* and *Kim*, together with the plain language of ss. 4 and 5 of the Act, support the conclusion that there is no independent work for the principle of fraudulent concealment to perform in assessing whether a plaintiff has commenced a proceeding within the basic two-year limitation period. That is because the elements of the discoverability test set out in [page402] s. 5(1)(*a*) and (*b*) address the situation where a defendant has concealed its wrong-doing. If a defendant conceals that an injury has occurred, or was caused by or contributed to by its act or omission, or that a proceeding would be an appropriate means to seek to remedy it, then it will be difficult for the defendant to argue that the plaintiff had actual knowledge of those facts until the concealed facts are revealed. Whether the plaintiff ought to have known of those matters, given their concealment, is a matter for inquiry under s. 5(1)(*b*).

[72] If the defendant's concealment of facts results in a lack of actual or objective knowledge by the plaintiff of the elements set out in s. 5(1)(*a*) of the Act, then the plaintiff does not discover his or her claim until the date the concealed facts are revealed to or known by the plaintiff, at

which point time begins to run. That is to say, the analysis required by s. 5(1) of the Act captures the effect of a defendant's concealment of facts material to the discovery of a claim.

Application of the principles to the present case

[73] In the present case, the motion judge considered the Zeppas' argument that Woodbridge's concealment of the information from Quietside about the improper installation of the HVAC system postponed the running of the limitation period until November 2010. At para. 37 of his reasons, the motion judge rejected that submission, writing:

> The Plaintiffs further argued that Woodbridge had been told by Quietside that the HVAC system had been installed improperly and had chosen to conceal such information. Even assuming this to be the case, it would not postpone the running of the limitations period. All that is required is that the Plaintiffs have discovered their claim and, as noted above, it is not necessary that they know why or how the claim arose. Thus even if Woodbridge had withheld information about the underlying cause of the claim, such withholding would not postpone the commencement of the limitation period.

[74] I see no error in the motion judge's analysis. It is consistent with the legal principles applied by this court in *Dhaliwal* and *Kim* concerning the interplay between the principle of discoverability in s. 5 of the Act and that of fraudulent concealment. Also, it rests on reasonable factual findings made by the motion judge about when the Zeppas discovered their claim: see paras. 45 and 46, above. Accordingly, I would not give effect to this ground of appeal.

IX. *Disposition*

[75] For the reasons set out above, I see no reversible error in the motion judge's conclusion that the appellants' action was statute-barred. I would dismiss the appeal. [page403]

[76] Based on the agreement of the parties about the costs of the appeal, I would award the respondents costs of the appeal fixed at $5,000, inclusive of disbursements and applicable taxes.

[77] K.N. Feldman J.A. (dissenting): -- I agree with Brown J.A. that the central issue on this appeal concerns the motion judge's determination of when time began to run for the appellants' action against the respondent.

[78] In my view, the motion judge erred in fact and in law by finding that the appellants did not need to know that the respondent had done anything to cause them damage in order to know that they had a claim in negligence, breach of contract and misrepresentation, and by finding that the fact that the respondent fraudulently concealed its wrongdoing from the appellants did not toll the running of the basic two-year limitation period.

[79] Time only began to run on the negligence and breach of contract claims in November 2010, when the appellants learned from the manufacturer that the reason the system never worked was because the respondent had installed it incorrectly. That information was fraudulently concealed from the appellants by the respondent. It was neither discovered nor reasonably discoverable before the appellant, Mr. Zeppa, called the manufacturer, Quietside, and was told that (1) the service company had been in touch with Quietside a number of times

Peter Haberman *Appellant*

v.

Mauricio Peixeiro and Fernanda Peixeiro *Respondents*

INDEXED AS: PEIXEIRO *v.* HABERMAN

File No.: 24981.

Hearing and judgment: March 13, 1997.

Reasons delivered: September 26, 1997.

Present: L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Limitation of actions — Motor vehicles — Torts — Discoverability — Plaintiffs commencing action against defendant more than three years after motor vehicle accident — Whether discoverability principle applies to postpone commencement of two-year limitation period — Highway Traffic Act, R.S.O. 1990, c. H.8, s. 206(1) — Insurance Act, R.S.O. 1990, c. I.8, s. 266(1).

Following a two-car accident in October 1990 in which the appellant and the respondent MP were the drivers, MP consulted his family doctor and was told that he had suffered soft tissue injuries in the form of a severe contusion to the right side of his back. X-rays were taken but disclosed nothing unusual. In January 1992, MP was involved in a second accident. His resultant injuries were again diagnosed as being soft tissue in nature. In June 1993, a CT scan was performed which revealed a disc protrusion in MP's spine. The respondents commenced an action against the appellant in July 1994 and a motion on a question of law was brought to determine whether the claim for the injuries of October 11, 1990 was statute-barred by s. 206(1) of the Ontario *Highway Traffic Act*, which provides for a limitation period of two years from the time "when the damages were sustained". The chambers judge held that the action was statute-barred. The Court of Appeal allowed the respondents' appeal.

Held: The appeal should be dismissed.

Peter Haberman *Appelant*

c.

Mauricio Peixeiro et Fernanda Peixeiro *Intimés*

RÉPERTORIÉ: PEIXEIRO *c.* HABERMAN

Nº du greffe: 24981.

Audition et jugement: 13 mars 1997.

Motifs déposés: 26 septembre 1997.

Présents: Les juges L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Prescription — Véhicules automobiles — Responsabilité délictuelle — Possibilité de découvrir le dommage — Action des demandeurs contre le défendeur plus de trois ans après l'accident de la route — La règle de la possibilité de découvrir le dommage s'applique-t-elle de façon à reporter le commencement du délai de prescription de deux ans? — Code de la route, L.R.O. 1990, ch. H.8, art. 206(1) — Loi sur les assurances, L.R.O. 1990, ch. I.8, art. 266(1).

À la suite d'un accident survenu en octobre 1990 entre deux automobiles, dont les conducteurs étaient l'appelant et l'intimé MP, ce dernier a consulté son médecin de famille, qui lui a indiqué qu'il avait subi des blessures des tissus mous sous forme d'une contusion grave sur le côté droit du dos. Les radiographies prises n'ont rien révélé d'anormal. En janvier 1992, MP a été victime d'une seconde collision. À nouveau, on a diagnostiqué des blessures des tissus mous. En juin 1993, une scanographie a révélé une protrusion d'un disque intervertébral de MP. Les intimés ont intenté une action contre l'appelant en juillet 1994 et une motion a été présentée afin de faire trancher un point de droit, c'est-à-dire la question de savoir si l'action intentée contre celui-ci pour les blessures résultant de l'accident du 11 octobre 1990 était prescrite par application du par. 206(1) du *Code de la route* de l'Ontario, qui établit un délai de prescription de deux ans à compter de la date «où les dommages ont été subis». Le juge des requêtes a statué que l'action était prescrite. La Cour d'appel a accueilli l'appel des intimés.

Arrêt: Le pourvoi est rejeté.

While at common law ignorance of or mistake as to the extent of damages does not delay time under a limitation period, under Ontario's no-fault insurance scheme at the time of the accident the starting point is when the damages are known to comprise "permanent serious impairment" within the meaning of s. 266(1) of the *Insurance Act*. Section 266 effectively bars actions for recovery in tort unless a certain level of physical injury, permanent in nature and entailing serious impairment of an important bodily function, is met. The right of action referred to in s. 206(1) of the *Highway Traffic Act* must mean an action that is not excluded by s. 266(1) of the *Insurance Act*. This view is strengthened by s. 266(3), which allows for a pre-trial motion on the issue of the existence of a cause of action. Under s. 206(1) of the *Highway Traffic Act*, there is no cause of action until the injury meets the statutory exceptions to liability immunity. The discoverability principle applies to avoid the injustice of precluding an action before the person is able to sue. Time under s. 206(1) does not begin to run until it is reasonably discoverable that the injury meets the threshold of s. 266(1). While the respondents knew of some injury, they did not know prior to June 1993 that the damage MP sustained as a result of the first accident was a herniated disc, and it cannot be said that they ought to have discovered the serious nature of the damage earlier. As the action was started within two years of the time when they first learned that they had a cause of action, it is not statute-barred.

Cases Cited

Referred to: *Murphy v. Welsh*, [1993] 2 S.C.R. 1069; *Bair-Muirhead v. Muirhead* (1994), 20 O.R. (3d) 744; *Grossi v. Bates* (1995), 21 O.R. (3d) 564; *Cartledge v. E. Jopling & Sons Ltd.*, [1963] A.C. 758; *July v. Neal* (1986), 57 O.R. (2d) 129; *Meyer v. Bright* (1993), 15 O.R. (3d) 129; *Buffa v. Gauvin* (1994), 18 O.R. (3d) 725; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6; *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Sparham-Souter v. Town & Country Developments (Essex) Ltd.*, [1976] 1 Q.B. 858; *Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200.

Bien que, en common law, l'ignorance ou la méprise quant à l'importance du dommage ne retarde pas le point de départ du délai de prescription, dans le cadre du régime d'indemnisation sans égard à la responsabilité en vigueur en Ontario au moment de l'accident, le délai de prescription commence à courir à compter du moment où l'on sait que les dommages subis comportent une «déficience grave et permanente» au sens du par. 266(1) de la *Loi sur les assurances*. L'article 266 exclut effectivement les actions en dommages-intérêts pour responsabilité délictuelle en l'absence d'une blessure d'ordre physique permanente causant une déficience grave d'une fonction corporelle importante. Le droit d'action envisagé au par. 206(1) du *Code de la route* doit viser les actions qui ne sont pas exclues par le par. 266(1) de la *Loi sur les assurances*. Cette opinion est renforcée par le par. 266(3), qui permet la présentation, avant le procès, d'une motion sur la question de l'existence d'une cause d'action. En vertu du par. 206(1) du *Code de la route*, il n'existe pas de cause d'action à moins que la blessure soit visée par l'une des exceptions à l'immunité contre la responsabilité civile qui sont prévues par la loi. La règle de la possibilité de découvrir le dommage s'applique pour prévenir l'injustice qu'entraînerait le fait d'empêcher une personne d'intenter une action avant qu'elle ne soit en mesure de le faire. Le délai prévu au par. 206(1) ne commence à courir qu'à compter du moment où il est raisonnablement possible de découvrir que la blessure atteint le seuil d'application du par. 266(1). Même si les intimés savaient qu'une blessure avait été subie, ils ne savaient toutefois pas, avant juin 1993, que la blessure causée à MP par le premier accident était une hernie discale, et il est impossible d'affirmer qu'ils auraient dû découvrir plus tôt la gravité du dommage. Puisque leur action a été intentée dans les deux ans de la date où ils ont appris qu'ils disposaient d'une cause d'action, elle n'est pas prescrite.

Jurisprudence

Arrêts mentionnés: *Murphy c. Welsh*, [1993] 2 R.C.S. 1069; *Bair-Muirhead c. Muirhead* (1994), 20 O.R. (3d) 744; *Grossi c. Bates* (1995), 21 O.R. (3d) 564; *Cartledge c. E. Jopling & Sons Ltd.*, [1963] A.C. 758; *July c. Neal* (1986), 57 O.R. (2d) 129; *Meyer c. Bright* (1993), 15 O.R. (3d) 129; *Buffa c. Gauvin* (1994), 18 O.R. (3d) 725; *M. (K.) c. M. (H.)*, [1992] 3 R.C.S. 6; *Kamloops (Ville de) c. Nielsen*, [1984] 2 R.C.S. 2; *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147; *Sparham-Souter c. Town & Country Developments (Essex) Ltd.*, [1976] 1 Q.B. 858; *Fehr c. Jacob* (1993), 14 C.C.L.T. (2d) 200.

It was conceded that at common law ignorance of or mistake as to the extent of damages does not delay time under a limitation period. The authorities are clear that the exact extent of the loss of the plaintiff need not be known for the cause of action to accrue. Once the plaintiff knows that some damage has occurred and has identified the tortfeasor (see *Cartledge v. E. Jopling & Sons Ltd.*, [1963] A.C. 758 (H.L.), at p. 772 *per* Lord Reid, and *July v. Neal* (1986), 57 O.R. (2d) 129 (C.A.)), the cause of action has accrued. Neither the extent of damage nor the type of damage need be known. To hold otherwise would inject too much uncertainty into cases where the full scope of the damages may not be ascertained for an extended time beyond the general limitation period.

Il a été admis que, en common law, l'ignorance ou la méprise quant à l'importance du dommage ne retarde pas le point de départ du délai de prescription. Il ressort clairement de la jurisprudence qu'il n'est pas nécessaire que l'ampleur exacte de la perte subie par le demandeur soit connue pour donner naissance à la cause d'action. Une fois que celui-ci sait qu'il a subi un préjudice et qui en est l'auteur (voir *Cartledge c. E. Jopling & Sons Ltd.*, [1963] A.C. 758 (H.L.), à la p. 772, lord Reid, et *July c. Neal* (1986), 57 O.R. (2d) 129 (C.A.)), la cause d'action a pris naissance. Il n'est pas nécessaire de connaître la nature du préjudice ni son étendue. Conclure autrement aurait pour effet d'introduire trop d'incertitude dans les affaires où toute l'étendue du préjudice ne peut être déterminée que longtemps après l'expiration du délai de prescription.

However, it was submitted that because of Ontario's no-fault insurance scheme at the time of the accident, the starting point of the running of time is when the damages are known to comprise "permanent serious impairment" within the meaning of s. 266 of the *Insurance Act*. The argument was that the intervention of the liability immunity, one of the mandatory features of Ontario's no-fault system, alters the time of accrual of the cause of action until the material fact of sufficient injury is reasonably discoverable.

Cependant, on a prétendu que, en raison du régime d'indemnisation sans égard à la responsabilité en vigueur en Ontario au moment de l'accident, le délai de prescription commence à courir à compter du moment où l'on sait que le préjudice subi comporte une «déficience grave et permanente» au sens de l'art. 266 de la *Loi sur les assurances*. Cette prétention était fondée sur l'argument que la disposition d'exonération de responsabilité, qui est l'un des éléments impératifs du régime ontarien d'assurance sans égard à la responsabilité, fait en sorte que la cause d'action ne prend naissance qu'au moment où le fait substantiel que constitue l'existence d'un dommage suffisant peut raisonnablement être découvert.

A. *The No-Fault Scheme in Ontario*

A. *Le régime ontarien d'indemnisation sans égard à la responsabilité*

Tort law provides fault-based compensation for car accidents. Fault as the basis of liability is grounded on the fundamental proposition that a person who is injured due to the fault of another person has the right to compensation from the wrongdoer. Tort law is based on individual responsibility.

Selon les règles du droit de la responsabilité délictuelle, le droit à une indemnité en cas d'accident de la route repose sur l'existence d'une faute. Le principe de la faute comme source de responsabilité repose sur la proposition fondamentale que la personne qui subit un préjudice par suite de la faute d'autrui a le droit d'être indemnisée par l'auteur de cette faute. Le fondement du droit de la responsabilité délictuelle est la responsabilité individuelle.

Hoy, Alec

From: David Ho <david.ho@constantineinc.com>
Sent: Friday, December 18, 2020 9:22 AM
To: Sam Mizrahi; Mark Kilfoyle; Josh Lax; Esteban Yanquelevech; Robert Hiscox; Chris Donlan
Subject: RE: 128 Hazelton - Mizrahi Weekly Progress Meeting

Importance: High

Hi All,

Below are the working session points in red that were updated and reviewed between CEI and Mizrahi Developments (MIZ) at the **Friday December 11thth 2020,128 Hazelton Ave. Progress Update meeting** at 10:30 AM.

1. LOAN to Sam RE: MIZ office:

The Loan LOI was fully executed on Oct 26th at 8PM. In good faith, last week CEI sent a further $1.2 million into the Project to pay trades including CCM.

On Tuesday Nov. 10th the loan agreements were fully executed and closed. On Thursday 12th CEI wired a further 1 million to the Project.

20 Nov 2020

In this meeting Mark and Josh agreed to provide Chris with a list of required Nov payables by trade.

- Cheques will be available today (20 Nov) for signatures for distribution to trades

- Funds will be max out within 2 weeks

- Mark to provide forecast for beyond 2 weeks for anticipated funds to cover trades

- Chris suggested approaching DUCA for options to stretch loan for another half million

27 Nov 2020

- Options for additional cash are sale of Barry unit + unit 601

- Mark to provide schedule for current payments needed to Chris

- Mizrahi reports that all trades have been paid to current

- RH stressed need to get traction on indemnity agreement for 128 H + related projects

- Sam to speak with Avril and circle back to RH

- Sam to place call to DUCA for $4 million loan

- Next week, Sam and Robert agreed to work together to finalize the outstanding MIZ indemnification agreement for 50% of the project losses at 128 Hazelton.

- No new update as of 4 Dec 2020

- No new update for 11 Dec 2020

2. Clark Construction Management Transition Plan:

The week of Oct 26th MIZ provided a transition Plan. CEI agreed to MIZ recommendation to remove CCM from the Project.

However, the Transition Plan due to CEI on Oct 27th was incomplete and on Oct 30th MIZ agreed to provide CEI with a complete plan which will include the outstanding items that were due on OCT 27th on Tuesday Nov 3rd.

On Friday Oct 30th Mark /Josh and Esteban to provide a transition plan for CCM replacement on by Tuesday NOV 3rd with details on showing:

- over 1 million in cost savings by MIZ taking over the Clark's work and a clear schedule acceleration for turning over the units to the Buyers

- Josh and Esteban to provide justification and rationale for CCM's removal at 128 Hazelton Site only Not provided yet ... Josh to provide outstanding information

- MIZ to advise Robert when he can see MIZ's legal support documentation for CCM's removal at Mizrahi offices. MIZ says that this can only be viewed in person due to confidentially as recommended by Mizrahi solicitor

As of the meeting on NOV 6th the above is still outstanding and MIZ is now saying that CEI will receive this information on Nov. 10th

- This information was not received.

13 Nov 2020

- In the weekly meeting a meeting was set up for Nov 19th at 3:30PM to review this information at Miz offices.

- Transition to Mizrahi forces completed

- Co-operation & communications between CCM & Mizrahi is not occuring

- CCM not providing information in a timely manner after transition

- Miz has identified information gaps in CCM documentation and will need more time to review to understand impact on schedule and cost savings.

- Esteban -still working on this -next week...

- Miz to schedule meetings with sub trades to understand impact

- Responsibility matrix missing - due now for next meeting

20 Nov 2020

- Miz to review hard drive from CCM for information gaps to determine a clear path for manpower as required to advance the schedule.

- Miz to compile a list of justifications for termination of CCM at 128 H

- Miz to pay CCM outstanding invoices to avoid liens by CCM.

- CCM contract was sent to Robert & Chris

- Sam gave Robert a high level overview of contract

- Registration process for condo has been initiated by Mizrahi

- CEI requested Mizrahi to compile a list of CCM impact items for 128 H

- Rationale is to determine an order of magnitude for liquid damages against CCM

- Miz to prepare a plan to determine magnitude and review with Robert and Chris for next meeting

- Overall strategy is to have a meeting with CCM on impact and cost to avoid litigation, liens and paying CCM outstanding invoices.

27 Nov 2020

- No current communications between Mizrahi and CCM todate

- No payments to CCM todate.

