

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

BRIDGING FINANCE INC., as agent for 2665405 ONTARIO LIMITED

Applicant

- and -

1033803 ONTARIO INC. and 1087507 ONTARIO LIMITED

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\*

**FACTUM OF THE MOVING PARTY  
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## **PART I - OVERVIEW**

1. Forma-Con (1033803 Ontario Inc. or 803) is one of the debtors in this proceeding. It is owed over \$2 million in outstanding holdback payments from MOD Developments for work on a Toronto condominium tower, completed in 2019. This money, when recovered, will be available to Forma-Con's creditors.
2. The Receiver commenced proceedings to recover the holdback. It was met by a technical argument from MOD that the Receiver did not have authority to advance the claim because 803 was not the proper party to the contract. This motion is brought to determine the authority of the Receiver to bring and defend claims and counterclaims about the holdback. The merits of the holdback claims will be determined in separate proceedings.
3. MOD's objections to the Receiver prosecuting holdback claims are technical and tactical. MOD's first objection is based on a typo. The predecessor of 803, 1428508 (or 508), operated as Forma-Con and was intended to be the trade contractor to MOD on this project. But by mistake, "1428502" was written in the contract instead of 1428508. MOD concedes that this is a typographical error. MOD's evidence is that it did not care about the name of the numbered company, so long as the company operating as Forma-Con provided its expertise, employees and equipment. 508 was paid for 90% of the work performed; MOD retained a 10% holdback.
4. MOD's second objection is that 803—and the Receiver on its behalf—is not a proper party to the contract. In a corporate reorganization, 508 was dissolved in 2016. 803, as its successor, was assigned the contract and performed the work. 803 billed for this work. 803 submitted all required supporting documents, like insurance and WSIB certifications. The bills and documents were in the name of 803. MOD and its agent reviewed and approved all 23

payment applications. 803 was paid for 90% of the work performed; MOD retained a 10% holdback.

5. MOD now claims that the contract was never assigned. It argues that it never received a letter expressly notifying it of the assignment or requesting its consent. The Receiver cannot find such a notice. But this is a red herring. MOD had ample notice of the assignment. It never objected. Moreover, 803 is the successor of 508 and no consent is required for the assignment.

6. For four years, MOD dealt with 508 and then 803, without complaint about the names of the numbered companies; however, when the Receiver was appointed in 2018, MOD tactically raised its objection that 502 was the proper party to the contract. Why? Because, if the Receiver cannot pursue the holdback, no one will. More than \$2 million—10% of the contract price—will go to MOD instead of Forma-Con's creditors. MOD conceded its motives on cross-examination: it is using this litigation to pay 90% of the contract price for 100% of the contract work.

7. The Receiver brings this motion to seek advice and directions of this Court. Its argument is as follows:

- (a) The listing of 502 instead of 508 was a typographical error. The contract should be rectified to read "1428508";
- (b) The contract was validly assigned from 508 to 803; no written consent was required, but if required, it was given;
- (c) MOD is estopped from denying 803 is a party to the contract; and
- (d) The contract and the holdback are property of the receivership, and the receiver has authority to enforce the contract and claim for the holdback.

## PART II - SUMMARY OF FACTS

### A. BACKGROUND

8. The Receiver in its 10<sup>th</sup> Report has provided a chronology of the relevant events. The chronology is excerpted and reproduced at Schedule C to this Factum. Extracts of relevant contractual provisions are reproduced at Schedule D.

#### (i) *The Parties*

9. Forma-Con Construction (“**Forma-Con**”) is the trade name of a construction company that formerly provided concrete forming services. It is a debtor in these proceedings.

10. Forma-Con is part of the Bondfield Group of Companies (the “**Group**”), which includes Bondfield Construction Company Limited (“**BCCL**”), a significant general contractor in Southwestern Ontario. Two numbered corporations have carried on the Forma-Con business for the Group:

- (a) 1428508 Ontario Limited (“**508**”) was incorporated on July 6, 2000 for the purpose of performing concrete forming work.<sup>1</sup> It carried on the Forma-Con business until 2016.
- (b) 1033803 Ontario Inc. (“**803**”) was incorporated in 1993.<sup>2</sup> At all material times, 508 was a wholly owned subsidiary of 803.<sup>3</sup> The Group was restructured between 2014 and 2016, following which 508 was dissolved and 803 became its successor and carried on the Forma-Con business.

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<sup>1</sup> Articles of Incorporation of 508, Motion Record [“MR”], Tab 2.C, p. 115; Cross-Examination of Steven Aquino [“Aquino Cross”], Book of Transcripts of the Moving Party [“BOT”], Tab 2, pp.13-14, q. 40.

<sup>2</sup> The 10<sup>th</sup> Report of KSV Restructuring Inc. as Receiver and Manager of 1033803 Ontario Inc. and 1087507 Ontario Limited and Certain Other Property, August 15, 2022 [“10<sup>th</sup> Report”], para. 2.01, MR, Tab 2, p. 20.

<sup>3</sup> 10<sup>th</sup> Report, para. 2.2.8, MR, Tab 2, p. 24.

11. KSV Kofman Inc.<sup>4</sup> (the “**Receiver**”) was appointed Receiver over all of the assets, undertakings and property of 803 acquired for or used in relation to a business carried on by 803 by an order of this Court dated November 19, 2018 (the “**Receivership Order**”).<sup>5</sup>

12. MOD Developments (197 Yonge) Limited Partnership (“**MOD**”) is a Toronto-based developer of residential condominiums. MOD was the developer of the Massey Tower, a 60-storey condominium tower in downtown Toronto (the “**Project**”). Aidan Ball is the Director of Construction for MOD.<sup>6</sup> Mr. Ball submitted an affidavit in this motion and was cross-examined.