- Mirahi reports that they have uncovered more impact items to cost and schedule after review of CCM files such as;

1. - CCM did not report approximately $30K of additional work claims in magnitude with drywall trade

SUPPLEMENTARY CONDITIONS TO CCDC 5A, 2010, CONSTRUCTION MANAGEMENT CONTRACTS FOR SERVICES

A. GENERAL

PREAMBLE

Without exception, the *Owner* assumes no legal duty or obligation in respect of the Request for Proposals or the Proposal process unless and until the *Owner* actually enters into a contract with the Proponent. The Request for Proposals and the Proposal process are expressly stated to be contingent on funds being committed for the *Project* to the satisfaction of the *Owner*.

SC 1 These Supplementary General Conditions presuppose the use of the Standard Construction Document CCDC 5A, 2010 Construction Management Contracts – for Services consisting of the Agreement Between Owner and *Construction Manager* as amended (the "Agreement"), Definitions (the "Definitions"), Schedules (the "Schedules") and General Conditions of the Construction Management Contracts – for Services (the "General Conditions"), GC 1 to GC 20 inclusive in full. These "Supplementary Conditions" void, supersede or amend the Agreement, the Definitions and the Conditions as the case may be, and shall form part of the *Contract Documents* as defined in the definitions.

SC 2 Throughout the *Contract Documents* reference to the "General Conditions of the Contract" shall imply the inclusion of these "Supplementary Conditions."

SC 3 Article A- 5: Section 5.3.3 Delete "as described in Schedule C" in the first and second line and replace it with the following:

"as described in Appendix A to the Supplementary Conditions"

SC 4 Article A- 6: Delete Item 6.2 in its entirety and replace with the following:

"6.2 Should either party fail to make payments as they become due under the terms of the *Contract* or in an award by arbitration or a court, interest shall also become due and payable on such unpaid amounts at 2% above the prime rate. If the payments are disputed as per Part 7 of the *Contract*, interest shall not be applied to the disputed amount until such time as the dispute is settled by mutual agreement. Such interest shall be compounded on a monthly basis. The prime rate shall be the rate of interest quoted by Royal Bank of Canada for prime business loans as it may change from time to time."

B. SCHEDULES

SC 5 Amend SCHEDULE A1 TO THE AGREEMENT – SERVICES AND COMPENSATION as follows:

1. PRECONSTRUCTION		**Performed by the Owner or Someone Other than the Construction Manager**	**Performed by the Construction Manager (F1/F2/F3)**	**Not applicable**
F1	Included in the fixed amount described in paragraph 5.2.1 of Article A-5 – COMPENSATION FOR SERVICES.			
F2	Included in the percentage amount as described in paragraph 5.2.2 of Article A-5 - COMPENSATION FOR SERVICES.			
F3	Fee to the Construction Manager based on time based rates as described in paragraph 5.2.3 of Article A-5 - COMPENSATION FOR SERVICES.			
1.1	**General Services**			
	Add the following as paragraph 1.1.3:			
.3	Continuously assists the *Consultant* and *Owner* in refining *Project* scope, sequencing and general requirements.		F3	
1.4	**Design Development Phase**			
.1	**Constructability:**			
	Amend paragraph 1.4.1 (3) by adding the following to the end of the paragraph:		F3	
	"Take diligent, commercially reasonable measures to identify defects or omissions in the *Construction Documents* and to promptly advise the *Owner* and the *Consultant* of the same."			
.2	**Estimating and Cost Control:**			
	Amend paragraph 1.4.2 (3) by adding the following to the end of the paragraph:		F3	
	"Update the cash flow forecast on a monthly basis throughout the entire duration of the Preconstruction and provide reports to the *Owner* in a mutually agreeable format."			
Add the following as Article 1.4.4:			F3	
".4	**Systems Evaluation and Value Engineering:**			
.1	Conduct a continuing analysis and re-evaluation program to scrutinize each system included in the *Construction Documents* in order to provide the *Owner* and the *Consultant* with prompt feedback on the cost implications of each facet of the design of		F3	

	the *Project*.			
.2	Prepare comparative cost analyses, value engineering studies and suggest alternative products, methods and approaches to achieve the cost effectiveness of each component included in the *Construction Documents*, without assuming design responsibility."			
Add the following as Article 1.4.5:			F3	
".5	**Investigative Work and Testing:**			
.1	Identify to the *Owner* all tests inspections, or investigative work which the *Construction Manager* recommends be completed during the preconstruction phase along with a proposal and estimate of the cost of such tests inspections, or investigative work. Upon the written approval of the *Owner*, the *Construction Manager* shall arrange for such tests or investigative work."			
1.5	**Construction Document Phase**			
.1	**Constructability:**			
	Amend paragraph 1.5.1 (2) by adding the following to the end of the paragraph:			
	"Take diligent, commercially reasonable measures to identify defects, deviations from *Project* requirements or omissions in the *Construction Documents* and to promptly advise the *Owner* and the *Consultant* of the same."		F3	
.2	**Estimating and Cost Control:**			
	Add the following as paragraph 1.5.2 (5):			
	"(5) Update the *Class A Construction Cost Estimate* at regular intervals as directed by the *Owner*. Review the *Class A Construction Cost Estimate* with the *Owner* and the *Consultant* to allow the *Owner* to establish the final value of each of the Class A Budgets."		F3	
1.5	**Construction Document Phase**			
.3	**Scheduling:**			
	Add the following as paragraph 1.5.3 (3) to 1.5.3 (5):			
	"(3) The *Project* schedule must be updated and monitored at least on a monthly basis and more frequently as required. Provide progress updates and confirm compliance with *Project* schedule to maintain all critical delivery dates.		F3	
	(4) Co-ordinate with the *Owner*, and the *Consultant* to			

		develop a detailed *Project* schedule, formatted in Primavera 6 and /or Microsoft Project 2007, within two (2) weeks of commencement of the *Services*. The *Project* schedule must be updated and monitored on a monthly basis, or more as required. Provide progress updates and confirm compliance with *Project* schedule to maintain all critical delivery dates throughout the phases of the *Project*.		F3	
	(5)	Upon the *Owner*'s request make recommendations with reasonable supporting analysis and information to the *Owner* and the *Consultant* on the separation of the *Project* into the segments of the *Project* to allow for construction of the *Project* in phases or for accelerated construction of portions of the *Project* on a fast track basis. The *Owner* shall, in its sole discretion, approve the number of segments of the *Project*."		F3	
1.6	**Construction Procurement Phase**				
.2	**Contracting:**				
	Amend paragraph 1.6.2 (2) by adding the following to the end of the paragraph:				
		"Pre-qualify bidders as may be required by the *Owner* for the trade packages based on an *Owner* approved bid list that encompasses all trade divisions. The *Construction Manager* shall submit the list of potential bidders to the *Owner* and the *Consultant* for review and approval. The bid list shall include *Trade Contractors* that are: known to the *Construction Manager*, known to the *Owner*, and known to have a reputation for performance of high quality work. The pre-qualification exercise shall assess the financial stability, the capacity to complete the *Work* and the resources of the *Trade Contractor* available to complete the *Work*. The pre-qualification exercise shall be carried out based on transparent and pre-determined evaluation criteria. "		F3	
1.6	**Construction Procurement Phase**				
.2	**Contracting:**				
	Add the following as paragraph 1.6.2 (4) to 1.6.2 (7):				
	"(4)	Obtain the approval of the *Owner* for the bid documents prior to the issuance of any bid package. Complete transparency in the bid process is required by the *Owner*.		F3	
	(5)	Develop a contracting work plan in collaboration with the *Owner* and the *Consultant* and prepare bid		F3	

	packages accordingly.			
	(6) Take diligent, commercially reasonable precautions to ensure that all required *Work* for the *Project* shall be included and co-ordinated in the various bid packages when considered as a whole, but without duplication of requirements.		F3	
	(7) Unless otherwise approved in writing by the *Owner*, in accordance with industry standard bidding practices, obtain at least two (2) independent written competitive bids for any subcontract valued less than $25,000 and at least three (3) independent written competitive bids for any subcontract value equal to or in excess of $25,000."		F3	
1.6	**Construction Procurement Phase**			
Delete paragraph 1.6.3 in its entirety and replace with the following:				
".3	Receive bids and conduct a bid opening in the presence of the *Owner* and the *Consultant*. Upon the completion of a bid opening, complete a bid review and assist in making a determination as to the successful bidder. Facilitate and prepare, on behalf of the *Owner*, the CCDC 17 2010, Stipulated Price Contract between *Owner* and *Trade Contractor* for Construction Management Projects, for award to the successful bidder. Should the Owner, in its sole and absolute discretion, choose to award the *Work* for Building B to a General Contractor managed by the *Construction Manager*, then the *Owner* shall conduct a separate tender for the Building B *Work through the Project Manager (PM)*. The *Owner* shall solicit and receive bids for the *Work*. Upon the completion of a bid opening, the *Construction Manager* shall complete a bid review and assist in making a determination as to the successful bidder. Facilitate and prepare, on behalf of the *Owner*, the CCDC 2, 2008, Stipulated Price Contract, for award to the successful bidder."		F3	
Delete paragraph 1.6.4 in its entirety and replace with the following:				
".4	Prepare and submit for review by the *Owner* and the *Consultant* the Supplementary Conditions to the CCDC 17, 2010, Stipulated Price Contract between *Owner* and *Trade Contractor* for Construction Management Projects, which shall be the form of Contract used by the *Owner* to engage successful bidders in the various trade disciplines. Structure the Supplementary Conditions in a manner that effectively transfer the *Owner's* risks, wherever applicable, that are inherent in the *Project* to the T*rade Contractors*."		F3	
Delete paragraph 1.6.5 in its entirety and replace with the following:				
".5	Update the construction cost control plan with actual budget allocations for all trade packages and general requirements and update the cash flow forecasts for the *Project*."		F3	

2. CONSTRUCTION		Performed by the Owner or Someone Other than the Construction Manager	Performed by the Construction Manager (F1/F2/F3)
F1	Included in the fixed amount described in paragraph 5.2.1 of Article A-5 – COMPENSATION FOR SERVICES.		
F2	Included in the percentage amount as described in paragraph 5.2.2 of Article A-5 - COMPENSATION FOR SERVICES.		
F3	Fee to the Construction Manager based on time based rates as described in paragraph 5.2.3 of Article A-5 - COMPENSATION FOR SERVICES.		
2.1	**General Services**		
Delete paragraph 2.1.1 in its entirety and replace with the following:			
"**.1**	Chair weekly construction meetings with *Trade Contractors* to review safety, coordination efforts, procedures, progress, scheduling and any open issues. Chair separate weekly meetings with the *Owner, Consultant* and other members of the *Project* team as required by the *Owner* to review coordination efforts, procedures, progress, scheduling and open issues. All meeting minutes are to be recorded by the *Construction* Manager and issued within forty-eight 48 hours of the completion of the meeting.		F3
	Delete paragraph 2.1.3 (3) in its entirety and replace with the following:		
	"(3) Give interpretations and make findings on matters in question relating to the performance of any *Work* in a manner consistent with the *Standard of Care*, or the requirements of the *Contract Documents*, except with respect to any and all architectural and engineering aspects of the *Project* or financing information required of the *Owner*. The *Construction Manager* shall issue supplemental instructions to *Trade Contractors* with reasonable promptness or in accordance with a schedule for such instructions agreed to by the *Construction Manager* and *Trade Contractors*."		F3
2.1	**General Services**		
	Add the following as paragraph 2.1.3 (10) to 2.1.3 (14):		
	(10) Direct and control construction activity on site.		F3
	(11) Provide all resources as appropriate to coordinate supervise and direct the construction work as required to deliver the *Project* as described in the RFP.		F3
	(12) Coordinate and manage the *Work* to be performed by all *Trade Contractors* and *Suppliers* from the commencement of the *Work* through *Total Performance of the Work*. Make reasonable efforts to ensure *Products* furnished and the *Work* performed are in accordance with the *Contract Documents*. If any *Products* furnished or Work performed are not in accordance with the *Contract Documents*, provide timely notice to *Owner* and cooperate with *Owner* in dealing with *Trade Contractors* and *Suppliers* as reasonably required to ensure that any such failure is remedied.		
	(13) Establish a clear organization with true lines of authority, accountability and report to deliver the scope of work within the		F3

	Contract Documents. (14) Schedule, contact and coordinate security escort services and ensure compliance with all *Owner* security policies."		F3
2.2	**Project Control and Scheduling** Delete paragraph 2.2.1 (5) in its entirety and replace with the following: "(5) Coordinate and supervise the efforts of all *Trade Contractors* and *Suppliers* in the performance of their respective *Work*, make all reasonable efforts to ensure that the *Project* is on schedule and constructed in accordance with the *Project* budget and the approved and current *Contract Documents*."		F3
2.5	**Changes in the Work** Add the following as paragraph 2.5.1 (5) to 2.5.1 (7): "(5) Receive, manage, review and provide recommendations for all proposed *Changes in the Work* quotes from *Trade Contractors*. Review unit prices, labour, quantities, time and material tickets for accuracy and compliance with the *Contract Documents* and the terms and conditions of each of the *Trade Contractors'* and *Suppliers'* contracts with the *Owner*. Make reasonable efforts to ensure that adequate supporting backup documentation to justify the recommendation as required by the *Owner* and *Consultant* is provided in each submission. If any *Trade Contractors or Suppliers* fail to provide adequate supporting documentation, provide timely notice to *Owner* and cooperate with *Owner* in dealing with *Trade Contractors* and *Suppliers* as reasonably required to ensure that any such failure is remedied. (6) Review all proposed *Changes in the Work* proposed by the *Owner* and make recommendations regarding the constructability, cost and schedule impact on the delivery of the *Project* of such a proposed *Change in the Work*. (7) Promptly inform the *Owner* and the *Consultant* if any *Change in the Work* contemplated by the *Owner* is expected to impact the *Contract Time* or *Budget*. The *Construction Manager* will also inform the *Owner* and the *Consultant* if any such *Change in the Work* that affects the *Contract Time* or will affect the *Construction Manager's* compensation as set forth in Article A-5 COMPENSATION FOR SERVICES. The *Construction Manager* shall, according to the obligations of its *Standard of Care,* review all *Trade Contractor* change order pricing.		F3 F3 F3
2.6	**Payments to Trade Contractors and Suppliers** Add the following to the end of paragraph 2.6.1 (1):"Establish a *Trade Contractor* payment breakdown with each *Trade Contractor* of their contracted *Work* prior to the submission of their first application for payment. The *Construction Manager* shall collect from each *Trade Contractor* proof of Registration with Canada Revenue Agency (CRA) for Harmonized Sales Tax purposes prior to the submission of their first application for payment. Delete paragraph 2.6.1 (2) in its entirety and replace with the following:		F3

	"(2) Collect from the *Trade Contractors* all documentation required to substantiate their claims (including a statutory declaration) in a manner acceptable to the *Owner*."		F3
	Delete paragraph 2.6.1 (3) in its entirety and replace with the following:		
	"(3) Provide the *Payment Certifier* with all documentation necessary to allow him to certify each *Trade Contactor's* monthly payment applications and ensure that the *Payment Certifier* has sufficient access to the *Work* to allow him to certify each *Trade Contractor's* monthly payment application."		F3
	Delete paragraph 2.6.2 (1) in its entirety and replace with the following:		
	"(1) In accordance with the *Standard of Care*, conduct a pre-review of the *Trade Contractors'* monthly payment applications to verify that the amount claimed reflects the amount of the *Trade Contractor's Work* that has been completed as of the date of the monthly payment application. Issue a document to the *Payment Certifier* that reflects the *Construction Manager's* review of the application from the *Trade Contractors*."		F3

2. CONSTRUCTION		**Performed by the Owner or Someone Other than the Construction Manager**	**Performed by the Construction Manager (F1/F2/F3)**
F1	Included in the fixed amount described in paragraph 5.2.1 of Article A-5 – COMPENSATION FOR SERVICES.		
F2	Included in the percentage amount as described in paragraph 5.2.2 of Article A-5 - COMPENSATION FOR SERVICES.		
F3	Fee to the Construction Manager based on time based rates as described in paragraph 5.2.3 of Article A-5 - COMPENSATION FOR SERVICES.		
2.6	**Payments to Trade Contractors and Suppliers**		
	Add the following as paragraph 2.6.2 (2) to 2.6.2 (3):		
	"(2) Chair an onsite review, if so requested by the *Owner* and *Payment Certifier*, of the *Trade Contractors* applications for payment with *Owner*, and the *Payment Certifier* to facilitate timely and accurate approval of the *Trade Contractors'* monthly applications for payment.		F3
	(3) Once each of the monthly progress draws has been certified, present to the *Owner* a package including all the required documentation, to allow the *Owner* to process payments for each of the *Trade Contractors*."		F3
2.7	**Field Review**		

	Add the following to the end of paragraph 2.7.1 (1): "The system for quality control and assurance shall include, without limitation, a process outlining, equipment integration, and maintenance/operation/use requirements for the *Owner's* operation team. Monitor, identify and have rectified all non-compliance items within the *Project* schedule."		F3
	Add the following as paragraph 2.7.1 (3): "(3) Coordinate all testing and inspection procedures as required by the *Contract Documents*, the *Owner* and *Applicable Laws*. Keep accurate records of all tests, inspections, findings and reports. Services of independent testing agencies, professional engineers, and the *Consultant* shall be retained by the *Owner* through direct contract, unless otherwise noted in the *Contract Documents.*"		F3

2. CONSTRUCTION		**Performed by the Owner or Someone Other than the Construction Manager**	**Performed by the Construction Manager (F1/F2/F3)**
F1	Included in the fixed amount described in paragraph 5.2.1 of Article A-5 – COMPENSATION FOR SERVICES.		
F2	Included in the percentage amount as described in paragraph 5.2.2 of Article A-5 - COMPENSATION FOR SERVICES.		
F3	Fee to the Construction Manager based on time based rates as described in paragraph 5.2.3 of Article A-5 - COMPENSATION FOR SERVICES.		
2.8	**Health and Construction Safety**		
	Delete paragraph 2.8.1 (1) and 2.8.1 (2) in their entirety and replace with the following:		
	"(1) Be solely responsible for construction safety at the *Place of the Project* and for compliance with the *Applicable Laws* and practices which relate to construction health and safety. **Without any exceptions the *Construction Manager* will act as "Constructor" within the meaning of the *Occupational Health and Safety Act (OHSA)* (Ontario) with respect to the *Project.***		F3
	(2) Be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the *Work.*		F3
	(3) Take diligent, commercially reasonable steps to prevent interference with adjacent properties. Take diligent, commercially reasonable steps to not close or obstruct streets, sidewalks, alleys, or other public thoroughfares unless all permits required by *Applicable Laws* have been obtained and take diligent, commercially reasonable steps ensure compliance with all such permits.		F3

2. CONSTRUCTION		Performed by the Owner or Someone Other than the Construction Manager	Performed by the Construction Manager (F1/ /F3)
F1	Included in the fixed amount described in paragraph 5.2.1 of Article A-5 – COMPENSATION FOR SERVICES.		
F3	Fee to the Construction Manager based on time based rates as described in paragraph 5.2.3 of Article A-5 - COMPENSATION FOR SERVICES.		
2.8	**Health and Construction Safety**		
	(4) Prepare a program of supervision and initiate, maintain, and supervise safety precautions and programs to assure that the *Trade Contractors* and *Suppliers* comply with all legal requirements, all safety and insurance requirements and other standards and requirements applicable to construction of the *Project*.		F3
	(5) Provide site specific health and safety orientation to all parties.		F3
	(6) Communicate, monitor and enforce *Construction Managers'* Safety Policy with all *Trade Contractors*. If required in the application of the Safety Policy, remove from site any person who fails to comply with the policy.		F3
	(7) Prior to commencement of its services on this *Project*, the *Construction Manager* shall submit to the *Owner*:		F3
	.1 a current WSIB clearance certificate and confirmation of the *Construction Manager*'s current WSIB CAD-7 performance rating;		
	.2 copies of the *Construction Manager's* insurance coverage that has application to the *Project* if requested by *Owner*;		
	.3 documentation of the *Construction Manager's* in-house safety-related programs; and		
	.4 a copy of the *Notice of Project* filed with the Ministry of Labour naming itself as "constructor" under the applicable Health and Construction Safety legislation."		

2. CONSTRUCTION		Performed by the Owner or Someone Other than the Construction Manager	Performed by the Construction Manager (F1/F2/F3)
F1	Included in the fixed amount described in paragraph 5.2.1 of Article A-5 – COMPENSATION FOR SERVICES.		
F2	Included in the percentage amount as described in paragraph 5.2.2 of Article A-5 - COMPENSATION FOR SERVICES.		
F3	Fee to the Construction Manager based on time based rates as described in paragraph 5.2.3 of Article A-5 - COMPENSATION FOR SERVICES.		
2.9	**Submittals**		
	Add the following as paragraph 2.9.1 (7) to 2.9.1 (9):		
	"(7) Establish a co-ordinated shop drawing control system to expedite and track co-ordinated shop drawings. Maintain and update on a daily basis the co-ordinated shop drawing control system and provide reports to the *Owner* and the *Consultant* during the weekly meetings.		F3
	(8) Receive and review, for compliance with the *Contract*, all *Trade Contractors* shop drawings, all other required information submitted by *Trade Contractors*. All submittals shall be reviewed and commented upon by the *Construction Manager* for *Contract* compliance prior to submittal to the *Consultant*. Maintain and manage a set of all *Trade Contractors* shop drawings and submittals at the *Place of the Project*.		F3
	(9) Schedule, monitor and implement the flow of all documents and *Products* for the proper sequence of approvals by the *Consultant* so as to meet the *Project* schedule."		F3

2. CONSTRUCTION		Performed by the Owner or Someone Other than the Construction Manager	Performed by the Construction Manager (F1/F2/F3)
F1	Included in the fixed amount described in paragraph 5.2.1 of Article A-5 – COMPENSATION FOR SERVICES.		
F2	Included in the percentage amount as described in paragraph 5.2.2 of Article A-5 - COMPENSATION FOR SERVICES.		
F3	Fee to the Construction Manager based on time based rates as described in paragraph 5.2.3 of Article A-5 - COMPENSATION FOR SERVICES.		
2.10	**Reports and Project Site Documents**		
	Add the following as paragraph 2.10.1 (4) to 2.10.1 (5):		
	"(4) Maintain a record-keeping database system which shall be backed up to a third party server (acceptable to the Owner, acting reasonably) on a weekly basis, to monitor and track the progress of the Work. Such records shall include, but not be limited to, correspondence, emails and other electronic communications, Trade Contracts, purchase orders, meeting minutes, daily reports, logs, progress schedules, jobsite manpower reports, material		F3

	delivery shipment tickets and co-ordinated shop drawings on site to comply with the Contract Documents. All records, information and data shall be instantly accessible the Owner directly and without restriction or permission from the Construction Manager for such period as the Owner determines, in its sole discretion.		
(5)	Prepare monthly cost reports and construction progress reports for the *Owner*'s approval. The cost report shall record the current value of the Work performed by the *Trade Contractors* and track approved and pending change order costs to anticipate and estimate the final cost to complete the *Work*. The progress report shall specify among other things, an estimated percentage of completion, whether the *Project* is on schedule, and if not, the reasons therefore and the *Construction Manager's* recommendations for getting the *Project* back on schedule, as well as the number of man-days worked for each category of labour and the *Work* to be completed in the succeeding month. Accompanying the progress report shall be an updated current proposed *Construction Manager's* construction schedule submitted for the *Owner's* review, and a listing and the status of all change orders, bulletins and other relevant documents. The *Construction Manager* shall prepare such additional reports as the *Owner*, may reasonably request."		F3

2. CONSTRUCTION		Performed by the Owner or Someone Other than the Construction Manager	Performed by the Construction Manager (F1/F2/F3)
F1	Included in the fixed amount described in paragraph 5.2.1 of Article A-5 – COMPENSATION FOR SERVICES.		
F2	Included in the percentage amount as described in paragraph 5.2.2 of Article A-5 - COMPENSATION FOR SERVICES.		
F3	Fee to the Construction Manager based on time based rates as described in paragraph 5.2.3 of Article A-5 - COMPENSATION FOR SERVICES.		
2.12	**Substantial Performance of the Work**		
	Add the following as paragraph 2.12.1 (4) to 2.12.1 (5):		
	"(4) Review and present, in accordance with the *Standard of Care*, the application for *Substantial Performance* for each of the *Trade Contractors*.		F3
	(5) Once satisfied that a T*rade Contractor* has met the requirements of *Substantial Performance*, as defined in the *Lien Act*, inform the *Owner* and the *Consultant* in writing that *Work* of each *Trade Contractor* is ready for final review prior to issuance of final certificate for payment.		F3
2.14	**Handover**		
	Add the following as paragraph 2.14.1 (6) and 2.14.1 (7):		
	"(6) Coordinate the activities of all *Trade Contractors* with respect to the commissioning of the *Project*.		F3
	(7) Make reasonable effort to ensure that all required *Trade Contractors* and *Suppliers* work with the *Owner's* Third Party Commissioning Agent and respond in a timely fashion to any inquiries or requests from the Third Party Commissioning Agent. If any *Trade Contractors or Suppliers* fail to respond in a timely fashion to any inquiries or request from the Third Party Commissioning Agent, provide timely notice to *Owner* and cooperate with *Owner* in dealing with *Trade Contractors* and *Suppliers* as reasonably required to ensure that any such failure is remedied. Develop and integrate all commissioning activities into the *Project* schedule and provide the services of a commissioning manager to ensure commissioning procedures are completed and documented, and commissioning records including any required attachments are submitted for approval."		F3

2. CONSTRUCTION			Performed by the Owner or Someone Other than the Construction Manager	Performed by the Construction Manager (F1/F2/F3)
F1	Included in the fixed amount described in paragraph 5.2.1 of Article A-5 – COMPENSATION FOR SERVICES.			
F2	Included in the percentage amount as described in paragraph 5.2.2 of Article A-5 - COMPENSATION FOR SERVICES.			
F3	Fee to the Construction Manager based on time based rates as described in paragraph 5.2.3 of Article A-5 - COMPENSATION FOR SERVICES.			
Add the following as 2.15:				
2.15	**Coordination with Authority Having Jurisdiction**			
".1	(1)	Provide coordination, as required, with all government agencies including TSSA (Technical Standards and Safety Authority), to obtain approvals and permits required for the construction of the *Project*. Make diligent, commercially reasonable efforts to ensure all building and other required permits are obtained in a manner to meet all *Project* delivery milestones and other milestones in the *Project* schedule. Provide timely notice to the Owner if any required permit has not been obtained or is reasonably expected to be obtained, as and when required.		F3
Add the following as 2.16				
2.16	**Small Tool Log**			
".1	(1)	If the *Construction Manager* procures, on behalf of the *Project,* any small tools then the *Construction Manager* shall track his small tools on a small tool inventory. This inventory will show vendor, type of tool, serial number, model number, date received, and purchase cost. All small tools must be stamped with an identifying number."		F2

2. CONSTRUCTION			Performed by the Owner or Someone Other than the Construction Manager	Performed by the Construction Manager (F1/F2/F3)
F1	Included in the fixed amount described in paragraph 5.2.1 of Article A-5 – COMPENSATION FOR SERVICES.			
F2	Included in the percentage amount as described in paragraph 5.2.2 of Article A-5 - COMPENSATION FOR SERVICES.			
F3	Fee to the Construction Manager based on time based rates as described in paragraph 5.2.3 of Article A-5 - COMPENSATION FOR SERVICES.			
Add the following as 2.17				
2.17	**Trade Contract Administration**			
".1	(1)	Manage all of the contracts for the *Trade Contractors* and *Suppliers* on behalf of the *Owner* as if the *Contracts* were held by the *Construction Manager.* Using its best discretion, the *Construction Manager* shall employ all reasonable measures to enforce the adherence of each of the *Trade Contractors* and		F3

	Suppliers to the terms and conditions of their contracts. The *Construction Manager* shall report instances of *Trade Contractor* non-compliance, which it is unable to resolve satisfactorily, to the *Owner*.		F3
(2)	Collect and present to the *Owner* all *Trade Contractors'* current certificates of clearance from the WSIB.		F3
(3)	Verify that each *Trade Contractor* has obtained all permits required to execute its respective *Scope of Work*;		F3
(4)	Verify that all *Trade Contractors* have insurance coverage that is current and compliant with the requirements of their T*rade Contracts*;		F3
(5)	Verify that all *Trade Contractors* submit their monthly progress draws in a timely fashion."		F3
Add the following as 2.18 **2.18 Insurance** (2) "**.1** (1) Take out and maintain in force throughout the duration of the *Project* at its cost its own policies for: Automobile Liability insurance, with coverage limits acceptable to the *Owner*. The *Owner*, the *Consultant,* and all other consultants retained by the *Owner,* and if requested by *Owner,* the Ontario Infrastructure Projects Corporation, the Province of Ontario (MOHLTC), and the City of Toronto, shall be named as additional insureds on all insurance policies required in relation to this *Project* and will provide true copies of certificates or other evidence of such insurance as may be reasonably requested from time to time by *Owner*. If the *Construction Manager* fails to provide or maintain insurance as required herein, the *Owner* shall have the right to obtain and maintain such insurance and give evidence thereof to the *Construction Manager* on demand and the *Owner* may deduct the costs thereof from monies which are due, or may become due, to the *Construction Manager."*			F3 F3 F3

2. CONSTRUCTION			Performed by the Owner or Someone Other than the Construction Manager	Performed by the Construction Manager (F1/F2/F3)
F1		Included in the fixed amount described in paragraph 5.2.1 of Article A-5 – COMPENSATION FOR SERVICES.		
F2		Included in the percentage amount as described in paragraph 5.2.2 of Article A-5 - COMPENSATION FOR SERVICES.		
F3		Fee to the Construction Manager based on time based rates as described in paragraph 5.2.3 of Article A-5 - COMPENSATION FOR SERVICES.		
Add the following as 2.19				
2.19	**Defective Work**			
".1	(1)	The *Construction Manager* shall administer the removal and repair of defective *Work* by the *Trade Contractors* for a period of one (1) year from the *Project In-Use Date*."		F3
Add the following as 2.20				
2.20	**Cutting and Patching**			
".1	(1)	The *Construction Manager* shall supervise and coordinate the *Work* of the *Trade Contractors* and make diligent, commercially reasonable efforts to minimize any requirement for cutting and patching of the *Work*.		F3
	(2)	The *Construction Manager* shall supervise and coordinate the *Work* of any specialist contractors required to perform cutting and remedial work.		F3
	(3)	The *Construction Manager* shall verify that the *Trade Contractor* does not perform any cutting through the existing structure without first having performed all required tests and inspections as may be required by the *Owner and Consultant*."		F3
Add the following as 2.21				
2.21	**Cleanup**			
".1	1)	The *Construction Manager* shall coordinate and supervise the cleaning of the *Place of the Project* by the *Trade Contractors* on an ongoing basis throughout the *Project*.		F3
	(2)	The *Construction Manager* shall supervise the cleaning of the *Place of the Project* prior to the *Project In-Use Date* to allow for occupancy by the *Owner*.		F3
Add the following as 2.22				
2.22	**Detection and Avoidance of Errors**			
".1	(1)	Using the *Standard of Care*, the *Construction Manager* shall review information furnished to it by or on behalf of the *Owner*		

		and shall advise the *Owner* of any error omission or inconsistency in such that it discovers.		F3
	(2)	If the *Construction Manager* discovers any error, inconsistency, or omission in the drawings and specifications, the *Construction* Manager shall obtain clarification from the *Owner* and the *Consultant* before allowing the *Trade Contractors* to proceed with any *Work* that would be affected by the discovered omission or inconsistency."		F3
Add the following as 2.23				
2.23	**Removal and Relocation of Utilities**			
".1	(1)	The *Construction Manager* shall coordinate and schedule the permanent relocation of utilities.		F3

3. POST-CONSTRUCTION		**Performed by the Owner or Someone Other than the Construction Manager**	**Performed by the Construction Manager (F1/F2/F3)**
F1	Included in the fixed amount described in paragraph 5.2.1 of Article A-5 – COMPENSATION FOR SERVICES.		
F2	Included in the percentage amount as described in paragraph 5.2.2 of Article A-5 - COMPENSATION FOR SERVICES.		
F3	Fee to the Construction Manager based on time based rates as described in paragraph 5.2.3 of Article A-5 - COMPENSATION FOR SERVICES.		
3.2	**Occupancy Review**		
	Add the following as paragraph 3.2.2 to 3.2.6:		
".2	Manage and coordinate the completion of the deficiencies in accordance with deficiency list prepared by the *Consultant* and in conjunction with the schedule for deficiency completion approved by the *Owner*.		F3
.3	Compile in an organized manner *Trade Contractor* and *Supplier close*-out documents, such as guarantees, warrantees, operation manuals, testing reports, as-built drawings (in electronic and hard copy format) and submit to the *Consultant* for final review and approval prior to *Project* closeout.		F3
.4	Compile and deliver to *Owner* as-built documentation produced by *Trade Contractors* in AutoCAD format.		F3
.5	Make diligent, commercially reasonable efforts to ensure that deficiencies are cleared and arrange for twelve (12) month warranty inspection.		F3
.6	Assist in rectifying all outstanding construction issues, assist in obtaining occupancy permits and assist in *Owner* training."		F3
3.3	**Warranties**		
	Add the following as paragraph 3.3.2:		
".2	During the one (1) year warranty period be solely responsible for		

administering the warranty work of all *Trade Contractors*, promptly and to the satisfaction of the *Owner*, have the *Trade Contractors* repair all *Products* and components thereof and any other element of the *Work*, which are found to be defective in materials and workmanship or are found not to conform to the requirements of their *Contract*. If other property of the *Owner* is damaged by a *Trade Contractor* during the completion of a warranty repair, make all reasonable efforts to ensure that the damage is corrected by the *Trade Contractor* to the satisfaction of the *Owner*."		F3

C. DEFINITIONS

SC 6 Amend the definition **Contract Time** by adding the following to the end of the paragraph:

"Time is of the essence for this *Contract.*"

SC 7 Amend the definition **Owner** by adding the following to the end of the paragraph:

"The term *Owner* means the *Owner* or the *Owner's* authorized agent or representative as designated to the *Construction Manager* in writing, but does not include the *Consultant.*"

SC 8 Amend the definition of **Payment Certifier** by deleting the words, "either the *Construction Manager* or," in the first sentence.

SC 9 Add the following Definition:

"**Applicable Environmental Law**

Applicable Environmental Law means all applicable federal, provincial, municipal and other laws, statutes, regulations, by-laws and codes, now or hereafter in existence having the force of law, intended to protect the environment or relating to "Hazardous Material" (as hereafter defined), including, without limitation, the Environmental Protection Act (Ontario) (the "EPA"), and the Canadian Environmental Protection Act (the "CEPA")."

SC 10 Add the following Definition:

"**Applicable Laws**

Applicable Laws means all applicable relevant laws, statutes, by-laws, codes, ordinances regulations, guidelines, development and site plan agreements, building codes, orders and restrictive covenants, and such permissions and consents of which the *Construction Manager* is made aware or should be aware, and includes, without limitation, *Applicable Environmental Law,* zoning by-laws, design and building codes, and permits, decrees, writs, injunctions, orders guidelines, policies, and official plans of any governmental authority."

SC 11 Add the following Definition:

"**Construction Management Staff**

The members of the *Construction Manager's Project* team are the persons identified in the Proposal. The persons designated in the *Proposal* as key members of the *Construction Management Staff* will not be changed without the prior approval of the *Owner.*"

SC12 Add the following Definition:

"**Certificate of Total Performance of the Work**

Certificate of Total Performance of the Work means a certificate of completion of the *Contract* issued by the *Consultant* and or the *Authorized Agent* (subject to project or program type) in accordance with the provision of the *Contract Documents* and applicable provisions of the *Lien Act.*"

SC 13 Add the following Definition:

"**Hazardous Material**

Hazardous Material means, collectively, any contaminant, waste or subject waste (as defined in the EPA and regulations there under), toxic substance (as defined in the CEPA), dangerous goods (as defined in the Transportation of Dangerous Goods Act (Canada)) or pollutant (as defined in the EPA), or any other substance which when released to the natural environment is likely to cause in some immediate or foreseeable future time, material harm or degradation to the natural environment or material risk or harm to human health."

SC 16 Add the following Definition:

"**Standard of Care**

Standard of Care means the degree of care, skill and diligence of a prudent, knowledgeable and experienced *Construction Manager* for a project which is similar in size, magnitude and complexity to the *Project*."

SC 17 Add the following Definition:

"**OHSA**

'OHSA' means the Occupational Health and Safety in the Province of Ontario.

SC18 Add the following Definition:

"**Lien Act**

Lien Act means the Construction Lien Act (Ontario)."

SC 19 Add the following Definition:

"**Project Manager**

Project Manager means **[Note to draft: insert the name of the Project Manager]** (herein referred to as PM) or such other person, firm or corporation identified by written notice by the *Owner* to the *Construction Manager*, engaged by the *Owner* on behalf of the *Owner* to act for and represent the *Owner* in respect of the *Project*. Wherever appropriate in the context, the expression "*Owner*" as used in the *Contract Documents* shall be deemed to include and be a reference to the *Project Manager*."

D. GENERAL CONDITIONS

SC 21 Delete GC 1.1.1.1 in its entirety and replace with the following:

"1.1.1.1 The order of priority of documents from highest to lowest, shall be:

- The Agreement between *Owner* and *Construction Manager* (including the Schedules to the Agreement);
- The Supplementary Conditions to CCDC 5A, 2010, Construction Management Contracts – for Services;
- The Definitions;

- The General Conditions

SC 22 Add the following as GC 1.1.1.3 to GC 1.1.1.11:

1.1.1.3 The *Contract Documents* are complementary, and what is required by any one shall be as binding as if required by all.

1.1.1.4 Words and abbreviations which have well known technical or trade meanings are used in the *Contract Documents* in accordance with such recognized meanings.

1.1.1.5 References in the *Contract Documents* to the singular shall be considered to include the plural as the context requires.

1.1.1.6 The specifications are that portion of the *Contract Documents*, wherever located and whenever issued, consisting of the written requirements and standards for *Products*, systems, workmanship, and the services necessary for the performance of the *Work*.