## **B. MOD ENTERS INTO THE CONTRACT WITH FORMA-CON**

13. In 2014, MOD hired Forma-Con to provide concrete forming services for the Project.<sup>7</sup> Forma-Con performed the work for which it was hired, including, but not limited to, falsework, void forming, hoisting, and management of rebar.<sup>8</sup> The Project now stands completed.

14. Forma-Con provided these services pursuant to a contract with MOD for a fixed payable value of \$23,084,770.00 (the “**Contract**”).<sup>9</sup> All progress payments made to Forma-Con were subject to a 10% holdback as required by the *Construction Act* (the “**Massey Holdback**”).<sup>10</sup> MOD was obligated to release the Massey Holdback to Forma-Con no later than 60 days after the contract was completed.<sup>11</sup>

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<sup>4</sup> KSV Kofman Inc. subsequently changed its name to KSV Restructuring Inc.

<sup>5</sup> Order Appointing Receiver, November 19, 2018 [“Receivership Order”], MR, Tab 2.A, p. 39.

<sup>6</sup> Mr. Ball is employed by MOD Developments Inc., which provides development management services for MOD. Mr. Ball is authorized to act on behalf of MOD. See Cross-Examination of Aidan Ball [“Ball Cross”], BOT, Tab 1, p. 17, qq. 75-76.

<sup>7</sup> 10<sup>th</sup> Report, para. 2.2.1, MR, Tab 2, p. 23.

<sup>8</sup> Stipulated Price Contract, December 19, 2014 [“Contract”], BOT, Tab 1.A.

<sup>9</sup> Contract, Article A-4, BOT, Tab 1.A, p.5.

<sup>10</sup> Contract, Article A-5.1, BOT, Tab 1.A, p.5.

<sup>11</sup> *Construction Act*, [R.S.O. 1990, c. C.30](#), ss. 22, 31(2).



15. The Contract defines the “Trade Contractor” as the party that will perform the concrete pouring and forming services. The single location where the Contract names the Trade Contractor contains a typographical error.<sup>12</sup>

16. The parties intended to name 508 as the “Trade Contractor”; however, the Contract mistakenly identified the Trade Contractor as “Forma-Con Construction (A DIVISION OF 1428502 ONTARIO LIMITED)” [emphasis added].

17. Both the Receiver and MOD agree that the naming of 1428502 (“**502**”) as a party to the Contract was a mistake.<sup>13</sup> MOD agrees the reference to 502 in the Contract was a typographical error, and that MOD understood it was contracting with 508, not 502, as the numbered company behind Forma-Con.<sup>14</sup>

18. 502 is unknown to both 508 and MOD.<sup>15</sup> 502 was incorporated on July 6, 2000 and carried on a business known as Second Floor Ltd. On February 19, 2007, far before the Contract was negotiated or executed, 502 ceased to carry on business.<sup>16</sup> 502 was never involved in the negotiation or acceptance of Contract, and it has never provided MOD with concrete forming services. 502 has never invoiced MOD, nor has it ever been paid by MOD.<sup>17</sup> 502 was not related to Forma-Con or any entity in the Group.<sup>18</sup>

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<sup>12</sup> Contract, Article A-1.1, GC 3.1(t), BOT, Tab 1.A, pp. 3, 14.

<sup>13</sup> Affidavit of Aidan Ball sworn September 16, 2022, para. 27, Responding Motion Record, Tab A, p. 7; 10<sup>th</sup> Report, para. 2.2.1, MR, Tab 2, p. 23.

<sup>14</sup> Ball Cross, BOT, Tab 1, p. 40, q. 280; p. 62, q. 332

<sup>15</sup> 10<sup>th</sup> Report, para. 2.2.11, MR, Tab 2, p. 24.

<sup>16</sup> Corporate Profile Report of Second Floor Ltd., MR, Tab 2.K, pp.163-165.

<sup>17</sup> 10<sup>th</sup> Report, para. 2.2.13, MR, Tab 2, p. 25.

<sup>18</sup> 10<sup>th</sup> Report, para. 2.2.11, MR, Tab 2, p. 24.

**C. MOD ENGAGES TUCKER AS CONSTRUCTION MANAGER**

19. Under the Contract, MOD appointed Tucker HiRise Construction Inc. (“**Tucker**”) as the “Construction Manager” for the Project.<sup>19</sup>

20. Article A-6.1 of the Contract specified that all communications from 508 to MOD that related to the Contract were to “be forwarded through [Tucker].”<sup>20</sup> Mr. Ball confirmed that if 508 had questions for MOD about the Project, it was supposed to direct those questions to Tucker.<sup>21</sup> Tucker forwarded those questions to MOD, and MOD sent its response to 508 through Tucker.<sup>22</sup>

21. Relatedly, as Mr. Ball acknowledged in his cross-examination, it was Tucker’s responsibility to tell MOD about any issues or concerns Tucker had with 508.<sup>23</sup>

22. Tucker was authorized by the Contract to act on MOD’s behalf, including by interpreting the Contract and by making findings on matters in question relating to the Contract.<sup>24</sup> Subject to a dispute mechanism, the Contract provided that Tucker’s determinations were final.<sup>25</sup>

23. Despite Tucker’s role as Construction Manager, MOD has not submitted any evidence from Tucker in this proceeding, either directly or through Mr. Ball’s affidavit. Mr. Ball’s affidavit does not include any correspondence between Mr. Ball and Tucker or any correspondence between anyone else at MOD and Tucker.<sup>26</sup>

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<sup>19</sup> Contract, BOT, Tab 1.A, p. 3.

<sup>20</sup> Contract, Article A-6, BOT, Tab 1.A, p. 5. Please note that Article A-6 is modified by SC 1.4.1, BOT, Tab 1.A, p. 37.

<sup>21</sup> Ball Cross, BOT, Tab 1, p. 16, q. 70.

<sup>22</sup> Ball Cross, BOT, Tab 1, p. 16, q. 71.

<sup>23</sup> Ball Cross, BOT, Tab 1, p. 17, qq. 77-78.

<sup>24</sup> Contract, GC 2.2.1-2.2.2, BOT, Tab 1.A, p. 12; Ball Cross, BOT, Tab 1, p. 16, q. 72.

<sup>25</sup> Contract, GC 8.2.2, BOT, Tab 1.A, p.26.

<sup>26</sup> Ball Cross, BOT, Tab 1, p.18, qq. 80-81.

**D. 508 ASSIGNS THE CONTRACT TO 803**

24. In December 2014, the Group decided to dissolve 508, and all of its assets were assigned to its corporate parent, 803.<sup>27</sup> The Group effected the assignment through a resolution of the shareholder of 508<sup>28</sup> and a Dissolution Agreement between 508 and 803 dated December 31, 2014 (the “**Dissolution Agreement**”).<sup>29</sup> The Dissolution Agreement used express language to make an absolute assignment from 508 to 803:

[508] grants, assigns, transfers, conveys and sets over to [803], as part of the winding-up of [508] and the distribution thereon of its property to [803], all of the right, title and interest of [508] in and to all of its property, assets and business, both real and personal, movable and immovable, wherever situate [*sic*], including, without limiting the generality of the foregoing, all cash on hand and in the bank, accounts receivable, refunds, rebates, contracts and goodwill, including, in particular, the goodwill of the name and all rights of whatsoever nature and kind to which [508] is entitled.<sup>30</sup>

The Ministry of Consumer and Commercial Relations issued Articles of Dissolution for 508 effective June 21, 2016.<sup>31</sup>

25. The Forma-Con business transferred from 508 to 803 as a result of the assignment. 803 received all of 508’s equipment and the right to operate under the Forma-Con trade name. The employees of 508 were transferred to 803.<sup>32</sup> 803 began to perform the Contract.

26. The Receiver has made inquiries and has not found any evidence that express consent to an assignment was provided by MOD.<sup>33</sup>

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<sup>27</sup> 10<sup>th</sup> Report, para. 2.3.1-7, MR, Tab 2, pp. 25-27.

<sup>28</sup> Resolution of the Sole Shareholder dated December 31, 2014, MR, Tab 2.O, p. 187.

<sup>29</sup> Dissolution Agreement, December 31, 2014 [“Dissolution Agreement”], MR, Tab 2.P, p. 182.

<sup>30</sup> Dissolution Agreement, s.1, MR, Tab 2.P, p. 182.

<sup>31</sup> Articles of Dissolution for 1428508 Ontario Limited, MR, Tab 2.R, p.192.

<sup>32</sup> Aquino Cross, BOT, Tab 2, p. 10, q. 30.

<sup>33</sup> 10<sup>th</sup> Report, para. 2.4.16, MR, Tab 2, p. 31.

**E. FORMA-CON PERFORMS THE CONTRACT**

27. Between 2014 and 2019, Forma-Con performed the Contract in full.<sup>34</sup> From the time of execution of the Contract to 2016 it performed the Contract while operating as 508. From 2016 to 2019 it performed the Contract while operating as 803. MOD paid all amounts payable to Forma-Con, except the Massey Holdback.

**(i) The Payment Application Process**

28. Under the Contract, Tucker was responsible for receiving payment applications from Forma-Con, reviewing them and then forwarding them to MOD for approval and payment.<sup>35</sup> As part of payment processing, MOD required Forma-Con to supply Tucker with supporting documents, including: (i) a payment application; (ii) a valid certificate of General Liability insurance, and (iii) Workplace Safety and Insurance Board (“**WSIB**”) clearance certificates.<sup>36</sup> If the legal entity that was performing the Contract changed, MOD required new proof of insurance in the name of that legal entity.<sup>37</sup> According to Mr. Ball, these documents were all “equally important.”<sup>38</sup> If any of the documents were deficient, a contractor would be asked to rectify its payment application before being paid.<sup>39</sup>

29. In keeping with MOD’s requirements, Forma-Con obtained General Liability insurance certificates and WSIB clearance certificates. From 2014 – 2016, these documents bore the name of 508: The General Liability insurance certificates named 508 as the insured; the WSIB

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<sup>34</sup> 10<sup>th</sup> Report, para. 2.0.9, MR, Tab 2, p. 21.

<sup>35</sup> Ball Cross, BOT, Tab 1, p. 16, q. 69; Contract, SC 7, BOT, Tab 1.A, p.41.

<sup>36</sup> 508’s Progress Billings [“508 Billings”], MR, Tab 2.S, p. 463.

<sup>37</sup> Ball Cross, BOT, Tab 1, pp. 26-27, qq. 128-129.

<sup>38</sup> Ball Cross, BOT, Tab 1, p.29, qq. 140-141.

<sup>39</sup> Ball Cross, BOT, Tab 1, p. 29, q. 141.

clearance certificates identified 508 as the “Contractor” being certified; and the payment applications were on 508 letterhead.<sup>40</sup>

30. MOD approved and paid all 15 of Forma-Con’s payment applications in 508’s name, which Forma-Con submitted to Tucker between October 31, 2015 and December 20, 2016.<sup>41</sup> Neither MOD nor Tucker raised an objection that any of the documents submitted in this timeframe did not name 502.