1.1.1.7 The drawings are the graphic and pictorial portions of the *Contract Documents*, wherever located and whenever issued, showing the design, location, and dimensions of the *Work*, generally including plans, elevations, sections, details, schedules, and diagrams.

1.1.1.8 *Construction Manager* will comply with all specifications pertaining to the Work and will supervise the *Work* of all *Trade Contractors* and *Suppliers* to ensure compliance with all specifications pertaining to the *Work*.

1.1.1.9 All issued drawings and as-built drawings, are to be returned at the end of the *Project* to *Owner*, including *Contract* sets, issued for construction sets and progress drawings issued by the *Consultants*. Should the *Construction Manager* require retention of drawings or information during the one (1) year warranty period, the *Construction Manager* shall return drawings to the *Owner* upon completion of the one (1) year warranty period.

1.1.1.10 *Construction Manager* is expected to treat all documents issued by *Owner* and its *Consultant* as confidential and not for use or viewing by parties not involved in the project. The *Construction Manager* will keep the Information safe and secure and ensure that the information cannot be viewed or distributed by or to anyone other than persons authorized in accordance with this *Contract*. The *Construction Manager* is not to have project documents open for public viewing.

1.1.1.11 Drawings, specifications, models, plans, information and data relating to the *Project* and copies thereof furnished by the *Consultant*, or the *Owner* ("*Information*") are and shall remain the property of the *Owner*, Such *Information* is to be used by the *Construction Manager* only with respect to the *Work* and is not to be used on any other work. The *Construction Manager* shall use reasonable best efforts to maintain the confidentiality of the *Information*, except to the extent required by *Applicable Laws.*"

SC 23 Delete GC 1.2 in its entirety and replace with new GC 1.2.1 to GC 1.2.7 as follows:

"1.2.1 The *Construction Manager* shall at all times comply with all *Applicable Laws* in the performance of its obligations hereunder.

1.2.2 This *Contract* shall in all respects be governed by, and construed and enforced in accordance with, the laws of the Province of Ontario and the federal laws of Canada applicable therein. The parties do hereby irrevocably and unconditionally submit and attorn to the jurisdiction of the courts of the Province of Ontario in connection with any disputes or other matters arising out of or in connection with this *Contract*.

1.2.3 The *Construction Manager* shall at all times comply with all *Owner* issued policies with respect to the Project in respect of which Owner has provided copies to the *Construction Manager*.

SC 24 Add the following as GC 2.1.6 to GC 2.1.15:

"2.1.6 The *Construction Manager* agrees that, notwithstanding anything to the contrary contained in the *Contract*, it shall fully comply with policies or procedures, as issued by *Owner* to *Construction Manager*, which are relevant to any activity of the *Construction Manager* to be performed under the *Contract*. The *Construction Manager* further agrees that it will use reasonable efforts to inquire from the *Owner* if such policies or procedures exist for any activity of the *Construction Manager* to be performed under the *Contract*. The *Owner* agrees it will use reasonable efforts to communicate to the *Construction Manager* policies or procedures it may have, relevant to any such activity.

2.1.7 The *Construction Manager* shall make diligent, commercially reasonable efforts to ensure that the *Work* and the *Owner's* property and property adjacent to and in the vicinity or proximate to the *Place of the Project* are protected from damage which may arise as the result of the *Trade Contractor's* operations under the *Contract* (including without limitation any operations relating to mould or asbestos-containing, mercury containing or PCB containing *Products* and other toxic or *Hazardous Materials*).

2.1.8 The *Construction Manager* shall coordinate and supervise the efforts of all *Trade Contractors* and *Suppliers*, make diligent, commercially reasonable effort to ensure that the *Project* is on schedule and constructed in accordance with the approved and current *Contract Documents*.

2.1.9 The *Construction Manager* shall maintain the good order and discipline of its employees and other persons under its direction and control or present at the *Place of the Project* in connection with the *Work*, and shall adopt and enforce regulations with respect to safety, fire prevention, smoking, the use of alcoholic beverages, illegal drugs and other controlled substances and other activities that will or may constitute a danger to life, health or property and shall not employ on the *Work* anyone not skilled in the tasks assigned.

2.1.10 The *Construction Manager* shall ensure that the proposed *Construction Manager* project management and *Construction Manager* construction staff is assigned to ensure proper coordination and supervision of the *Work*.

2.1.11 The *Construction Manager* shall maintain the good order and discipline of its employees and other persons under its direction and control or present at the *Place of the Project* in connection with the *Work*, and shall adopt and enforce regulations with respect to safety, fire prevention, smoking, the use of alcoholic beverages, illegal drugs and other controlled substances and other activities that will or may constitute a danger to life, health or property and shall not employ on the *Work* anyone not skilled in the tasks assigned.

2.1.12 The *Construction Manager* shall not employ any person for the *Project* whose labour affiliation (or lack thereof) is incompatible with other labour employed in connection with the *Project*.

2.1.13 At the *Owner's* instruction, the *Construction Manager* shall promptly remove from the *Place of the Project* any employee or other person who in the *Owner's* reasonable opinion represents a threat to the safety or progress of the *Project* or persons on the *Place of the Project*.

2.1.14 The *Construction Manager* shall make diligent, commercially reasonable efforts to ensure that the *Trade* Contractors perform the *Work* in accordance with the *Contract Documents* and that they employ only *Products* and workmanship and materials which comply with the specific requirements of the *Contract Documents*. Notwithstanding prior review and action by the *Consultant*, only *Products* and *Owner* supplied equipment conforming to the requirements of the *Contract Documents* shall be incorporated into the *Work*. The *Construction Manager* shall make diligent, commercially reasonable efforts to ensure that all *Products* and *Owner* supplied equipment shall be applied, installed, connected, erected, used, cleaned and conditioned in accordance with the instructions of the applicable manufacturer, fabricator, supplier or distributor, except as otherwise provided in the *Contract Documents*. In the absence of other standards being required by the *Contract Documents*, the *Work* shall conform to, or exceed, the minimum standards of the Electrical Safety Authority, Canadian General Standards Board, the Canadian Standard Association, the National Building Code of Canada (latest edition with all current addenda), or the Ontario Building Code, whichever is applicable.

2.1.15 The *Construction Manager*, shall accurately and continuously note, on the *Contract Documents* kept by the *Construction Manager* at the *Place of the Project*, (1) all approved changes and deviations made during the *Work* which differ from that shown or specified in the *Contract Documents* and approved shop drawings indicating, in a neat, accurate and legible manner the *Work* as actually installed; (2) the exact location and detail of buried, embedded or concealed as-built conditions and all other as-built conditions of the *Work* (including the location of all asbestos abatement work dealing with such matters as floor tiles and pipe insulation); and (3) the exact location and detail of *Work* installed on a "field run" basis (collectively, the "Record Drawings"). If any *Work* is performed otherwise than as shown in the *Contract Documents* the *Construction Manager* shall have noted on such Record Drawings the *Work* as installed. Without limiting the generality of the foregoing, with respect to the mechanical, electrical and fire protection work, the *Construction Manager* shall

have recorded, accurately, the exact location and detail of all "field run" services. The Record Drawings shall be made available for review by the *Owner* and the *Consultant* at all times. The Construction Manager shall have two (2) complete sets of good quality mylar reproducible final Record Drawings and two (2) computer disks containing the final Record Drawings, arranged in proper order in accordance with the various divisions of the *Work*; indexed and endorsed, delivered to the *Consultant* following final review of the *Work* by the *Consultant* but prior to application for final payment.

SC 25 Delete GC 3.1.1.14 in its entirety.

SC 25A Add new GC 3.1.3:

(a) *Owner* represents and warrants that, prior to or upon execution of this *Contract*, *Owner* has secured sufficient financing arrangements or otherwise has sufficient funds available to it to meet its payment obligations to *Construction Manager* under the *Contract*.

(b) *Owner* shall forthwith provide written notice to *Construction Manager* upon the occurrence of any of the following events:

a. *Owner* receives written notice from any lender that *Owner* is in default of a material term of any lending agreement that might reasonably result in Owner having insufficient funds to meet its payment obligations to *Construction Manager* under the *Contract*;

b. Owner reasonably believes that it will not have sufficient funds to meet its payment obligations to Construction Manager under the *Contract*; or

c. the representation in GC 3.1.3(a) above ceases to be true for any reason.

(c) Upon receipt of a notice provided pursuant to section (b) above, *Construction Manager* shall be entitled, upon notice in writing to *Owner*, to suspend its *Services* pending delivery by *Owner* to *Construction Manager* of reasonable evidence that the condition for which notice was provided has been cured or other reasonable measures have been take to provide for sufficient funds for *Owner* to meet its payment obligations to *Construction Manager* under the *Contract*.

(d) If *Owner* receives written notice from any party to whom *Owner* has conditionally assigned its rights to the *Contract* that such party intends to invoke such assignment, *Owner* will forthwith provide written notice thereof to *Construction Manager* and, if as a result of such assignment, *Construction Manager* determines, acting reasonably, that the assignee does not have sufficient funds to meet the payment obligations to *Construction Manager* under the *Contract*, *Construction Manager* shall be entitled, upon notice in writing to the assignee, to suspend its *Services* pending delivery by the assignee to *Construction Manager* of reasonable evidence that the condition for which notice was provided has been cured or other reasonable measures have been take to provide for sufficient funds for the assignee to meet its payment obligations to *Construction Manager* under the *Contract*.

SC 26 Add the following as GC 4.1.3 and GC 4.1.4:

"4.1.3 The *Construction Manager* shall include, as part of Construction Manager's monthly applications for payment, all information and supporting documentation required by the *Owner* or the *Consultant to* substantiate the *Construction Manager's* claim.

4.1.4 Prior to the submission of the *Construction Manager's* first monthly application for payment the *Construction Manager* shall provide to the *Owner* proof of Registration with Canada Revenue Agency (CRA) for Harmonized Sales Tax purposes.

4.1.5 For each application for payment following its first application to the *Owner*, the *Construction Manager* shall submit to the *Owner* a statutory declaration using the standard form document, CCDC 9A, 2001, Statutory Declaration of Progress Payment Distribution by Contractor. The *Construction Manager's* application for payment shall not be processed by the *Owner* unless the *Construction Manager* has submitted a statutory declaration."

4.1.6 If the *Construction Cost* exceeds $35 million dollars, the fixed fee (B) for profit and OH identified in Article 5.2.1 will be replaced by a percentage fee (2%) identified in Article 5.2.2.

SC 27 Amend GC 4.2.1 by substituting the number "25" for the number "20" following the word "than" in the first sentence.

SC 28 Amend GC 5.1.2 by adding the following to the end of the paragraph:

"In the event that a contemplated change is expected by the *Construction Manager* to extend the *Project In-Use Date*, the *Construction Manager* shall provide the *Owner* with a mitigation strategy to minimize the impact of the proposed change. For all proposed changes that affect the *Construction Manager's* compensation or the *Project In-Use Date*, the *Construction Manager* shall provide the *Owner* with and a detailed breakdown of the nature and magnitude of the proposed change to the *Construction Manager's* compensation."

SC 29 Amend GC 5.1.3 by adding the following to the end of the paragraph:

"There shall be no adjustment in the *Construction Manager's* compensation or the *Contract Time* without the prior written consent of the *Owner*, which shall not be unreasonably withheld.

SC 30 Add the following as GC 6.1.9 and GC 6.1.10:

"6.1.9 The *Owner* reserves the right to terminate the *Contract* for convenience during the Preconstruction period, upon 30 days written notice. For greater certainty, the Preconstruction period will continue through completion of the construction procurement phase until the *Owner* has confirmed in writing that it is satisfied with the tender process and the bids, the proposed contracts with all *Trade Contractors* and *Suppliers*, and that the *Project* will be completed within its $35 million budget. If the *Owner* exercises its right

pursuant to this GC 6.1.9 to terminate the *Contract*, 50% of the *Construction Manager's* fee (i.e. $340,000, being 50% of $680,000) will be paid to the *Construction Manager* within 30 days of the notice of such termination. The *Construction Manager* shall have no claim for damages, compensation, loss of profit, allowance or otherwise by reason of or directly or indirectly arising out of any action taken or notice given by the *Owner* under the provisions of this GC 6.1.9.

6.1.10 After the Preconstruction period the *Owner* may at any time and in its sole discretion, by giving written notice to the *Construction Manager*, terminate or suspend the *Contract* or the *Work*, or any portion thereof upon written notice and, upon receipt of written notice the *Construction Manager* will make diligent, commercially reasonable efforts to redeploy its project staff, minimize or reduce costs for which the *Construction Manager* may seek reimbursement under the *Contract* and demobilize as soon as possible. If the *Contract* is terminated by the *Owner* pursuant to this GC 6.1.10 in the period after the Preconstruction period and before completion of the Project, the Owner will pay to the Construction Manager the balance of its fee adjusted as follows:(i) through to and including April 30, 2012, the *Owner* will pay to the *Construction Manager* an amount equal to 50% of the *Construction Manager's* fee (i.e. $340,000, being 50% of $680,000) plus a *per diem* in the amount of $2,615.38 for each day during that period up to the effective date of such termination, and (ii) after April 30, 2012 through to the completion of the *Project* the unpaid balance of the *Construction Manager's* fee (as applicable, the "Termination Fee"). The Termination Fee will be paid within 30 days of the effective date of the termination. In addition to the Termination Fee, if the *Contract* is terminated by the *Owner* pursuant to this GC 6.1.10, the *Owner* will continue for a period of up to 120 days from the date of notice of such termination (the "Demobilization Period") to pay to the *Construction Manager* the costs for which the *Construction Manager* is entitled to seek reimbursement under the *Contract* to the extent the Construction Manager has not been able to avoid using diligent, commercially reasonable efforts. During the Demobilization Period, to the extent any of its staff or equipment dedicated to the *Project*, have not been redeployed, the *Construction Manager* will make reasonable efforts using the services of such staff to complete components as may be reasonably requested by the *Owner* and to effect an orderly demobilization of the *Project*. Except for the Termination Fee and for reimbursable expenses as expressly provided in this GC 6.1.10, the Owner shall have no other financial obligation or liability to the *Construction Manager*, if this Contract is terminated pursuant to this GC 6.1.10 and the *Construction Manager* shall have no claim for damages, compensation, loss of profit, allowance or otherwise by reason of or directly or indirectly arising out of any action taken or notice given by the *Owner* under the provisions of this GC 6.1.10.

SC 31 Amend GC 6.2.1 by substituting the number "10" for the number "5" following the word "the" in the last sentence of the paragraph.

SC 31 Amend GC 6.2.3.1 by substituting the number "45" for the number "30" in the first sentence of the paragraph.

SC 32 **[Intentionally left blank]**

SC 33 **[Intentionally left blank]**

SC 34 Amend GC 8.1.3 as follows. At the beginning of the first sentence of the paragraph, following the word "The," delete the word, "*Owner*" and replace it with the word, "*Construction Manager*."

SC 35 **[Intentionally left blank]**

SC 36 **[Intentionally left blank]**

SC 37 ~~Delete GC 9.1.1 to 9.1.4 in their entirety and replace with the following:~~

"9.1.1 *Construction Manager* shall defend, indemnify and hold harmless *Owner* and *Consultant* and their respective parents, subsidiaries, affiliates, partners, officers, directors, agents and employees from and against any and all third party claims, costs, losses, expenses, liens, demands, damages, actions, suits, orders (whether administrative or otherwise), proceedings, liabilities and causes of action of whatsoever kind or nature (including all legal fees and disbursements and the amount of any judgment, penalty, interest charge, and fee) (collectively, the "*Claims*"), directly or indirectly, arising out of any breach of this *Contract* by *Construction Manager* or any negligent act, error or omission of *Construction Manager* or its respective agents and employees, directors, partners and officers and any other persons for whom it is law responsible (including any patent or copyright infringement and bodily injury, death or property damage). Owner shall defend, indemnify and hold harmless *Construction Manager* and its parent, subsidiaries, affiliates, partners, officers, directors, agents and employees from and against any and all *Claims*, directly or indirectly, arising out of any breach of this *Contract* by *Owner* or any negligent act, error or omission of the *Owner* or its respective agents and employees, directors, partners and officers and any other persons for whom it is law responsible (including any patent or copyright infringement and bodily injury, death or property damage)."

SC 38 Add the following as new GC 10:

"10.1 REVIEW AND INSPECTION OF THE WORK

10.1.1 The *Owner* and the *Consultant* shall have access to the *Work* at all times. The *Construction Manager* shall provide sufficient, safe and proper facilities at all times for the review of the *Work* by the *Consultant* and the inspection of the *Work* by authorized agencies. If parts of the *Work* are in preparation at locations other than the *Place of the Project*, the *Owner* and the *Consultant* shall be given access to such work whenever it is in progress.

10.1.2 If work is designated for tests, inspections, or approvals in the *Contract Documents*, or by the *Consultant*'s instructions, or the laws or ordinances of the *Place of the Project*, the *Construction Manager* shall give the *Consultant* reasonable notice of when the *Work* will be ready for review and inspection. The *Construction Manager* shall arrange for and shall give the *Consultant* reasonable notice of the date and time of inspections by other authorities.

10.1.3 The *Construction Manager* shall furnish promptly to the *Consultant* two copies of certificates and inspection reports relating to the *Work*.

10.1.4 If the *Construction Manager* permits to be covered, *Work* that has been designated for special tests, inspections, or approvals before such special tests, inspections, or approvals are made, given or completed, the *Construction Manager* shall, if so directed, uncover such *Work*, have the

inspections or tests satisfactorily completed, and make good covering work at the *Construction Manager's* expense.

10.1.5 The *Construction Manager* shall arrange for *Trade Contractors* to furnish samples of all materials and component parts of the *Work* required as test specimens in connection with the tests and inspections and shall furnish labour and facilities at the *Place of the Project* as deemed necessary by the *Consultant* or the testing and inspection agencies for the testing and inspection of the *Work*. All inspection or testing shall be done in a timely manner so as to avoid unnecessary delay in the completion of the *Work*.

SC 38 Add the following as new GC 13:

"13.1 USE OF THE WORK

13.1.1 The *Construction Manager* shall confine construction machinery and equipment, storage of *Products*, and operations of employees to limits indicated by laws, ordinances, permits, or the *Contract Documents* and shall not unreasonably encumber the *Work*. All *Owner* supplied equipment shall be stored under suitable conditions to prevent damage, deterioration and contamination. No *Owner* supplied equipment shall be temporarily used or installed as a facility for construction purposes except with the prior written approval of the *Owner*.

13.1.2 The *Owner* shall have the right to enter and occupy the *Place of the Project* in whole or in part for the purpose of placing equipment, or for any other use before completion of the *Contract* if, in the reasonable opinion of the *Construction Manager*, such entry and occupation does not prevent or interfere with the *Construction Manager* in achieving the *Project In-Use Date* within the *Contract Time* stipulated in the *Contract*. Such entry or occupation shall neither constitute nor be considered as acceptance of the *Work*, or in any way relieve the *Construction Manager* of its responsibility to complete the *Work*.