31. Beginning in January 2017, following the dissolution of 508 and the assignment of the Contract to 803, Forma-Con began submitting payment applications that identified 803 as the Trade Contractor: “Forma-Con Construction (a division of 1033803 Ontario Inc.)”.<sup>42</sup> Between January 20, 2017 and November 22, 2018, Forma-Con submitted 23 payment applications in 803’s name.<sup>43</sup> The payment applications were accompanied by General Liability insurance certificates with 803 as the named insured and, in all but two instances, WSIB clearance certificates identifying 803 as the “Contractor.”<sup>44</sup>

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<sup>40</sup> WSIB Clearance Certificates for 508, MR, Tab 2.L, pp. 168-173; General Liability Insurance Certificate for 508, MR, Tab 2.M, p. 175; 508 Billings, MR, Tab 2.S, pp. 197-383.

<sup>41</sup> 508 Billings, MR, Tab 2.S, pp. 200, 209, 221, 233, 260, 269, 280, 292, 304, 315, 327, 338, 356, 368, 374.

<sup>42</sup> 10th Report, para. 2.4.8-9, p. 29; 803’s Progress Billings [“803 Billings”], MR, Tab 2.T, p. 386.

<sup>43</sup> 803 Billings, MR, Tab 2.T, pp. 385-658. One invoice for March 2018 was issued on 508 letterhead but was accompanied by a WSIB clearance certificate identifying 803 as the Contractor. The name on the invoice is an error: 803 Billings, MR, Tab 2.T, p. 596.; 10th Report, FN 6, MR, Tab 2, p. 27.

<sup>44</sup> 10th Report, paras. 2.4.3-4, MR, Tab 2, p. 28; 803 Billings, MR, Tab 2.T, pp. 386, 396, 408, 418, 430, 442, 455, 469, 483, 495, 509, 522, 534, 545, 569, 592, 596, 611, 620, 637, 650, 653, 657. The WSIB Certificates attached to the first two progress billings issued by 803, dated January 20 and February 17, 2017, have WSIB Certificates that identify the Trade Contractor as 508. The remaining 803 Billings have a WSIB Certificate attached which identifies 803 as the Trade Contractor. See also General Liability Insurance Certificate for 803, MR, Tab 2.V, p. 666.

32. Neither Tucker nor MOD raised any objection to these payment applications, General Liability insurance certificates or WSIB certificates in 803's name. Instead, both Tucker and MOD approved the payment applications and the supporting documentation, and MOD paid Forma-Con for its work, less the Massey Holdback.

33. The WSIB clearance certificates were especially important to MOD because without them MOD was liable for Forma-Con's unpaid premiums or other amounts owing to the WSIB.<sup>45</sup> In Mr. Ball's words, the clearance certificate had "to be compliant with the trade that [MOD was] certifying work for."<sup>46</sup> MOD faced financial risk if this was not the case.

34. Neither MOD nor Tucker objected to 803's WSIB clearance certificates (or any of the other supporting documents bearing 803's name), nor did it ever ask for WSIB clearance certificates to be provided in 502's or 508's name.<sup>47</sup>

35. Rather, MOD and Tucker approved these documents by paying Forma-Con. As Mr. Ball explained, if Forma-Con received payment for an invoice, it meant that the payment and the supporting documents had been "approved by Tucker first and then MOD second."<sup>48</sup> Payment was approval of the General Liability insurance certificates and the WSIB clearance certificates.

36. Payment also included MOD's approval of a total amount that included the Massey Holdback. Forma-Con's invoices included a line item labelled "Holdback" that identified the 10% holdback amount that would not be paid until a later date.<sup>49</sup>

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<sup>45</sup> *Workplace Safety and Insurance Act, 1997*, [S.O. 1997, c. 16, Sched A](#), ss.141.2.

<sup>46</sup> Ball Cross, BOT, Tab 1, p. 25, q. 120.

<sup>47</sup> 10<sup>th</sup> Report, para. 2.4.10, MR, Tab 2, p. 29.

<sup>48</sup> Ball Cross, BOT, Tab 1, p. 23, q. 110.

<sup>49</sup> See e.g. 803 Billings, MR, Tab 2.T, pp. 386, 396, 408, 418.

*(ii) Tucker acknowledges the assignment of the Contract*

37. Correspondence between Forma-Con and Tucker demonstrate that Tucker was expressly made aware of the corporate change. On April 4, 2017, Bruce Rogers, Tucker’s Site Manager for the Project, forwarded Gordon Graham, Forma-Con’s project manager, a copy of insurance documents provided by Primo Mechanical Inc. relating to crane lifts to be used on the Project, referencing 508. Mr. Graham reminded Mr. Rogers that the insurance documents named the wrong numbered company and that they needed to be corrected to properly identify Forma-Con as “(a division of 10833803 Ontario Inc.)” [emphasis in original] as an insured.<sup>50</sup>

38. Mr. Rogers responded “OK I’ll get it changed,”<sup>51</sup> and provided a revised certificate in 803’s name.<sup>52</sup> Tucker continued to inform other parties of the change in the proper name of the numbered corporation behind Forma-Con. For example, In March 2018, Tucker, informed a third party that Forma-Con should be identified as 803: “FORMA-CON CONSTRUCTION, A DIVISION OF 1033803 ONTARIO LTD.”<sup>53</sup>

39. Tucker’s approval of Forma-Con’s documents is noteworthy because when the specific legal entity was important for MOD, then Tucker would expressly ask for the correct legal entity to be identified. Where required, Tucker would ask parties to resubmit payment applications to properly identify those legal entities.<sup>54</sup>

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<sup>50</sup> Correspondence re “Primo mechanical insurance doc for crane lifts”, MR, Tab 2.AA, p. 683.

<sup>51</sup> Correspondence re “Primo mechanical insurance doc for crane lifts”, MR, Tab 2.AA, p. 682.

<sup>52</sup> Certificate of Liability Insurance, MR, Tab 2.CC, p. 689.

<sup>53</sup> Correspondence re “Massey Tower – Lifting Docs and Crane Usage”, MR, Tab 2.EE, p. 694.

<sup>54</sup> Ball Cross, BOT, Tab 1, pp. 38-39, qq. 192-200.

**F. THE RECEIVER IS APPOINTED AND ENTERS INTO THE CLOSE-OUT AGREEMENT WITH MOD**

40. On November 19, 2018, while construction was still underway on the Project, the Receiver was appointed by the Receivership Order.<sup>55</sup>

41. On December 27, 2018, the Receiver and MOD entered into an agreement under which the Receiver, on behalf of 803, agreed to complete 803's work on the Project (the "**Close-Out Agreement**").<sup>56</sup> During these negotiations, counsel for MOD argued for the first time that the Receiver lacked authority to deal with the Contract because the proper counterparty was 502, and the Receivership Order did not give the Receiver authority with respect to 502.<sup>57</sup> MOD and the Receiver included a provision that the Close-Out Agreement was "without prejudice to the Parties' rights as it relates to disputes regarding the identity of the counterparty to the Owner under the Construction Contract (1428502 Ontario Limited versus 1033803 Ontario Inc.)"<sup>58</sup>

42. In the Close-Out Agreement, MOD agreed that the Massey Holdback was Property under the Receivership Order:

Subject to Recital 3 above, the [Massey] Holdback is Property (as such term is defined in the Receivership Order) over which the Receiver has been appointed receiver and manager pursuant to the Receivership Order.<sup>59</sup>

43. The Receiver's purpose for entering into and performing the Close-Out Agreement was to preserve the Estate's claim to the Massey Holdback in the amount of \$2,038,704.26.<sup>60</sup> The

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<sup>55</sup> Receivership Order, MR, Tab 2.A, p. 39.

<sup>56</sup> Close-Out Agreement, December 27, 2018 ["Close-Out Agreement"], MR, Tab 2.JJ, p. 731.

<sup>57</sup> 10<sup>th</sup> Report, para. 2.5.4., MR, Tab 2, p. 32.

<sup>58</sup> Close-Out Agreement, MR, Tab 2.JJ, s. 1.6(a), MR, Tab 2.JJ, p. 734.

<sup>59</sup> Close-Out Agreement, Recital 5, MR, Tab 2.JJ, p. 732.

<sup>60</sup> 10<sup>th</sup> report, paras. 2.5.3-5, MR, Tab 2, p. 32.



Receiver, on behalf of 803, completed the work required under the Close-Out Agreement, and MOD paid the Receiver for that work, less the Massey Holdback.<sup>61</sup>

(i) *MOD Refuses to pay the Massey Holdback*

44. Following completion of the Project, the Receiver sought payment of the Massey Holdback, but MOD refused to pay it. The Receiver commenced an action with respect to a lien registered against the Project in the amount of \$2,038,704.26 (the “**Lien Action**”).<sup>62</sup>

45. On March 10, 2022, over three years after the Receiver filed its lien, MOD commenced a motion for leave to dismiss the Lien Action on the basis that its refusal to pay the Massey Holdback was justified because neither 508 nor 803 were proper counterparties to the Contract.<sup>63</sup>

46. On June 8, 2022, the Receiver commenced a separate proceeding against MOD related to delays, productivity impacts and increased costs in relation to the Project and the payment of the Massey Holdback (the “**Delay Action**”).<sup>64</sup> MOD’s Statement of Defence and Counterclaim in the Delay Action again asserted that the Receiver had no standing to bring the action, because the proper counterparty to the Contract was 502, not 803.<sup>65</sup> Despite taking this position, MOD also sought in its Counterclaim to the Delay Action to make the Receiver liable for “all breaches and damages” caused by Forma-Con under the Contract.<sup>66</sup>

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<sup>61</sup> 10<sup>th</sup> Report, para. 2.5.11, MR, Tab 2, p. 33; Receiver’s Progress Billings, MR, Tab 2.U, pp. 660-664.

<sup>62</sup> Statement of Claim dated March 13, 2019, MR, Tab 2.LL, p. 760.

<sup>63</sup> Notice of Motion dated March 10, 2022, MR, Tab 2.RR, p. 834.

<sup>64</sup> Statement of Claim dated June 8, 2022, MR, Tab 2.UU, p. 847.

<sup>65</sup> Statement of Defence and Counterclaim dated July 12, 2022 [“SODC”], MR Tab 2.VV, p. 856.

<sup>66</sup> SODC, para. 25, MR, Tab 2.VV, pp. 859-860.

### **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

#### **G. ISSUES**

47. The issue on this motion is whether the Receiver can proceed with the Lien Action and the Delay Action and defend any counterclaim brought by MOD in those actions. MOD takes the position that the Receiver cannot do so because 803 is not a party to the Contract, and therefore the Receiver lacks standing. To support this position, MOD relies on technical arguments that resile from its prior conduct.

48. In this factum, the Receiver makes the following arguments:

- (a) ***Rectification***: MOD and the Receiver agree that the Contract was properly between MOD and 508. The Contract should be rectified to name 508.
- (b) ***Assignment***: The Contract was assigned, at law or equity, from 508 to 803. 803, as 508's successor and legal representative, automatically received the benefits and burdens of the Contract.
- (c) ***Estoppel***: MOD cannot resile from the shared understanding that 803 is a party to the Contract. Forma-Con has relied on this understanding to its detriment, and it would be unjust to allow MOD to take a different position now that the Contract is complete.

#### **H. RECTIFICATION OF THE CONTRACT TO REPLACE MISTAKEN REFERENCE TO 502 WITH 508**

49. The Contract identifies the Forma-Con party as "1428502." The "2" was a typo for "8". All parties agree it was an error. Such clerical errors are the quintessential application of

rectification, including fixing a mistaken single digit in the identification of a numbered company.<sup>67</sup> The Contract should be rectified to replace “1428502” with “1428508.”