13.1.3 Whether the *Project* contemplates work by way of renovations in (a) building(s) which will be in use or be occupied during the course of the *Work* or where the *Project* involves *Work* that is adjacent to a structure which is in use or is occupied, the *Construction Manager*, without in any way limiting its responsibilities under this contract, shall take diligent, commercially reasonable steps to manage and maintain fire exits, building access and egress, continuity of electric power and all other utilities, suppression of dust and noise and all other steps reasonably necessary to promote and maintain the safety and comfort of the users and occupants of such structures or adjacent structures.

13.1.4 The *Owner* shall have the right at any time or times to take possession of or use any completed or partially completed parts of the *Work*. Such possession or use will not be deemed an acceptance of *Work* not completed in accordance with the *Contract* nor relieve the *Construction Manager* from any other obligation or responsibility under the *Contract* (including, without limitation, the *Construction Manager's* warranty administration obligations). While the *Owner* is in such possession, the *Construction Manager* will be relieved of the responsibility for loss or damage to such completed or partially completed parts of the *Work* while they are in the possession or use of the *Owner* other than that resulting from the *Construction Manager's* negligence.

SC 39 Add the following as GC 14:

"14.1 SECURITY REGULATIONS

14.1.1 The *Construction Manager* agrees that its employees, when using the *Place of the Project*, shall comply with all security rules and regulations of the *Owner* in effect throughout the *Project*. In the event that any servant, agent, employee, invitee or representative of the *Construction Manager* shall wilfully fail or refuse to abide by such rules and regulations, they shall be removed from the *Place of the Project* by the *Construction Manager* and prevented from performing any part of the *Services*. The *Owner* shall provide the *Construction Manager* with a copy of the rules and regulations referred to in this paragraph.

14.1.2 The *Construction Manager* shall conduct security checks with respect to such of its servants, agents, employees and invitees having access to the *Place of the Project* or to any confidential information of *Owner* as the *Owner* may reasonably request and provide authorization in writing, when so requested by the Owner in writing, for the *Owner* to undertake a security check for a servant, agent, employee, invitee or representative of the *Construction Manager* to be provided access to the *Place of the Project*.

14.1.3 All costs incurred by the *Construction Manager* in complying with this GC 14.1 – SECURITY REGULATIONS shall be borne by the *Owner*.

SC 40 Add the following as GC 15:

"15.1 STANDARD OF CARE

15.1.1 In performing its services and obligations under the *Contract*, the *Construction Manager* shall exercise a standard of care, skill and diligence that would normally be provided by an experienced and prudent *Construction Manager* supplying similar service for similar projects. The *Construction Manager* acknowledges and agrees that throughout the *Contract,* the *Construction Manager's* obligations, duties and responsibilities shall be interpreted in accordance with this standard. The *Construction Manager* shall exercise the same standard of due care and diligence in respect of any personnel, or procedures which it may recommend to the *Owner*.

15.1.2 The *Construction Manager* further represents covenants and warrants to the *Owner* that:

.1 the personnel it assigns to the *Project* are and will be appropriately experienced;

.2 as of the date hereof it has a sufficient staff of qualified and competent personnel to replace its designated supervisor and project manager, subject to the *Owner's* approval, in the event of death, incapacity, removal or resignation; and

.3 there are no pending, threatened or anticipated claims that would have a material effect on the financial ability of the *Construction Manager* to perform its *Work* under the *Contract*."

15.1.3 If *Construction Manger's* designated supervisor or project manager is for any reason unable or unwilling to serve in the capacity, *Construction Manager* will

promptly supply a qualified and competent replacement satisfactory to *Owner*, acting reasonably.

SC 41 Add the following as GC 16:

"16.1 OWNERSHIP & CONFIDENTIALITY:

16.1.1 The *Owner* will have at all times all ownership rights, including where applicable copyright, in:

.1 any items which the *Owner* and *Consultant* supplies to the *Construction Manager* or the *Construction Manager's Staff* for the performance of the *Work*; and

.2 any items the *Construction Manager* buys under the *Contract* for the *Owner* or for which the *Owner* pays or reimburses the *Construction Manager*.

The *Construction Manager* will create and keep up-to-date an inventory of the items in 16.1.1.1 and 16.1.1.2 above and provide a copy of it to the *Owner* upon request and the *Construction Manager* will clearly identify these items as belonging to the *Owner* under the *Contract* on the *Construction Manager's* premises or at the *Place of the Project* as being property of the *Owner*.

16.1.2 Each of the parties will take reasonable precautions to protect the confidential information of the other, and will not disclose the confidential information of the other to any third party except for employees, *Suppliers* and *Trade Contractors* with a need to know. For the purposes of the *Contract*, "confidential information" shall mean any business or financial information about either party, including but not limited to information about their customers, suppliers or finances, but shall exclude any information in the public domain without a breach of this *Contract* or information a party gets from a source other than the other party without a breach of this *Contract*. Before granting access to any confidential information of the other to any third party other than an employee, a party will undertake to have such third party sign an agreement causing them to be bound by terms substantially the same as those in this present paragraph. In addition to the foregoing, the *Construction Manager* agrees, when dealing with confidential information of the *Owner*, to comply with any applicable policies of the *Owner* upon reasonable request by the *Owner*. At either party's request, the other will immediately return to that party any confidential information of that party then in its possession or under its control, except for information necessary to perform duties under the *Contract*.

16.1.3 If any unauthorized disclosure of, loss of, or inability to account for, confidential information of a party occurs while it is in the possession of the other, the other will notify the party in writing immediately.

16.1.4 If any confidential information contains information received under confidence from any third party, the party receiving that information will on request enter into any non-disclosure agreement that third party may reasonably require that creates similar obligations of confidentiality as those in the *Contract*."

SC 42 Add the following as GC 17:

"17.1. RECORDS AND AUDIT

17.1.1 The *Owner* may inspect such *Project* records of the *Construction Manager*, which relate to the *Project* at any time as reasonably required by the *Owner* prior to date of the final certificate for payment and thereafter for a period of seven (7) years for the purpose of verifying the *Construction Manager's* estimates and valuation of changes in the *Work* and claims, and the *Construction Manager* shall supply certified copies of such records to the *Owner* when so requested in writing.

SC 43 Add the following as GC 19:

"19. 1. DESTRUCTION OF PROJECT.

19.1.1 If the *Project* is totally or partially destroyed and the *Owner* elects to rebuild, at the discretion of the *Owner*, the *Construction Manager* shall continue its services during the reconstruction and if such destruction is the result of an act or omission by the *Owner* the *Construction Manager* shall be entitled to the reimbursement for costs as provided for in the *Contract*."

SC 44 Add the following as GC 20:

"20.1 TOXIC AND HAZARDOUS SUBSTANCES AND MATERIALS

20.1.1 If the *Construction Manager*
.1 encounters *Hazardous Material* at the *Place of the Project*, or
.2 has reasonable grounds to believe that *Hazardous Material* is present at the *Place of the Project*, the *Construction Manager* shall:

.1 take all reasonable steps, including stopping the *Work*, and endeavouring to direct that *Trade Contractors*, *Suppliers* or others take reasonable steps to ensure that no person suffers injury, sickness or death and that no property is injured or destroyed as a result of exposure to or the presence of the *Hazardous Materials*,

.2 immediately report the circumstances to the *Consultant* and the *Owner* in writing, and

.3 cooperate reasonably with *Owner* and *Consultant* to implement such steps as are required to properly store, manage, handle, clean up or dispose of any *Hazardous Material*.

20.1.2 If the *Construction Manager* introduces any materials to the *Project* site, the *Construction Manager* must ensure that such materials are labelled and handled in accordance with the "Workplace Hazardous Materials Information System" ("*WHMIS*"). If requested by the *Owner*, as an *Additional Service*, *Construction Manager* will develop and follow procedures for the storage, use and disposal of *Hazardous Material* sufficient to satisfy the requirements of all *Applicable Environmental Law* including, without limitation, the provisions of the and the *Ontario Occupational Health and Safety Act (collectively, "Environmental Protocols")*. The *Construction Manager* will ensure that all *Trade Contractors* and *Suppliers* are aware of those *Environmental Protocols*. The *Construction Manager* will provide timely notice in writing to *Owner* if it learns that any *Trade Contractor* or *Supplier* fails to comply with those *Environmental Protocols* and will cooperate reasonably with *Owner* to implement steps to ensure full compliance with those *Environmental Protocols*.

20.1.3 The *Construction Manager* will immediately notify the *Owner* of any notice it receives from any governmental authority of any actual or potential violation of any *Applicable Environmental Law* and will cooperate with the *Owner* in dealing with that notice and in correcting or contesting that violation.

SC 45 Add the following as GC 20.2:

"20.2 ARCHAEOLOGICAL MATERIALS

20.2.1 If the *Construction Manager* encounters fossils, artifacts and other objects having artistic, historic, archaeological or monetary value, including human remains and burial sites on the *Project* site, the *Construction Manager* will

20.2.1.1 immediately inform the *Owner* of such discovery;

20.2.1.2 take, and ensure that all *Trade Contractors* and *Suppliers* take, all steps not to disturb the item and, if necessary, cease any *Work* in so far as performing such *Work* would endanger the item or prevent or impede its excavation;

20.2.1.3 take all necessary steps to preserve and ensure the preservation of the item in the same position and condition in which it was found;

20.2.1.4 comply, and ensure compliance by all *Trade Contractors* and *Suppliers* with all Applicable Laws and all requirements of the *Owner* with respect to such discovery; and

20.2.1.5 if requested by the *Owner*, as an *Additional Service*, develop and follow procedures for its preservation and evacuation.

Supplementary Conditions to include Appendix A, B, C, D, E

Appendix A
Time Base Rates

STAFF RATES	1Sept2016 - 30Aug2017	1Sept2017 - 30Aug2018	1Sept2018 - 30Aug2019	1Sept2019 - 30Aug2020	Sept 1 2020- Aug 30 2021	Sept 1 2021- Aug 30 2022
	E	F	G	H	I	J
	Rate	Rate	Rate	Rate	Rate	Rate
Project Manager 1	$ 116.79	$ 120.29	$ 123.90	$ 127.62	131.45	135.39
Coordinator 1	$ 69.84	$ 71.94	$ 74.10	$ 76.32	78.61	80.97
Superintendent 1	$ 131.45	$ 135.39	$ 139.45	$ 143.64	147.95	152.39
Assistant Superintedent	$ 72.73	$ 74.92	$ 77.16	$ 79.48	81.86	84.32
Monthly Chargeout Rates	Monthly	Monthly	Monthly	Monthly	Monthly	Monthly
Project Manager 1	20243.6	20850.27	21476	22120.8	22784.67	23467.6
Coordinator 1	12105.6	12469.6	12844	13228.8	13625.73	14034.8
Superintendent 1	22784.67	23467.6	24171.33	24896.48	25644.67	26414.27
Assistant Superintedent	12606.53	12986.13	13374.4	13776.53	14189.1	14615.47

LABOUR RATES	1Sept2016 - 30Aug2017	1Sept2017 - 30Aug2018	1Sept2018 - 30Aug2019	1Sept2019 - 30Aug2020	Sept 1 2020- Aug 30 2021	Sept 1 2021- Aug 30 2022
	E	F	G	H	I	J
	Rate	Rate	Rate	Rate	Rate	Rate
Flagman	$ 78.25	$ 80.99	$ 83.82	$ 86.76	90.23	93.84
Flagman - OT	$ 117.38	$ 121.49	$ 125.74	$ 130.14	135.35	140.76
Hoist Operator		$ 95.84	$ 99.19	$ 102.66	106.77	111.04
Hoist Operator - OT		$ 157.85	$ 163.37	$ 169.09	175.85	182.89
2nd Hoist Operator		$ 86.48	$ 89.51	$ 92.64	96.35	100.2
2nd Hoist Operator - OT		$ 129.71	$ 134.26	$ 138.96	144.52	150.3
Carpenter		$ 96.97	$ 100.36	$ 103.87	108.02	112.36
Labourer - Base	$ 83.55	$ 86.48	$ 89.51	$ 92.64	96.36	100.2
Labourer - Foreman	$ 88.27	$ 91.35	$ 94.55	$ 97.86	101.77	105.84

Appendix B
Cost of Work Definition

Clark Construction Management INC

COST OF WORK DEFINITION

The Cost of the Work shall include:

(a) Wages and benefits paid for field hourly staff in the direct employ of the Contractor in the performance of the Work as ~~pre-approved by owner~~ per schedule.

(b) Salaries, wages, assessments and benefits for the Contractor's personnel when stationed at any field office, in whatever capacity employed for actual hours spent on the work will be charged in accordance with the rates listed in Schedule "C"; salaries, wages, assessments and benefits of personnel engaged at shops, or on the road, in expediting the production or transportation of materials or equipment for actual hours spent on the work will be charged in accordance with the rates listed in Schedule "C"; salaries wages, assessments and benefits of other personnel for actual hours spent on the work will be charged in accordance with the rates listed in Schedule "C";

(c) Contributions, assessments and taxes incurred for such items as employment insurance, provincial or territorial health insurance, worker's compensation, and Canada or Quebec Pension Plan, insofar as such cost is based on wages, salaries or other remuneration paid to employees of the Contractor and included in the Cost of Work as provided in paragraphs (a) and (b) above;

(d) The portion of travel and subsistence expenses of the officers or employees of the Contractor incurred while traveling outside of the GTA in discharge of duties connected with the work as pre-approved by owner;

(e) The cost of all materials, products, supplies and equipment incorporated into the work, including costs of transportation thereof as ~~pre-approved by owner;~~ per cidv

(f) The costs of materials, products, supplies, equipment, temporary services and facilities, and hand tools not owned by the workers, including transportation and maintenance thereof, which are consumed in the performance of the work, and cost less salvage value on such items used, but not consumed, which remain the property of the Contractor as ~~pre-approved by owner;~~ per cidv

(g) The rental costs of all tools, machinery, and equipment and facilities exclusive of hand tools, used in the performance of the *Work*, whether rented from or provided by the Contractor or others, including installation, insurance, minor repairs and replacements, dismantling, removal, transportation and delivery costs thereof; rental of "small tools" as defined in the Contractor's equipment manual, having a replacement value of less than five hundred dollars, shall be charged at an assessment rate of five percent of costs in paragraphs (a), (b), and (c) above;

(h) The cost of quality assurance such as independent inspection and testing services as pre-approved by owner;

(i) Charges levied by authorities having jurisdiction over the work;

(j) Royalties, patent license fees and damages for infringement of patents and the costs of defending suits thereof;

5

Clark Construction Management INC

(k) Premiums and assessments for all applicable bonds and insurance, including subcontractor default insurance, and related adjuster costs;

(l) Value-added taxes (GST), sales taxes and duties related to the work and for which the Contractor is liable;

(m) Charges for telegrams, faxes, telephones, photocopiers, courier services, expressage, and petty cash items incurred in connection with the work;

(n) The cost of Site Pickup Truck and associated FOG cost ~~as pre-approved by owner~~ to a maximum of $2000 per month,

(o) Costs incurred due to emergencies affecting the safety of persons or property;

(p) The cost associated with the *Construction Manager*'s safety orientation programs, to a maximum of fifteen hundred dollars per session.

(q) The cost of computer equipment;

(r) The cost associated with the Contractor's safety and training and recruiting programs;

(s) Insurance costs associated with the project insurance coverage's to be placed by the Contractor as follows:

1. General Liability insurance (including the Contractor's equipment, owned/non-owned auto and pollution exposure) shall be provided by the Contractor and included at the rate of seven dollars per thousand dollars of the Building Contract Price; and
2. Builder's risk (Course of Construction) insurance, if provided by the Contractor, shall be included at the rates available at the time of construction;

The rates for insurance described above are 2015 rates based on a deductible of twenty-five thousand dollars per claim and are subject to escalation to reflect increases in rates as charged under the Contractor's corporate risk program from time to time.

(t) Project management and administration staff, who are stationed in our office will only be charged as a cost of the work for that portion of their time relating to this Project in accordance with (c) and (d) above;

(u) The cost of duplication or reproduction of any plans and drawings;

The Cost of the Work shall cover and include all other costs reasonably incurred by the Contractor in performing work and services in accordance with the Agreement from time to time, or as otherwise approved in writing by the Owner, and at rates prevailing in the locality of the place of the Project.

*Rider: Clark Construction Management shall have a $5,000 purchasing authority to be reconciled at the end of each month

From: David Ho
To: Josh Lax
Cc: Esteban Yanquelevech; Sam Mizrahi; Robert Hiscox; Chris Donlan; Mark Kilfoyle
Subject: Re: Discussion Points from From Friday 23 Oct 2020 Meeting
Date: Wednesday, October 28, 2020 6:58:00 PM

Hi Josh et al,

Further to this afternoon's meeting on the review of the Transition Plan for 128 Hazelton, we understand the following will be executed accordingly by Mizrahi Developments;

- Execute formal notice of termination with CCM to occur on 29 October 2020

- Mizrahi management staff to execute the Transition Plan as reviewed at this meeting

- Mizrahi project staff will assume management control of the project for all major deliverables to achieve substantial completion, occupancy and post occupancy requirements

- Mizrahi management staff to safeguard project site after termination of CCM

- Mizrahi management staff to use best efforts for a seamless transition to assume all trade contracts and management relationships to complete work of each division

- Mizrahi Management concurs with Constantine recommendations as per our earlier email of today to include

  - Provide a schedule to illustrate cost comparison to illustrate benefit of owner managed activities
  - Provide a revised construction schedule to show accelerated deliverables for substantial completion and occupancy
  - Provide a risk management register to identify workarounds and exposure for mitigation
  - Provide a personnel responsibility matrix to identify their role and work breakdown structure to manage and control deliverables
  - Include weekly monitoring reports on the progress of transition deliverables to gage success and alignment

- Key recommendation of cost and schedule update on Transition Date to be used as a benchmark to determine where we were before termination to where we will be at substantial completion and occupancy as a measure of the difference between Mizrahi managing project versus CCM.

- Mizrahi management to provide a project cost update after a thorough vetting and audit of all CCM project costs to date post termination

- Mizrahi management staff will continue to seek all opportunities to improve schedule and cost savings to substantial completion

- Constantine recommendations will be implemented over the next 2 weeks post termination

We trust that the above is an accurate account of the points and the decisions that were

From: Chris Donlan
To: Mark Kilfoyle
Subject: Re: FINAL capital contribution agreement and indemnity agreement required for the 128 Haz loan with 3rd eye
Date: Friday, October 18, 2024 3:25:39 AM

Hi Mark,

Happy belated birthday. Hope work didn't interfere too much.

Yes, I have the file you sent on Friday. One update required that I discussed with Sam and Robert at our office is the $200k payable to CEI for the funds that we advanced for the CEC payments. We were each supposed to put in $100k when we thought we had a repayment schedule with CEC but Sam was unable to do so. He said he would refund us in early December but that didn't happen. Sam told us that Arif agreed that CEI could be repaid from 701 closing funds given that it was related to AP for CEC.

Your schedule should also be adjusted for the $400k owing to Mizrahi. It is in AP but we agreed that it would be credited against Sam's contribution requirements. Based on that, you have too much in AP and too much for Mizrahi contributions at the start of the project.

The rest of the budget discussion today is to get everyone comfortable with schedule and cost for the other units. I saw Sam's note this morning about the $150k for 601 and we should include that as a payment to come out of 701 closing proceeds.