50. In cases of common mistake, equity requires the following for rectification: (i) the parties had reached a prior agreement whose terms are definite and ascertainable; (ii) the agreement was still effective when the instrument was executed; (iii) the instrument fails to record accurately that prior agreement; and (iv) if rectified as proposed, the instrument would carry out the agreement.<sup>68</sup>

51. This case of a typographical error meets all of the criteria: at the time of signing, both parties intended for the contract to reflect Forma-Con as 1428508, which was improperly recorded as 1428502. The proposed rectification—changing a single number—carries out the intent of the agreement to properly identify the numbered company.

## **I. THE CONTRACT WAS VALIDLY ASSIGNED FROM 508 TO 803**

52. Through the Dissolution Agreement, the Contract was assigned from 508 to 803, automatically. MOD’s consent was not required. Nonetheless, MOD did consent as evidenced by its writing and conduct.

### ***(i) The Contract was Assigned to 803***

53. The Dissolution Agreement effected an assignment of the Contract from 508 to 803. The Assignment is valid as either a legal or, in the alternative, as an equitable assignment.

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<sup>67</sup> *Ajanta Management Ltd. v. 2445262 Manitoba Ltd.* (1993), [91 Man. R. \(2d\) 17](#) (Man. Q.B.), paras. 15-16, aff’d 95 Man. R. (2d) 160 (C.A.).

<sup>68</sup> *Canada (AG) v. Fairmont Hotels Inc.*, [2016 SCC 56](#), para. 14.

54. For an effective legal assignment, it must be (i) in writing by the assignor (ii) in whole and (iii) on express notice to the counterparty.<sup>69</sup> The Dissolution Agreement satisfies the first two requirements on its face; the disputed question is whether there is notice.

55. Forma-Con gave express notice of the assignment to Tucker and MOD through documents and correspondence. First, it provided (i) payment applications; (ii) WSIB clearance certificates and (iii) general liability insurance certificates—all documents required by MOD to be provided by the Trade Contractor, the party performing the concrete pouring and forming services, to receive progress payments—in the name of 803. This could indicate only one thing: that 803 was acting as Trade Contractor and therefore an assignee of the Contract. Second, Forma-Con also corresponded with Tucker concerning the need to change the name of the numbered company in the Primo insurance policy to 803.<sup>70</sup>

56. In the alternative, notice is not a requirement of equitable assignment.<sup>71</sup> Equity considers only the intentions of the assignor and assignee to assign. The Dissolution Agreement provides the express intention that the Contract be transferred from 508 to 803. Therefore, irrespective of whether MOD received express notice, the Contract was assigned at either law or equity.

*(ii) Consent was not required for a valid assignment*

57. MOD objects to the assignment. It argues that the assignment is invalid because MOD did not consent. The Receiver disagrees. First, no consent was required here because 803 is the successor and legal representative of 508. Second, if consent was required, MOD provided it.

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<sup>69</sup> *Conveyancing and Law of Property Act*, [R.S.O. 1990, c. C.34](#), s. 53(1).

<sup>70</sup> Correspondence re “Primo mechanical insurance doc for crane lifts”, MR, Tab 2.AA, p. 683.

<sup>71</sup> *Landmark Vehicle Leasing Corp. v. Mister Twister Inc.*, [2015 ONCA 545](#), para. 10.

58. The Contract contains two provisions relating to its assignment:

- (a) The enurement clause in article A-9.1, entitled “SUCCESSION” provides: “The Contract shall enure to the benefit of and be binding upon the parties hereto, their respective heirs, legal representatives, successors, and assigns.”
- (b) General Condition 1.4 provides for written consent for assignments: “Neither party to the Contract shall assign the Contract or a portion thereof without the written consent of the other, which consent shall not be unreasonably withheld.”

59. It is article A-9.1 that is the relevant clause in this case. 803 is both the successor and legal representative of 508:

- (a) **Successor.** In the Dissolution Agreement, 508 expressly refers to 803 as “its successor.”<sup>72</sup> This is consistent with the accepted definition of *successor* in article A-9.1; the common understanding of successor in such enurement clauses is that of a “corporate successor.” A corporate successor, “denotes another corporation which, through merger, amalgamation or some other type of legal succession, assumes the burdens and becomes vested with the rights of the first corporation.”<sup>73</sup> Because 803 assumes all the rights and burdens of 508, it acts in all respects as the corporate successor of 508.
- (b) **Legal Representative.** Under section 5 of the Dissolution Agreement, 508 provides 803 with its power of attorney and appoints 803 its legal representative. 803 is appointed the “lawful attorney” of 508 “with full power of substitution” to take all actions to effect the transfer of all property to 803. This power of attorney expressly survives the dissolution of 508.

60. Article A-9.1 provides for the enurement of the benefit and burden of the Contract to a successor or legal representative, such as 803. An enurement provision constitutes “an express

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<sup>72</sup> Dissolution Agreement, s. 5(a), MR, Tab 2.P, p. 183.

<sup>73</sup> *Resolute FP Canada Inc. v. Ontario (Attorney General)*, [2019 SCC 60](#), para. 160 (dissenting but not on this point).

stipulation by the contracting parties that they intended the benefit” of the Contract to be shared beyond the immediate signatory.<sup>74</sup> No consent is required.

61. To interpret A-9.1 the Contract must be read as a whole “giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.”<sup>75</sup>

62. The clear, unequivocal language of the enurement clause includes no requirement for consent from the counterparty for a successor or legal representative. Instead, the enurement clause provides that the benefit *and* burden of the Contract attaches automatically. In short, if either party to the Contract goes through a reorganization—including a merger, amalgamation or other corporate change—whatever successor emerges simply continues both the obligations and concomitant benefits under the Contract. The same applies if a legal representative, like the holder of a power of attorney or a trustee, is acting on a party’s behalf.<sup>76</sup>

63. The factual matrix is consistent with this interpretation. The evidence shows that, at time of contract formation, the focus was for MOD to contract with Forma-Con, irrespective of the numbered company bearing this trade name. Mr. Ball stated in his cross-examination that MOD wanted to contract with the Forma-Con entity irrespective of the numbered company behind it.<sup>77</sup>

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<sup>74</sup> *Brown v. Belleville (City)*, [2013 ONCA 148](#), para. 84.