Thanks,

CMD

CONSTANTINE ENTERPRISES INC.
CHRIS DONLAN | Chief Financial Officer | www.constantineinc.com
chris.donlan@constantineinc.com | +1.416.543.9327
128 Hazelton Ave., Suite 201, Toronto, Ontario, Canada M5R 2E5

On Jan 15, 2024, at 12:31 PM, Mark Kilfoyle <mark@mizrahidevelopments.ca> wrote:

HI Chris,

You have the updated budget it was sent to you Friday morning.

Best regards
Mark

Mark Kilfoyle
CFO and COO
125 Hazelton Avenue
Toronto, Ontario M5R 2E4
T. 416.922.4200 ext.4220
F. 1.866.300.0219
E. **Mark@MizrahiDevelopments.ca**
www.MizrahiDevelopments.ca

Begin forwarded message:

From: robert.hiscox <robert.hiscox@constantineinc.com>
Subject: FINAL capital contribution agreement and indemnity agreement required for the 128 Haz loan with 3rd eye
Date: January 14, 2024 at 3:25:43 PM EST
To: Sam Mizrahi <sam@mizrahidevelopments.ca>, Mark Kilfoyle <Mark@mizrahidevelopments.ca>, Avril Lavallee <avril@mgbwlaw.com>
Cc: Chris Donlan <chris.donlan@constantineinc.com>, Edward Rogers <edward.rogers@rci.rogers.com>, "Arbuck, Jason" <jarbuck@cassels.com>

Hi Sam:

CEI has reviewed your comments sent late last night on the contribution agreement and the indemnity agreement that we provided you Thursday last week, and which are required for the proposed 128 HAZ loan with 3rd eye.

CEI has agreed to some changes and not to others.

Attached please find the mark up draft and the final execution copies. This these agreements herein are CEI's best and final. No other changes or edits will be excepted by CEI on either of these documents.

Please sign and return these document.

After we receive these executed these agreements, we still require:

1. confirmation of acceptance of the credit agreement from 3rd eye that CEI sent Friday at noon.

2. confirmation of accurate and agreed budget and cashflow between CEI and MIZ. Which is still outstanding from MIZ and required by 3rd eye as part of the loan docs. Hopefully, we will receive this final version from you shortly and confirm it in our meeting Monday afternoon so that we can forward to 3rd eye Monday. Further, be advised that Edward, will be sending you an email CEI's best and final further concessions in our favour shortly today. Once received confirm that email as well so that a term sheet can be drafted and executed.

Best,

Robert

ROBERT HISCOX | CONSTANTINE ENTERPRISES INC. | Co-founder & Chief Executive Officer
robert.hiscox@constantineinc.com | +1.416.266.0000 |
128 Hazelton Avenue, Suite 201,Toronto, Ontario, Canada M5R 2E5

From: Arbuck, Jason <jarbuck@cassels.com>
Sent: Sunday, January 14, 2024 2:56 PM
To: robert.hiscox <robert.hiscox@constantineinc.com>; Chris Donlan <chris.donlan@constantineinc.com>; 'Edward ROGERS' <edward.rogers@rci.rogers.com>
Cc: Grossman, Lauren <lgrossman@cassels.com>

Court File No. CV-24-00728675-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERICAL LIST)

B E T W E E N:

SAM MIZRAHI, MIZRAHI 128 HAZELTON RETAIL INC.,
SAM M (180 SAW) LP INC., SAM M (180 SAW) INC.,
and 1000041090 ONTARIO INC.

Plaintiffs

and

EDWARD S. ROGERS III, ROBERT HISCOX,
and CONSTANTINE ENTERPRISES INC.

Defendants

FRESH AS AMENDED STATEMENT OF CLAIM OF SAM MIZRAHI AND 1000041090 ONTARIO INC.

1. THE PLAINTIFF, SAM MIZRAHI, CLAIMS:

   (i) General Damages and special damages in the sum of $50,000,000.00 for breach of partnership and contract between the Defendants, Edward Rogers ("Rogers") and Robert Hiscox ("Hiscox"), or, in the alternative, Constantine Enterprises Inc. ("CEI"), breach of fiduciary duties and duties of good faith owed by Rogers and Hiscox (or, in the alternative, CEI) as partners, and intentional or tortious interference with economic interests by Hiscox and CEI;

   (ii) A declaration that he is not indebted to the Defendants or others with respect to the 128 Hazelton Project (defined below), including with respect to the Retail Loan (defined below);

i) The balance, if any, to Sam M Inc.

68. In the case of the obligations enumerated in subparagraphs (ii) and (iii) above, Sam is either the borrower or he personally guaranteed such obligation. The 180 SAW Loan is an amended and restated promissory note issued by Sam Mizrahi to CEI, dated December 3, 2021. The 180 SAW Note is a promissory note from Sam M (180 Saw) LP Inc. to CEI, dated December 3, 2021, for which Sam is a guarantor.

ROGERS AND HISCOX BREACHED THEIR DUTIES OF GOOD FAITH AND FIDUCIARY DUTIES TO THEIR PARTNER, SAM

A. 128 Hazelton: The Unreasonable Actions by Rogers and Hiscox to Harm the Interests of their Partner Sam

69. Sam caused Sam M Inc. to enter into the Hazelton Deficiency Agreement and the Waterfall Agreement with the expectation that Rogers and Hiscox (or, in the alternative, CEI) would reasonably conduct themselves as partners on the Projects and would meet their duties of good faith and fiduciary duties owed to Sam as their partner.

70. In particular, Sam reasonably expected that Rogers and Hiscox (or, in the alternative, CEI) would not take unreasonable steps to prohibit the sale of the 180 SAW Project and deprive the Partnership of a reasonable return on investment. In addition, Sam reasonably expected that Rogers and Hiscox (or, in the alternative CEI) would not block efforts to finance the 128 Hazelton Project or close on units so that the 128 Hazelton Project could earn revenue necessary to pay down the liabilities of the Project and therefore pay down Sam's exposure to personal guarantees.

71. Unknown to Sam, in and around September 2023, Rogers and Hiscox reached an agreement amongst themselves to increase Sam's liability, which would be directly incurred by Sam M. Inc, under the Hazelton Deficiency Agreement and the Waterfall Agreement, and to expose Sam to

personal liability on his personal guarantee to DUCA, Aviva and to CEI on the Retail Inc. loan, along with the 180 SAW Loan and the 180 Saw Note.

72. Rogers and Hiscox sought to accomplish this goal, in breach of their good faith duties and fiduciary duties owed to Sam as partners, by using their 50% voting rights in the 180 SAW Project and CEI's rights as a shareholder and lender on the 128 Hazelton Project to prevent the repayment of loans, such as the loans owed to DUCA, the Retail Loan, or the Sam 180 Saw Loan and the Sam M. Inc. 180 Saw Loan.

73. On July 21, 2023, Rogers, Hiscox and CEI were put on notice of their bad faith and breach of fiduciary duties referable to the 128 Hazelton Project. At that time, and as early as March 2023, multiple offers had been received from a strongly incentivized purchaser of "orphaned" 7th-floor space at 128 Hazelton, which, if accepted, would have reduced the DUCA debt and provided necessary capital to pay trades to finish the 128 Hazelton Project. By refusing to close on the sale of this unit, Rogers and Hiscox purposefully sought to increase Sam's exposure to his personal guarantees on the DUCA debt. Rogers and Hiscox also sought to manufacture the insolvency of the 128 Hazelton Project, so that they could put the Project into receivership, which would have the result of forcing Sam, their partner, out of the Project.

74. Similarly, Rogers and Hiscox reached an agreement amongst themselves to purposefully prevent the closing of the Retail Unit with an aim of increasing Sam's personal liability. On May 12, 2023, Sam communicated to Rogers and Hiscox that DUCA was prepared to consent to the sale of the Retail Unit which would enable Sam to reduce the interest payable by Retail Inc. and Sam to CEI and the Retail Unit paid for in full on closing.

75. On July 21, 2023, Rogers and Hiscox were also put on notice that it was in breach of their fiduciary and good faith duties to Sam when they failed to honour an agreement reached with Sam that when CEI sold unit 601, it would discharge the a $1,500,000.00 loan referred to by the parties as the "Mizrahi SPV Loan" upon the closing of unit 601. Similarly, Rogers and Hiscox, through CEI, had refused to discharge the Mizrahi SPV Loan upon the closing of CEI's other retail units, unreasonably preferring their own interests to prevent repayment of Sam's indebtedness to CEI.

76. In addition to unit 601, CEI and Robert Hiscox acquired units 201, 204, 401, 402, 403, and 404, at below-market prices, depriving the 128 Hazelton Project of additional revenue for upgrades if sold to third parties, and then assigned these units at a profit. This self-dealing is a breach of the duty of good faith that Rogers and Hiscox owed Sam as partners. The self-dealing is also a breach of fiduciary duty and duty of good faith owed by Hiscox to Mizrahi (128 Hazelton) Inc. as a director. This self-dealing enriched the Rogers and Hiscox and increased the losses on the 128 Hazelton Project, exposing Sam on his personal guarantee on the DUCA debt and the Retail Loan.

77. On November 21, 2023, CEI signed a Non-Binding Proposal with Third Eye Capital ("TEC") for the inventory loan required for the 128 Hazelton project. Item (f)(viii) of Appendix A of the proposal specified the usual lender requirement of execution of definitive documentation satisfactory to TEC of postponement, subordination, and standstill of claims of credit parties in respect of other credit parties.

78. Section 3.5 of TEC's standard form of guarantee, also in keeping with usual lender requirements, provided that the guarantor will not exercise any rights of indemnification, contribution, or subrogation, so long as the guarantee is in effect and such rights are terminated in the event of sale, foreclosure, or other disposition, of any equity securities. CEI sought from TEC changes to S. 3.5

to permit CEI guarantors to pursue indemnification, contribution, or subrogation, against the Mizrahi guarantors. On January 11, 2024, predictably TEC refused to make the changes.

79. On January 24, 2024, Rogers and Hiscox (and CEI) were advised by Sam that the TEC financing would avoid the appointment of a receiver and enable them to recover $11,400,000.00 from the 128 Hazelton Project that it was unlikely to recover with the appointment of a Receiver.

80. On January 25, 2024, Rogers and Hiscox (and CEI) refused to meet to discuss the issue with TEC and Sam. Rogers, Hiscox and CEI then demanded that the TEC financing proceed on the condition Sam execute a contribution agreement requiring Sam to personally pay 50% of whatever capital CEI decided was required to fund the 128 Hazelton Project and a guarantee indemnity agreement with interest paid at 28%. This demand by CEI was a breach of the Contribution Agreement with MDI, which set out the terms and obligations with respect to the payment of capital for the 128 Hazelton Project.

81. On January 19, 2024, DUCA served a Notice of Application for the appointment of a receiver owing to the filing of a lien on the 128 Hazelton project by CEC Mechanical Inc. (“CEC”). Since TEC was no longer an option to refinance DUCA, Sam repeatedly pursued CEI for a plan on a way forward.

82. On January 27, 2024, when no plan was forthcoming from CEI, Sam outlined a way forward to bond off the CEC lien that was the cause of the default DUCA relied upon for its contended right to a Receivership, pay down of the DUCA debt with immediate closings of suite 701 and the balance of all other units that are available and have occupancy under APS so that DUCA could be paid out in advance of its March 4 return date of its receivership application.

83. The CEC lien could be removed with an Aviva bond in three days. This would avoid the unnecessary costs of a Receivership.

84. On January 29, 2024, Rogers and Hiscox, through CEI, rejected the suggested plan and instead suggested a meeting to discuss options to take place Friday February 2, 2024.

85. On or about February 2, 2024, without advance notice to Sam, CEI announced it had acquired the DUCA debt by buying out DUCA and taking an assignment of its rights to include Sam's personal guarantee. The purchase of the DUCA debt by CEI was part of the plan of Rogers and Hiscox to force Sam out of the Partnership and the 128 Hazelton Project. Rogers and Hiscox had intentionally blocked reasonable proposals and efforts to close on units in the 128 Hazelton Project and to pay down the DUCA debt and the Retail Loan, which would, in turn, reduce Sam's personal liability on personal guarantees.

86. On February 2, 2024, CEI advised it had, contrary to the Shareholders' Agreement, which provides for joint decision making on the 128 Hazelton Project, unilaterally negotiated a settlement agreement with Ozz Electric that was not in the interests of the 128 Hazelton Project. The settlement agreement was deficient since it did not clarify remaining outstanding work to be completed by Ozz Electric, the timing of the works, or the value of the works. CEI was informed the Ozz Electric settlement was not an authorized liability of Mizrahi (128 Hazelton) Inc. CEI therefore proceeded to acquire the Ozz Electric claim so the liens were lifted. The cost to do so is CEI's liability since the Ozz Electric claims should have been bonded at a fraction of the costs of acquiring the claim and there was merit to a defence of its claims.

87. On February 5, 2024, Hiscox communicated that CEI would proceed with closing the Retail Unit provided that both the Retail Loan was repaid to CEI and the full purchase price required under

the APS paid to Mizrahi (128 Hazelton) Inc. In other words, Hiscox sought to require that the Retail Loan and the full purchase price for the Retail Unit be paid, effectively doubling the cost. This was a breach of section 3(d) of the Term sheet of the Retail Loan which requires CEI to sign any documentation required to permit the loan set-offs "free and clear of any security interests held by the Lender [CEI] in connection with any other loans made by it [CEI] to ProjectCo". The Retail Loan was to be extinguished from the proceeds payable upon Retail Inc. closing on the unit.

88. On February 14, 2024, CEI purported to make a capital call for the 128 Hazelton Project pursuant to the Contribution Agreement. On February 15, 2024, Sam responded that no additional capital was required to exit the Project since the assets of the Project were well in excess of the DUCA debt (by approximately $14.5M) and all other ongoing obligations were met as eight units with a value of $15.5M were ready to close and the CEC lien could be bonded for $9,000.00.

89. On February 22, 2024, CEI proceeded with a Notice of Application for the appointment of a receiver naming Mizrahi (128 Hazelton) Inc. and Retail Inc. as respondents. The receivership was granted by Order of Justice Cavanagh dated June 4, 2024.

90. The receivership for 128 Hazelton came at substantial costs to the 128 Hazelton Project, which would have been avoided if not for the unreasonable decisions made by Rogers and Hiscox with an aim of damaging the economic interests of their partner Sam.

91. If Rogers and Hiscox had agreed to proceed with Sam's plans for exiting the 128 Hazelton Project in and prior to July 2023, or the TEC refinancing, or Sam's plan proposed on January 27, 2024, the receivership for 128 Hazelton and its substantial costs and damage to Sam's reputational interests would have be avoided.

92. Sam's proposals for the 128 Hazelton Project set out above would have resulted in the DUCA debt being paid in full and the elimination of both Sam's exposure to his personal guarantee on that

debt. Similarly, the 50% of losses to be sustained on the 128 Hazelton Project and payable by Sam (by agreement) out of what should have been substantial profits on the 180 SAW project would be substantially reduced.

93. Sam therefore seeks to recover from the Defendants any and all amounts payable by Sam pursuant to the DUCA guarantee, should CEI advance a claim on that guarantee. In the case of the losses of CEI payable by Sam under the Hazelton Deficiency Agreement, Sam's liability should be reduced by any and all costs associated with the receivership for 128 Hazelton and the Defendants' unreasonable refusal to carry out Sam's plans as pleaded above or the TEC financing.

B. 180 SAW: The Unreasonable Decisions of Rogers and Hiscox to Harm the Interests of their Partner Sam

94. Rogers and Hiscox (and in the alternative CEI) intentionally harmed Sam's economic interests and breached their good faith duties and fiduciary duties owed to Sam as their partner in the development of the 180 SAW Project by unreasonably rejecting the sale of the Project.

95. In particular, Rogers and Hiscox refused to sell the 180 SAW project at a profit and used their ability to refuse the proposed sale as leverage to: (1) coerce Sam to agree to pay 50% of the losses on the 128 Hazelton project; (2) delay any exit on the 180 SAW Project to increase Sam's exposure on personal guarantees provided for the indebtedness of both Projects and to increase his interest liability to CEI, given the indebtedness was at an interest rate of 28% per annum; and (3) eliminate Sam M Inc.'s 1/3 interest in the 180 SAW Project.

96. On April 28, 2023, Hiscox and Chris Donlan, CEI's Chief Financial Officer, attended an introductory meeting with potential Korean investors, Hyundai Asset Management ("HAM") in the 180 SAW Project arranged by Sam.

Court File No. CV-24-00715321-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

B E T W E E N:

CONSTANTINE ENTERPRISES INC.

Applicant

- and -

MIZRAHI (128 HAZELTON) INC. and

MIZRAHI 128 HAZELTON RETAIL INC.

Respondents

IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 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

--- This is the Cross-Examination of ROBERT HISCOX, on his affidavits (dated 29 October 2025 and 22 December 2025), herein, taken via Veritext Legal Solutions Virtual Platform (Zoom), on Tuesday, the 20th day of January, 2026.

cheques with Sam to avoid construction delays.

42 Q. My question is that we don't see a written communication from Constantine to Mizrahi Inc. saying "we're signing this cheque under protest to avoid construction delays." You don't --

A. We've said that repeatedly all the time with Sam.

43 Q. And not once in writing that we see from the materials you put before the court, correct?

A. If they're not in the materials of the court, they're not in the materials of the court.

44 Q. Fair to say that there is likely thousands of e-mails between Mizrahi Inc. and Constantine on the issue of construction costs and the development of the 128 Hazelton project?

A. There's lots of e-mails, yes.

45 Q. And this isn't a criticism, but you didn't undertake a review of all of those e-mails in preparation of your affidavits?

A. No.

46 Q. And you didn't provide the Receiver with all of those communications in advance of them bringing this proceeding, correct?

A. No.

47 Q. Just a moment. Okay. So, sir, we'll move

CITATION: Li v. Bank of Nova Scotia, 2023 ONSC 4235
COURT FILE NO.: CV-22-00688485-0000
DATE: 20230718

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SHU KUAN LI, Applicant

AND:

BANK OF NOVA SCOTIA, Respondent

BEFORE: VERMETTE J.

COUNSEL: *Michael R. Kestenberg,* for the Applicant

Christopher DiMatteo and Brittany Town, for the Respondent

Gregory Govedaris, for Goldentrust XE Inc., Applicant in Court File No. CV-22-00687741-0000

Natalia Paunic, for Canadian Imperial Bank of Commerce, Respondent in Court File No. CV-22-00687741-0000

HEARD: July 12, 2023

ENDORSEMENT

[1] The Applicant, Shu Kuan Li, claims damages for conversion against the Respondent, the Bank of Nova Scotia ("**BNS**"). Mr. Li alleges that BNS negotiated a bank draft that he purchased and that BNS credited the proceeds of the draft to a person other than the intended payee. Most of the proceeds were subsequently transferred to the bank account of Goldentrust XE Inc. ("**Goldentrust**") at the Canadian Imperial Bank of Commerce ("**CIBC**"). CIBC froze the funds a few days later and Goldentrust commenced an application against CIBC.

[2] BNS moves for an order that this application ("**Li Application**") be converted to an action and heard together with the application commenced by Goldentrust, *Goldentrust XE Inc. v. Canadian Imperial Bank of Commerce*, Court File No. CV-22-00687741-0000 ("**Goldentrust Application**" and, together with the Li Application, the "**Applications**").