<sup>75</sup> *Sattva Capital Corp. v. Creston Moly Corp.*, [2014 SCC 53](#), para. 47.

<sup>76</sup> Nor does the consent required in GC 1.4 inject a consent requirement for successors or legal representatives. Article A-9.1, as a provision of the “Agreement”, expressly takes precedence in the event of a conflict with a “General Condition.” See Contract, GC 1.1.6, BOT, Tab 1.A, p.11.

<sup>77</sup> Ball Cross, BOT, Tab 1, p. 56, q. 291.

64. As Mr. Ball further explained, what mattered to MOD was that “it was the Forma-Con entity that was doing the work” and “was contractually obligated to do the job,”<sup>78</sup> with the management MOD knew at Forma-Con, with the expertise MOD knew Forma-Con had,<sup>79</sup> and with Forma-Con’s equipment.<sup>80</sup> As Mr. Ball then reiterated, the numbered company behind Forma-Con did not matter.<sup>81</sup>

65. The parties’ business purpose at the time of contracting is an important part of the factual matrix.<sup>82</sup> Here the business purpose was to contract with the business operating as Forma-Con, whatever its specific corporate form. This factual matrix is consistent in requiring the Contract to follow to successors without formality. In contrast, there is no evidence of any business purpose of requiring consent or providing the counterparty with a veto on corporate reorganizations.

***(iii) In the alternative, consent to assign was given***

66. In the alternative, if—despite 803 being the successor and legal representative of 508—written consent is required, such consent was granted.<sup>83</sup> Tucker was authorized to act on behalf of MOD to the extent provided in the Contract, which includes the administration of the Contract and interpretations of the Contract related to the requirements of the Contract. Both of these categories include the ability to consent to assignment.<sup>84</sup> As Mr. Ball stated in his cross-examination, it was Tucker’s role to act on MOD’s behalf when administering the Contract.<sup>85</sup>

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<sup>78</sup> Ball Cross, BOT, Tab 1, p. 56, qq. 291-292.

<sup>79</sup> Ball Cross, BOT, Tab 1, p. 56, qq. 294-295.

<sup>80</sup> Ball Cross, BOT, Tab 1, p. 55, q. 286.

<sup>81</sup> Ball Cross, BOT, Tab 1, p. 56, q. 296.

<sup>82</sup> *Dumbrell v. Regional Group of Cos.*, [2007 ONCA 59](#), para. 55.

<sup>83</sup> 10<sup>th</sup> Report, para. 2.4.16, MR, Tab 2, p. 31.

<sup>84</sup> Contract, GC 2.2.1-2.2.2, BOT, Tab 1.A, p.12.

<sup>85</sup> Ball Cross, BOT, Tab 1, p. 16, q. 72.

67. Tucker gave written consent to assignment, on behalf of MOD, through its correspondence. In April 2017 Bruce Rogers, of Tucker, was informed that the relevant entity operating as Forma-Con was not 508 but instead 803. Rogers replied “Ok I’ll get it changed”—which is a consent—and then acted to change the relevant documents.<sup>86</sup> MOD now argues that these were mere insurance documents. But, as discussed above, MOD and Tucker took insurance coverage very seriously; there is no contractual basis for Tucker to provide consent to assignment for some purposes but not others.

68. Furthermore, MOD’s and Tucker’s approval of progress payments in the name of 803 was a consent to the assignment from 508 to 803. MOD and Tucker approved these progress payments for the Trade Contractor, *i.e.* the Contract counterparty, identified as 803, with insurance and WSIB certificates in the name of 803. Several instances of these consents in writing are in the record.<sup>87</sup>

69. There is no evidence that MOD ever wanted to decline consent to the assignment of the Contract to 803. Mr. Ball’s evidence is that MOD wanted the entity with the trade name Forma-Con to perform the concrete pouring and forming services. Mr. Ball conceded that “it didn’t matter” which numbered corporation was performing the work, “as long as it was the Forma-Con entity that was doing the work.”<sup>88</sup> At all times, MOD wanted access to “Forma-Con’s equipment,”<sup>89</sup> with “the management [MOD] knew at Forma-Con,”<sup>90</sup> and with “the expertise

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<sup>86</sup> Correspondence re “Primo mechanical insurance doc for crane lifts”, MR, Tab 2.AA, p. 682.

<sup>87</sup> See *e.g.* 803 Billings, MR, Tab 2.T, pp. 427, 439, 477, 499, 506, 517.

<sup>88</sup> Ball Cross, BOT, Tab 1, p. 56, q. 291. See also p. 56, q. 296.

<sup>89</sup> Ball Cross, BOT, Tab 1, p. 55, q. 286.

<sup>90</sup> Ball Cross, BOT, Tab 1, p. 56, q. 294.



[MOD] knew Forma-Con had.”<sup>91</sup> Following the assignment, Forma-Con, its employees and equipment, were operating through 803 and were performing the services under the Contract.

**J. ESTOPPEL BY CONVENTION PREVENTS MOD FROM DENYING THAT 803 IS PARTY TO CONTRACT**

70. From 2017 until the end of 2018, Forma-Con and MOD (including Tucker) acted on the shared assumption that 803 was the proper contractual counterparty, without concern. Once the Receiver was appointed, MOD changed its mind, objected to 803 as a counterparty and refused to pay the holdback. The formalities of assignment have only now been raised in this proceeding.