[3] In my view, BNS's motion to convert the Li Application to an action is premature. I also find that the balancing of the relevant factors does not favour an order that the Li Application and the Goldentrust Application be heard together. As a result, BNS's motion is dismissed.

A. FACTUAL BACKGROUND

1. Li Application

[4] Mr. Li commenced the Li Application on October 11, 2022. He seeks damages for conversion in the amount of $901,199.05 against BNS.

[5] Mr. Li provided affidavit evidence in support of the Li Application. The following summarizes his evidence.

[6] Mr. Li is a lawyer. In June 2022, he was referred a sale transaction from a real estate agent. He was retained by a person who purported to be Mofei Yu, the registered owner of a condominium unit located on Yonge Street in Toronto ("**Condo**"). Ms. Yu asked that Mr. Li act on her behalf to complete the sale of her Condo to Hong Dong, the purchaser, further to an agreement of purchase and sale dated May 20, 2022.

[7] Mr. Li reviewed the parcel register of the Condo and the last transfer. The owner's date of birth on the last transfer matched the ID received by Mr. Li from the person who held herself out as Ms. Yu.

[8] The purchase and sale transaction closed on June 15, 2022, and title to the Condo was transferred to Hong Dong.

[9] In connection with the closing of the purchase and sale of the Condo, Mr. Li received the sum of $920,476.95 from Hong Dong's solicitor. After making the authorized and necessary disbursements, the net proceeds payable to Mofei Yu were $901,199.05.

[10] Mr. Li arranged to purchase a bank draft from his bank, National Bank of Canada, in the amount of $901,199.05 payable to Mofei Yu. BNS negotiated the draft and credited $901,199.05 to an account.

[11] BNS's evidence on this motion is that the bank draft was deposited on June 16, 2022 into a BNS chequing account in the name of Mofei Yu and Daihang Liu. The BNS chequing account was opened on June 15, 2022, i.e., the day before the bank draft was deposited. The bank draft was held for five days before being cleared in the BNS account.

[12] In July 2022, the real estate agent who had acted for the person who held herself out as Mofei Yu told Mr. Li that she had discovered that the Condo had been sold without the real Mofei Yu's knowledge and consent. Given the allegation that the real Ms. Yu had not retained him to act on her behalf on the sale of the Condo, Mr. Li concluded that the sale of the Condo on which he acted was possibly fraudulent.

[13] According to Mr. Li, an investigator for Chicago Title subsequently confirmed that the transaction was fraudulent, and Mr. Li's office reported the matter to the Toronto Police. Mr. Li

also took steps in early August 2022 to put both National Bank of Canada and BNS on notice and he asked them to take steps to address the apparent fraud.

[14] Mofei Yu has provided statutory declarations in which she declared that she did not receive the $901,199.05 draft, nor did she authorize anyone to receive the funds on her behalf.

[15] Mr. Li states the following in his affidavit:

> At all times, I believed that I was dealing with and taking instructions from the registered owner of the Property – Mofei Yu. Consequently, I intended to pay the net proceeds of sale of the Property to the registered owner – Mofei Yu.

[16] On August 31, 2022, the Director of Titles registered a Caution under the *Land Titles Act*, R.S.O. 1990, c. L.5 in respect of the Condo. The Caution states that the underlying real estate transfer from Mofei Yu to Hong Dong may be fraudulent and orders that there be no dealings with the Condo until the matter has been resolved.

[17] On September 29, 2022, Mr. Li's lawyer sent a letter to BNS that read, in part:

> I am enclosing herewith, a copy of a letter which was delivered by Li Law Professional Corporation under dated [sic] of August 2, 2022, with respect to property municipally known as 388 Yonge Street, Unit 6901, Toronto. The transaction in question was a fraudulent transaction. You received a draft drawn on National Bank in the amount of $901,199.05, a copy of which I enclose. The draft was payable to Mofei Yu and was negotiated by your branch to a fraudster purporting to be Mofei Yu. I am sure, as you are aware, that Bank of Nova Scotia is liable in conversion, which is a strict liability obligation to reimburse the aforesaid amount to Mr. Li, on whose behalf we have been authorized to request repayment, so that in turn Mr. Li can reimburse the victim/purchaser of the aforesaid condominium at least in the amount of the bank draft.
>
> Would you be good enough, if you have not already forwarded the prior letter dated August 2, 2022 to your legal department, that you do so immediately. If we have not heard from you within five days of the date hereof or your legal department on your behalf in respect to this matter, we will be instituting proceedings.
>
> As a matter of courtesy, I understand that $800,000 of the proceeds of the draft are currently on deposit at CIBC. You might want to reach out to CIBC, who I understand has put a freeze on the property, to repay the monies in accordance with the *Canadian Payment Association Rules*.

2. Goldentrust Application

[18] Goldentrust commenced the Goldentrust Application against CIBC and Daihang Liu on September 23, 2022. The Goldentrust Application was commenced after CIBC froze Goldentrust's bank account.

[19] Goldentrust seeks various relief, including an order unfreezing its bank account and a declaration that it is the absolute owner of the $800,000.00, free and clear of any third party claims. Goldentrust also requests an injunction enjoining and preventing CIBC from releasing the $800,000.00 from Goldentrust's bank account to Mr. Liu or any other person or entity or, in the alternative, an order that the monies be paid to the credit of the Goldentrust Application.

[20] Peng Zhang, the principal of Goldentrust, provided affidavit evidence in support of the Goldentrust Application. The following summarizes Peng Zhang's evidence.

[21] Goldentrust is registered with FINTRAC – Money Servives Business. Its activities are described as "Foreign exchange dealing" and "Money transferring".

[22] On June 24, 2022, Daihang Liu came to Goldentrust's office and said that he had sold his house in China and he needed to exchange Canadian dollars for Chinese renminbi. Goldentrust agreed to do the exchange with Mr. Liu because it needed Canadian dollars. Goldentrust provided its bank account details to Mr. Liu on WeChat.

[23] On June 24, 2022, Mr. Liu wire transferred CAD $800,000.00 from his BNS account to Goldentrust's CIBC account. Goldentrust received $799,985.00 in its bank account.

[24] On June 27, 2022, Goldentrust transferred Chinese renminbi to the Chinese bank account provided by Mr. Liu.

[25] CIBC froze Goldentrust's bank account after the $799,985.00 was deposited.

[26] On August 26, 2022, counsel for Goldentrust wrote to CIBC and demanded that CIBC immediately unfreeze Goldentrust's bank account.

[27] On September 8, 2022, counsel for CIBC responded to Goldentrust's counsel. He stated that recent deposits made to Goldentrust's bank account, including the $800,000.00, required further investigation and the funds would be on hold until the investigation was complete.

[28] On October 26, 2022, on consent of the parties (except for Daihang Liu who has not participated in the litigation), I ordered that CIBC pay the sum of $800,000 from Goldentrust's bank account into court to the credit of the Goldentrust Application ("**Funds**"), subject to further order of the Court. I also ordered that any notice of application to pay the Funds out of court be served on CIBC, Daihang Liu, Hong Dong. Mr. Li, Bank of Montreal (which has a charge from Hong Dong registered against the Condo), Mofei Yu and BNS.

3. Subsequent case conferences and BNS's answers to written interrogatories

[29] In late 2022, counsel for the parties in the Li Application appeared before Justice Centa at Civil Practice Court because Mr. Li wanted to schedule the hearing of the Li Application. At that time, counsel for BNS raised the issue of whether the Li Application should be coordinated with the Goldentrust Application. Justice Centa convened a case conference with all counsel in both Applications to discuss how the two matters should move forward in an efficient way.

[30] The case conference took place on December 20, 2022. Justice Centa summarized the parties' positions as follows in his endorsement:

> Each of the applicants submits that their proceeding is properly commenced as an application and that there are no disputed facts that would require the proceeding to be brought as an action. They also submit that there is no need to consolidate or coordinate the applications and that each can proceed on its own path.
>
> BNS is less sure. It maintains that it is still investigating the facts underling [sic] the fraudulent real estate transaction and the transfer of the funds. It states that many of the facts are unknown or remain under investigation. BNS agrees that the funds in the Goldentrust application should be paid out of court, but it is not sure to whom the funds should be paid. It wishes further time to advance further its investigations and to obtain instructions on whether or not to seek to consolidate the proceedings or to convert them to actions.

[31] Ultimately, Justice Centa ordered that BNS had to advise whether it intended to bring a motion to consolidate the two Applications and/or to convert the Li Application to an action on or before January 27, 2023. He also established a timetable for the motion, if brought. In addition, in the event BNS did not bring a motion, he scheduled the hearing of the Li Application for October 18, 2023 and he established a timetable for the delivery of materials and the other steps leading to the hearing.

[32] There is no hearing date or timetable with respect to the Goldentrust Application. No responding materials have been delivered.

[33] On March 13, 2023, I was assigned as the Case Management Judge for the two Applications. A case conference was held before me on April 3, 2023. At that time, I scheduled the hearing of BNS's motion. An early motion date was provided in order to maintain the October 18, 2023 hearing date for the Li Application, if possible and depending on the outcome of the motion.

[34] On April 19, 2023, counsel for Goldentrust sent written interrogatories to counsel for BNS in relation to this motion. BNS provided the following answers on May 8, 2023:

> 1. Please advise if the Bank of Nova Scotia ("BNS") will be advancing any claims against any parties.
>
> Answer: Please see below.
>
> 2. Please advise if the BNS is alleging any allegations of fraudulent conduct as against our client, Goldentrust Xe Inc.
>
> Answer: BNS is not aware, nor is it presently alleging, that Goldentrust Xe has perpetuated a fraud against BNS.

3. Assuming that both applications are converted into actions and consolidated\tried together, will BNS be advancing any claims as against our client, Goldentrust Xe Inc., the Canadian Imperial Bank of Commerce or Daihang Liu?

   Answer: BNS denies that it is liable to conversion to Shu Kuan Li. However, based on facts known to date, if the applications are converted to actions and consolidated or tried together, BNS expects to seek recovery from Goldentrust XE Inc., and reserves its right to seek recovery from Daihaung [sic] Liu, with respect to any amounts for which is held liable for conversion to Shu Kuan Li, including through a claim for conversion and/or contribution or indemnity. BNS does not intend to make a claim against CIBC in connection with these proceedings.

4. Was the BNS chequing account in the name of Mofei Yu and Daihang Liu, account number 64642 01537 29 opened up by the real Mofei Yu or an imposter, and by the real Daihang Liu or an imposter? If you do not know the answer, then please explain how having both applications converted into actions and consolidated\tried together will provide you with the answer?

   Answer: BNS is not currently in a position to verify the "true" identities of the parties who opened the account. This case involves material facts in dispute requiring a trial and production and discovery of interested parties is necessary to give the Court the factual foundation to allow it to determine the rightful owner of the funds in question.

B. DISCUSSION

[35] There are two issues in this case: (1) whether the Li Application should be converted to an action; and (2) whether the Applications should be heard together.

1. Conversion to an action

i. Applicable legal test

[36] Under Rule 38.10 of the *Rules of Civil Procedure*, a judge may order that an application proceed to trial and give such directions as are just. A motion judge may convert an application to an action before the hearing of the application: see *Metropolitan Toronto Condominium Corporation No. 965 v. Metropolitan Toronto Condominium Corporation No. 1031*, 2014 ONSC 4458 at para. 8 ("***MTCC***").

[37] Where the legislature has stipulated that a proceeding may be brought by application, there is a *prima facie* right to proceed by application and the matter should not be converted into an action without good reason, such as when the application judge cannot make a proper determination of the issues on the application record: see *MTCC* at para. 10 and *Collins v. Canada (Attorney General)* (2005), 76 O.R. (3d) 228, 2005 CanLII 19819 at para. 29 (S.C.J.) ("***Collins***").

[38] The following factors are relevant to the determination of whether an application should proceed as an action: (1) whether there are material facts in dispute; (2) the presence of complex issues requiring expert evidence and/or a weighing of the evidence; (3) whether there is a need for the exchange of pleadings and for discoveries; and (4) the importance and impact of the application and of the relief sought. See *Collins* at para. 5 and *Family and Children's Services of Lanark, Leeds and Grenville v. Co-operators General Insurance Company*, 2021 ONCA 159 at para. 48.

[39] In determining whether to convert an application into a trial of an issue, the court should consider whether it would be satisfied that there is no genuine issue requiring a trial if the proceeding had already been commenced as an action and a party had brought a motion for summary judgment. It has been held that it makes little sense to convert an application into an action that could be determined by a motion for summary judgment. See *Sekhon v. Aerocar Limousine Services Co-Operative Ltd.*, 2013 ONSC 542 at para. 52.

ii. Positions of the parties

[40] BNS argues that there are several material facts in dispute that require the weighing of evidence. BNS refers to one of the defences potentially available to it under subsection 20(5) of the *Bills of Exchange Act*, R.S.C. 1985, c. B-4, i.e., the fictitious payee defence. A payee will be "fictitious" under subsection 20(5) if the payee is the name of a real person known to the drawer, but the drawer names him as payee by way of pretence, not intending that they should receive payment. Thus, the drawer's intention determines whether a payee is fictitious. See *Kayani v. Toronto-Dominion Bank*, 2014 ONCA 862 at paras. 29-30.

[41] BNS submits that the state of Mr. Li's knowledge and intentions cannot be resolved based on affidavit evidence alone. According to BNS, document production and discovery of Mr. Li and potentially others, such as Ms. Yu, will be required. BNS states the following in its Factum:

> […] Whether Mr. Li was party to the alleged fraudulent scheme, or a victim of it, is critical to assessing whether "Mofei Yu" is a fictitious payee within the meaning of s. 20(5). For example, if Mr. Li made the Bank Draft out to Ms. Yu "by way of pretence", not intending that the real Mofei Yu should receive payment, then BNS cannot be liable in conversion because Ms. Yu would be a "fictitious payee" under s. 20(5) of the *Bills of Exchange Act*. Relevant to Mr. Li's intentions include matters such as whether he complied with his "know your client" obligations, and what steps he took to validate Ms. Yu's identity – which, aside from bald assertions with no supporting documents, are not addressed at all in Mr. Li's affidavit. Also relevant to Mr. Li's intentions are the nature of his relationship with Yuqi Zhang, the realtor who referred "Mofei Yu" to him, and the manner in which Mr. Li allegedly discovered the alleged fraud after closing. […]

[42] In addition to its argument regarding the fictitious payee defence, BNS argues that the Li Application should be converted to an action because an action is better suited to addressing all competing claims to the Funds. BNS states that if the Li Application is converted to an action, BNS expects to defend the claim and make a third party claim against Goldentrust for contribution

and indemnity for any amount that BNS is held liable to Mr. Li, up to the maximum of the Funds. In BNS's view, this way of proceeding would ensure that all parties with a potential interest in the Funds would be before the Court in one proceeding.

[43] BNS alleges that it is entitled to claim contribution and indemnity against Goldentrust because Goldentrust received and dealt with the Funds subject to Mr. Li's conversion claim, and Mr. Li could himself have made a claim directly against Goldentrust in respect of conversion. In support of its position that it has a claim in contribution and indemnity against Goldentrust, BNS relies on the decision of the Supreme Court of British Columbia in *Pang v. Zhang*, 2021 BCSC 591 ("***Pang***"). According to BNS, the essential question before the Court in the two Applications is who should bear the loss occasioned by the alleged fraud.

[44] BNS states that if the Li Application and the Goldentrust Application proceed on their own, it will be forced to commence a third proceeding to effectively link the matters together and issue an entirely new claim against Goldentrust for contribution and indemnity in respect of any amounts for which BNS is held liable for conversion. BNS argues that there is no need for such a multiplicity of proceedings and haphazard process, and that principles of economy and efficiency generally call for contribution and indemnity actions to be joined with a main action.

[45] Finally, BNS submits that the relief sought in the Li Application – damages for conversion in the amount of the bank draft – is better suited to an action. It states that the adjudication of damages claims is the essence of an action, particularly where there are material facts in dispute. It also points out that other cases involving claims for conversion following allegedly fraudulent schemes have proceeded as actions rather than applications.

[46] Mr. Li's position is that the legal test for conversion to an action is not met in this case. According to Mr. Li, the only relevant issue to be determined in the Li Application is whether the real Mofei Yu (or a person authorized by her) received the proceeds of the bank draft. Mr. Li points out that the real Mofei Yu has provided a sworn statutory declaration indicating that she did not receive the proceeds of the bank draft and did not authorize anyone to receive the proceeds on her behalf. Mr. Li states that should BNS wish to challenge Ms. Yu's sworn statement, it can do so by cross-examination in the Li Application.

[47] Mr. Li submits that BNS's bald and speculative assertions that an exchange of pleadings and discovery are necessary to a full determination of the issues on the Li Application are based on the premise that the circumstances giving rise to Mr. Li's delivery of the bank draft are relevant. Mr. Li argues that the circumstances giving rise to his delivery of the bank draft to an individual who held herself out to him as Mofei Yu and as the owner of the Condo are legally irrelevant to his conversion claim. This is because contributory negligence of the drawer of the instrument or the ability to discover the underlying fraud are irrelevant in a claim for conversion.

[48] Goldentrust takes no position on the issue of the conversion of the Li Application to an action.

iii. The motion to convert the Li Application to an action is premature

[49] In my view, BNS's motion to convert the Li Application to an action is premature. I find that there is no valid reason to convert the Li Application to an action at this stage. If it wishes to do so, BNS can renew its request at the hearing of the Li Application. At that time, the record will be fully developed, and the application judge will be in a better position to determine whether there are material facts in dispute to justify converting the Li Application to an action.

[50] The first factor to consider on a motion to convert an application to an action is whether there are material facts in dispute. On the record before me, there are no material facts in dispute. The points that BNS raises with respect to the issue of fictitious payee are all speculative at this time. As set out above, Mr. Li's affidavit contains the following sworn statement:

> At all times, I believed that I was dealing with and taking instructions from the registered owner of the Property – Mofei Yu. Consequently, I intended to pay the net proceeds of sale of the Property to the registered owner – Mofei Yu.

[51] Mr. Li's application record also contains Ms. Yu's statutory declarations that she did not receive the bank draft and did not authorize anyone to receive the bank draft funds on her behalf.

[52] BNS has not adduced any evidence to contradict these statements. While it advised Justice Centa in December 2022 that it needed more time to further its investigation, it has not shared anything about any such investigation. The affidavit filed by BNS in support of this motion was affirmed by one of its external counsel and, aside from a summary of the evidence filed by the applicants in the two Applications, it contains very little additional information. At the hearing, counsel for BNS advised that BNS had not taken any steps to contact Ms. Yu or her Ontario lawyer.

[53] It is possible that BNS could, during the cross-examination of Mr. Li or an examination of Ms. Yu under Rule 39.03, obtain information that raises credibility issues, shows that there are material facts in dispute and/or that there is a genuine issue requiring a trial. However, this is speculative at this point, especially in the absence of any evidence of BNS on the merits of the conversion claim. As pointed out by counsel for Goldentrust, BNS is the only party that can identify its account holders and has information in this regard.

[54] In determining whether there are material facts in dispute, it is important to characterize properly the issues raised in the Li Application. In my view, BNS's arguments on this motion often mischaracterized the Li Application and the relief sought by Mr. Li. Mr. Li does not claim any entitlement to the Funds. He seeks damages for conversion against BNS. The Li Application also does not require the Court to make any findings about who should bear the loss occasioned by the alleged fraud or who is the rightful owner of the Funds.

[55] Despite this, BNS argues that there will be material facts in dispute in the future because it intends to bring a third party claim against Goldentrust if the Li Application is converted to an action. While BNS has expressed an intention to commence a claim against Goldentrust for contribution and indemnity, it has yet to do so. Even though the merits of any future claim advanced by BNS is not before me, I note that there is some uncertainty regarding the basis of

BNS's proposed claim for contribution and indemnity. The Li Application is based on the alleged conversion of the bank draft purchased by Mr. Li. The tort of conversion applies to instruments such as cheques and bank drafts. See *Tran v. Chung*, 2016 ONCA 378 at paras. 23-25 and *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727 a para. 36. Goldentrust never dealt with the bank draft that was purchased by Mr. Li. The only party who dealt with the bank draft was BNS. It is unclear whether Mr. Li would have a claim for conversion against Goldentrust or that Goldentrust could be said to have participated in any way in the conversion of the bank draft. BNS relies on the *Pang* decision, but this decision is not binding on this Court and is not on all fours.

[56] The issues raised by BNS regarding its proposed third party claim against Goldentrust relate to the Funds and events that took place after the bank draft was deposited in a BNS account. Such issues are beyond Mr. Li's claim. If the Li Application is dismissed, BNS will not need to pursue a claim against Goldentrust. If the Li Application is granted, BNS may well wish to seek relief against Goldentrust and raise the issues that it raised on this motion, but such issues can be dealt with between BNS and Goldentrust (and potentially others) and do not need to involve Mr. Li.

[57] Thus, I find that like its argument regarding a potential fictitious payee defence, BNS's arguments with respect to a potential third party claim against Goldentrust are premature. No claim has been commenced, no draft pleading has been prepared and such a claim may not be necessary, depending on the outcome of the Li Application. There is no good reason to derail the Li Application, which is on track to be heard this fall. The discrete issues that it raises can be determined on their own, without the significant delay that would be associated with the conversion to an action. This does not prejudice BNS as it is open to it to commence a separate proceeding against Goldentrust, as acknowledged in its Factum. As the Case Management Judge for the Applications, I can address at the appropriate time the issue of coordination between the Goldentrust Application and any proceeding commenced by BNS.

[58] Turning to the other factors to consider when determining whether an application should proceed as an action, the issues raised in the Li Application are not complex and do not require expert evidence. It is uncertain whether the weighing of evidence will be required. Given that the issues raised are very narrow, I find that there is no need for the exchange of pleadings and for discoveries. The relevant issues can be explored during cross-examinations and examinations under Rule 39.03. Finally, the importance and impact of the application and of the relief sought do not militate in favour of converting the Li Application to an action.

[59] I note that the facts of the Li Application are very similar to the facts in *Khosla v. Korea Exchange Bank of Canada*, 2009 ONCA 467 ("***Khosla***"). While *Khosla* proceeded as an action, it was ultimately determined on a motion for summary judgment, including the defence of fictitious payee. As stated above, it would make little sense to convert the Li Application to an action if it could be determined on a motion for summary judgment.

[60] In light of the foregoing, I dismiss BNS's motion to convert the Li Application to an action. As stated above, BNS can renew its request at the hearing of the Li Application if it wishes to do so.

2. Hearing together

i. Applicable legal test

[61] Rule 6.01(1) of the *Rules of Civil Procedure* provides as follows:

> Where two or more proceedings are pending in the court and it appears to the court that,
>
> (a) they have a question of law or fact in common;
>
> (b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or
>
> (c) for any other reason an order ought to be made under this rule,
>
> the court may order that,
>
> (d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or
>
> (e) any of the proceedings be,
>
> (i) stayed until the determination of any other of them, or
>
> (ii) asserted by way of counterclaim in any other of them.

[62] The underlying purpose of this rule is to avoid multiplicity of proceedings, to promote expeditious and inexpensive determination of disputes, and to avoid inconsistent judicial findings. The threshold question is to determine whether any of the criteria under Rule 6.01(1) have been met. If so, the court must still consider whether the balance of convenience requires the order. See *Coulls v. Pinto*, 2007 CanLII 46242 at paras. 18-20 (Ont. S.C.J.) and *Abdulrahim v. Air France*, 2010 ONSC 5542 at para. 53.

[63] As noted by Justice Brown (as he then was) in *CN v. Holmes*, 2011 ONSC 4837 at para. 1 ("***Holmes***"), while a multiplicity of legal proceedings should be avoided as far as possible, multiple proceedings might be required in some circumstances to secure the just, most expeditious and least expensive determination of disputes, in accordance with Rule 1.04 of the *Rules of Civil Procedure*. Whether there should be one proceeding or two "turns on the particular facts of any case and the various litigation-related considerations attaching to any case."

[64] In *1014864 Ontario Ltd. v. 1721789 Ontario Inc.*, 2010 ONSC 3306 at para. 18 ("***101 Ontario***"), Master Dash (as his title then was) set out a non-exhaustive list of seventeen factors that the court may consider when determining whether to order that two matters be tried together.[1]

ii. Positions of the parties

[65] BNS argues that at least two of the "gateway" criteria in Rule 6.01(1)(a)-(c) are satisfied in this case: (1) the two proceedings have a question of law or fact in common; and (2) the relief claimed in them arises out of the same transaction or occurrence. It states that the claims made in the two Applications are competing claims for the same money, arising from the same underlying transaction or occurrence, i.e., the allegedly fraudulent sale of the Condo. According to BNS, everyone with a potential interest in the Funds should be before the Court in one process so that the Funds can be returned to their rightful owner, whoever the Court determines that to be.

[66] BNS submits that hearing the Applications independently from one another would lead to a multiplicity of proceedings. It states that there are already two proceedings claiming entitlement to the Funds and that if the Li Application is not converted to an action and proceeds on its own, BNS will be forced to commence a third proceeding claiming contribution and indemnity from Goldentrust of any amount BNS is ordered to pay Mr. Li. BNS points out that the contribution and indemnity that BNS would seek from Goldentrust in a new action, i.e., the Funds, has already been paid into court to the credit of the Goldentrust Application, and that it would be inefficient for three separate proceedings to involve claims to the same money. BNS also argues that if the Goldentrust Application is adjudicated by itself, independently of BNS's contribution action against Goldentrust, there is a risk of inconsistent findings.

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[1] The factors are the following: (1) the extent to which the issues in each action are interwoven; (2) whether the same damages are sought in both actions, in whole or in part; (3) whether damages overlap and whether a global assessment of damages is required; (4) whether there is expected to be a significant overlap of evidence or of witnesses among the various actions; (5) whether the parties are the same; (6) whether the lawyers are the same; (7) whether there is a risk of inconsistent findings or judgment if the actions are not joined; (8) whether the issues in one action are relatively straight forward compared to the complexity of the other actions; (9) whether a decision in one action, if kept separate and tried first would likely put an end to the other actions or significantly narrow the issues for the other actions or significantly increase the likelihood of settlement; (10) the litigation status of each action; (11) whether there is a jury notice in one or more but not all of the actions; (12) whether, if the actions are combined, certain interlocutory steps not yet taken in some of the actions, such as examinations for discovery, may be avoided by relying on transcripts from the more advanced action; (13) the timing of the motion and the possibility of delay; (14) whether any of the parties will save costs or alternatively have their costs increased if the actions are tried together; (15) any advantage or prejudice the parties are likely to experience if the actions are kept separate or if they are to be tried together; (16) whether trial together of all of the actions would result in undue procedural complexities that cannot easily be dealt with by the trial judge; and (17) whether the motion is brought on consent or over the objection of one or more parties.

[67] BNS states that the following factors set out in *101 Ontario* favour hearing the two proceedings together: (a) the issues in each proceeding are interwoven and the damages overlap; (b) there will be an overlap of evidence or witnesses; (c) the parties and lawyers are the same; (d) there is a risk of inconsistent findings; (e) the complexity of the two cases; (f) the fact that a decision holding Goldentrust liable to BNS for contribution and indemnity in the amount of the Funds would effectively dispose of the Goldentrust Application; (g) the litigation status of each proceeding, i.e., all matters are at an early stage; and (h) considerations of advantage, prejudice and costs, including the fact that dealing with all competing claims to the Funds in one court proceeding would ensure that all issues can be determined in an orderly and cost-effective manner. I note that BNS's arguments with respect to most of these factors are premised on BNS making a claim for contribution and indemnity against Goldentrust.

[68] According to Mr. Li, just as the events giving rise to his delivery of the bank draft to a person who held herself out as Mofei Yu are legally irrelevant to the determination of his conversion claim against BNS, any issues involving Mr. Liu's transfer of monies to Goldentrust's account at CIBC after BNS negotiated the bank draft and credited the proceeds to a BNS customer account are equally irrelevant to the determination of Mr. Li's conversion claim against BNS.

[69] Mr. Li submits that none of the criteria in Rule 6.01(1)(a)-(c) are satisfied in this case. He states that there are neither factual nor legal issues in common between the Li Application and the Goldentrust Application. He notes that the only issue in the Li Application is whether BNS credited someone other than the real Mofei Yu with the proceeds of the bank draft on June 16, 2022. He argues that the issues presented in the Li Application cannot be said to be interwoven with the factual or legal issues presented in the Goldentrust Application, all of which began eight days after BNS negotiated the bank draft and credited its proceeds to its customer's account, and none of which involve Mr. Li or Ms. Yu.

[70] Mr. Li's position is that any relief claimed in respect of what happened to the bank draft proceeds after BNS converted the bank draft payable to Mofei Yu cannot be said to arise out of the same transaction at issue in the Li Application. Mr. Li states that the relief sought in the Li Application is based wholly on BNS's negotiation of the bank draft and its credit of the proceeds to the account of a customer who was not Mr. Li's intended payee. The relief claimed starts and stops on June 16, 2022, with BNS's negotiation of the bank draft to the credit of a customer account. Mr. Li points out that the Goldentrust Application, in contrast, arises from its dealings with Mr. Liu, which began the following week (on June 24, 2022). Neither Mr. Li nor Ms. Yu are alleged to have had dealings with Goldentrust.

[71] Mr. Li relies on cases that have held that where proceedings involve different parties, they should not be consolidated. I note that while BNS originally sought the consolidation of the two Applications, it now only seeks to have the two matters heard together.

[72] Mr. Li submits that in light of the limited relevant factual issues presented by the Li Application, there are no other reasons to make an order under Rule 6.01(1).

[73] Mr. Li also argues that where, as here, the sole issue in the proceeding can be determined by summary judgment, consolidation with another proceeding is not warranted.

[74] Goldentrust does not oppose the hearing together of the two Applications.

iii. The balance of convenience does not favour an order that the two Applications be heard together

[75] I accept that at least one criterion under Rule 6.01(1) has been met, i.e., that the relief claimed in the Applications arises out of the same series of transactions or occurrences. As a result, the question to determine is whether the balance of convenience requires an order that the Applications be heard together.

[76] I have considered the factors set out in *101 Ontario*. However, I find it unnecessary to conduct a detailed analysis of each of them because: (a) I have dealt with many of them above, in the context of BNS's request to convert the Li Application to an action; and (b) I have reached the conclusion that, in light of the "litigation-related considerations" particular to this case (see *Holmes* at para. 1), the Li Application should not be delayed and should not be required to be heard at the same time as the Goldentrust Application.

[77] BNS's arguments under Rule 6.01(1) are, again, premised on a mischaracterization of the Li Application and/or on BNS making a claim for contribution and indemnity against Goldentrust. While there may be very good reasons for any proceeding commenced by BNS against Goldentrust to be heard together with the Goldentrust Application, such a claim has yet to be commenced and it does not justify having the Li Application heard together with the Goldentrust Application.

[78] In my view, there is no risk of inconsistent judicial findings between the Li Application and the Goldentrust Application. As pointed out already: (a) Mr. Li's claim and the relief he is seeking do not relate to the Funds, and (b) if the Li Application is granted, BNS may well wish to seek relief against Goldentrust and raise the issues that it raised on this motion, but such issues can be dealt with between BNS and Goldentrust and do not need to involve Mr. Li.

[79] The effect of the Order I made on October 26, 2022 is that the Goldentrust Application cannot proceed without notice being provided to a number of parties as any application to pay the Funds out of court must be on notice to these parties. The involvement of multiple parties raises the possibility of delay. I see no reason to delay the adjudication of the issues raised in the Li Application, for which a hearing date has already been scheduled. Again, as the Case Management Judge for the Applications, I can address at the appropriate time any issue of coordination between the Goldentrust Application and any proceeding commenced by BNS.

[80] In light of the relevant factors and the discussion above, I conclude that the balance of convenience does not favour an order that the Li Application and the Goldentrust Application be heard together.

C. CONCLUSION

[81] BNS's motion is dismissed.

[82] The parties have agreed that the appropriate scale of costs with respect to this motion is partial indemnity. If the parties cannot reach an agreement on costs, Mr. Li and Goldentrust shall deliver submissions of not more than three pages (double-spaced), excluding the costs outline, by July 31, 2023. BNS shall deliver its responding submissions (with the same page limit) by August 14, 2023. The submissions of all parties shall also be sent to my assistant by e-mail and uploaded onto CaseLines.

[83] A new timetable is needed for the steps leading to the hearing of the Li Application on October 18, 2023. In light of the arguments made on this motion, it is my view that Mr. Li should be given an opportunity to deliver supplementary materials. I order the parties to comply with the following timetable:

a. Any Supplementary Application Record to be delivered by July 31, 2023.

b. Responding Application Record of the Respondent to be delivered by August 18, 2023.

c. Reply Application Record, if any, to be delivered by August 31, 2023.

d. Cross-examinations and other examinations, if any, to be completed by September 15, 2023.

e. Factum of the Applicant to be delivered by September 27, 2023.

f. Factum of the Respondent to be delivered by October 11, 2023.

[84] The timetable set out above can be modified on consent. If any issue arises with respect to the timetable, counsel can contact my assistant to request a case conference.

Vermette J.

Date: July 18, 2023

CITATION: FFO Fiberglass v. Distribution Composites, 2019 ONSC 4291
COURT FILE NO.: CV-17-0393
DATE: 2019 07 15

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
FFO FIBERGLASS INC., carrying on business as COMPOSITES CANADA	)	Bernie Romano, for the Plaintiff
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
DISTRIBUTION COMPOSITES INC.	)	James A. Manson, for the Defendant
	)	
Defendant	)	
	)	
	)	**HEARD:** May 1, 2019

REASONS FOR DECISION

DOI J.

OVERVIEW

[1] The Plaintiff seeks summary judgment for $322,343.30 representing its claim against the Defendant for unpaid invoices. According to the Plaintiff, its

[12] On a summary judgment motion, the focus should not be on what further or other evidence could be adduced at trial but rather on whether a trial is required. A trial is not required when the summary judgment process: (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a more proportionate, more expeditious and less expensive means to achieve a just result: *Hryniak* at para. 49.

[13] A party to a summary judgment motion may not rest solely on the allegations or denials in the pleadings. Under Rule 20.02(1), the court may "*draw an adverse inference from a party's failure to adduce evidence from a person having personal knowledge of contested facts*." Absent detailed and supporting evidence, a self-serving affidavit does not create a triable issue: *Guarantee Co. of North America v. Gordon Capital Corp.,* [1999] 3 S.C.R. 423 at para. 31. Each side must "*put its best foot forward*" with respect to the existence or non-existence of material issues to be tried; *2212886 Ontario Inc. v. Obsidian Group Inc.*, 2018 ONCA 670 at para. 49. A court is entitled to assume that the record contains all evidence that the parties would adduce at trial; *Broadgrain Commodities Inc. v. Continental Casualty Company*, 2018 ONCA 438 at para. 7.

[14] There is an important caveat to the "*best foot forward*" principle, which applies when a motion for summary judgment is brought early in the litigation. As the Court of Appeal stated in *Combined Air Mechanical Services Inc. v. Flesch*, it

is not in the interests of justice to use summary judgment where the record is insufficiently developed and prevents a party from responding appropriately:

> It will not be in the interest of justice to exercise rule 20.04 (2.1) powers in cases where the nature and complexity of the issues demand that the normal process of production of documents and oral discovery be completed before a party is required to respond to a summary judgment motion. In such a case, forcing a responding party to build a record through affidavits and cross-examinations will only anticipate and replicate what should happen in a more orderly and efficient way through the usual discovery process.
>
> Moreover, the record built through affidavits and cross- examinations at an early stage may offer a less complete picture of the case than the responding party could present at trial. As we point out below, at para. 68, counsel have an obligation to ensure that they are adopting an appropriate litigation strategy. A party faced with a premature or inappropriate summary judgment motion should have the option of moving to stay or dismiss the motion where the most efficient means of developing a record capable of satisfying the full appreciation test is to proceed through the normal route of discovery. This option is available by way of a motion for directions pursuant to Rules 1.04(1), (1.1) (2) and 1.05. [Emphasis added]
>
> *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 at paras. 57-58; see also *Fitzgerald v. Fitzgerald*, 2017 ONSC 6209 at para. 26(e).

[15] On a summary judgment motion featuring an inadequate record, the court "should be reluctant to attempt to resolve the case. Substantial costs are thereby incurred and further delay caused, with little being achieved;" *Lesenko v. Guerette*, 2017 ONCA 522 at para. 30. Summary judgment is not intended to take the place of regular trials and is only appropriate where it leads to "a fair process and just adjudication:" *Hryniak* at para. 33. Summary judgment remains the exception, not the rule: *Mason v. Perras Mongenais*, 2018 ONCA 978 at para. 44.

The Evidentiary Record is Inadequate to Determine this Motion

[16] The Defendant argues that the evidentiary record on this summary judgment motion is incomplete, under-developed, and insufficient for the court to make the necessary factual findings to determine this motion. For the reasons that follow, I agree with this submission.

[17] A motion for summary judgment should not be brought until such time as the issues in the action may appropriately be heard in summary manner. Otherwise, a motion for summary judgment may be premature where it does not serve the principles of proportionality, timeliness and affordability; *Den Elzen v. Kelly,* 2017 ONSC 98 at para. 53. This is particularly true when a motion for summary judgment is bought before the parties have completed documentary productions. A summary judgment motion that relies on an incomplete record lacking necessary documents may well be premature; *Sweda Farms Ltd. v. L.H. Gray & Son Ltd.,* [2013] OJ No 6363 (SCJ) at paras 25-26 and 39-40, leave to appeal refused [2014] OJ No. 3972 (Div Ct).

[18] I find this summary judgment motion to be premature as the evidentiary record is not yet sufficiently developed to permit an appropriate determination of the factual elements in dispute. At this stage of the litigation, documentary production has not been completed and examinations for discovery have not commenced. As a result, there are a number of evidentiary gaps in the record which, in my view, make it difficult to properly understand the parties' transaction

CONSTANTINE ENTERPRISES INC. Applicant	-and-	MIZRAHI (128 HAZELTON) INC. and MIZRAHI 128 HAZELTON RETAIL INC., Respondents

CV-24-00715321-00CL

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SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

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