71. Under the doctrine of estoppel by convention, equity protects against such late-stage reversals. Where parties rely on a shared assumption to their detriment, one party cannot later resile from the assumption, even if the assumption was wrong. Here, MOD is estopped from arguing that 803 is not a party to the Contract.

72. Estoppel by convention has three elements: (i) the parties’ dealings were based on a shared assumption of fact or law, even if mistaken; and (ii) a party must have acted in reliance on the shared assumption; and (iii) it would be unjust or unfair to allow one of the parties to resile or depart from the common assumption.<sup>92</sup>

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<sup>91</sup> Ball Cross, BOT, Tab 1, p. 56, q. 295.

<sup>92</sup> *Ryan v. Moore*, [2005 SCC 38](#), para. 59; *Fram Elgin Mills 90 Inc. v. Romandale Farms Ltd.*, [2021 ONCA 201](#), para. 144.

(i) ***MOD and Forma-Con Shared the Assumption that 803 was a Party***

73. The shared assumption need not be created or encouraged by the estopped party. Rather, the assumption must simply be shared in the sense that each party of aware the assumption is held by the other. In sum, the parties must be of a “like mind.”<sup>93</sup>

74. Here, the shared assumption was simple: from January 2017 onwards, 803 was a party to the Contract and bore the benefit and burden of the Contract.

75. The parties’ conduct show that they were of a like mind. Beginning in 2017, 803 acted in all respects as the Trade Contractor and a party to the Contract. 803 performed the services, issued progress billings, provided insurance and submitted WSIB clearance certificates. MOD, and Tucker acting on its behalf, shared in this assumption. They reviewed, approved and paid progress billings issued in the name of 803, after receiving insurance and WSIB clearance certificates from 803. They did so for two years. MOD paid 803 \$11,729,116 over this period.<sup>94</sup>

76. MOD’s evidence is that it “believed Forma-Con was the trade contractor.”<sup>95</sup> During the years of 2017-2018, 803 was the only entity operating as Forma-Con. MOD cannot now conveniently claim that it did not share the understanding that 803 was its counterparty as a reason to justify not paying the Massey Holdback. Its sole witness, Mr. Ball, does not depose in his affidavit that he or MOD were unaware or ignorant that they were dealing with 803. And there is no reason to believe that they were unaware. For example, Mr. Ball testified to the importance MOD placed on insurance and WSIB, which were “equally important as part of

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<sup>93</sup> *Fram Elgin Mills 90 Inc. v. Romandale Farms Ltd.*, [2021 ONCA 201](#), paras. 154-55.

<sup>94</sup> 10<sup>th</sup> Report, para. 2.0.9, MR, Tab 2, p. 21.

<sup>95</sup> Ball Cross, BOT, Tab 1, p. 51, q. 264.

[MOD's] process" as the payment application itself.<sup>96</sup> If any of the documents were wrong a trade contractor would be asked to rectify the application before being paid.<sup>97</sup>

77. Indeed, as discussed above at para. 33, it was "very important" for MOD's trade contractors to maintain current WSIB.<sup>98</sup> If a trade contractor did not pay, MOD would be liable for unpaid WSIB premiums. A WSIB clearance certificate from the wrong trade contractor does nothing to protect MOD from liability.<sup>99</sup> In short, if MOD truly believed it was 502 or 508 acting as the Trade Contractor under the Contract, then receiving two years of WSIB clearance certificates in the name of 803 would have offered no protection to it from WSIB liability. MOD, through Tucker, would have asked for new clearance certificates.<sup>100</sup> It never did.<sup>101</sup> Instead, as Mr. Ball confirmed, MOD approved each of the progress billings.<sup>102</sup>

***(ii) 803 relied on the shared assumption to carry out the Contract work***

78. 803 relied on the shared assumption that it was a party to the Contract—including bearing the entitlement to full payment—to carry out the work on the Project between 2017 and 2018. For this work, it only received 90% of the payment owed. It expected the final 10% would be paid to it when the Massey Holdback was released. If MOD had, at any time, taken a position contrary to the shared assumption *i.e.* that 803 was not a party to the Contract, 803 would not have continued to provide the work.<sup>103</sup>

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<sup>96</sup> Ball Cross, BOT, Tab 1, p. 29, q. 140.

<sup>97</sup> Ball Cross, BOT, Tab 1, p. 29, q. 142.

<sup>98</sup> Ball Cross, BOT, Tab 1, pp. 24 l. 16 – p. 25 l. 2.

<sup>99</sup> Ball Cross, BOT, Tab 1, pp. 25 l. 20 – p. 26 l. 2.

<sup>100</sup> Ball Cross, BOT, Tab 1, p. 45, q. 236.

<sup>101</sup> Ball Cross, BOT, Tab 1, p. 49, q. 258.

<sup>102</sup> Ball Cross, BOT, Tab 1, p. 31, q. 150.

<sup>103</sup> Affidavit of Steven Aquino sworn August 11, 2022, para. 11, MR, Tab 3, pp. 865-866.

*(iii) Allowing MOD to treat 803 as a non-party would be unjust*

79. It would be unfair to allow MOD to resile from the shared assumption that 803 was a party to the Contract. 508 has been dissolved. If 803 is not a party to the Contract and if the Receiver cannot pursue the claim against MOD, then 803 (and its creditors) will lose access to the Massey Holdback of more than \$2 million.

80. Equally, it would be unjust to allow MOD to benefit from denying 803 is a party to the Contract. MOD did not raise any concern about the identity of its counterparty until the Receiver was appointed in 2018. Its concern was purely tactical. MOD knows that if the Receiver cannot pursue the Massey Holdback, then no one will. MOD wants to keep the 10% holdback for itself, keeping more than \$2 million for its own account. Its witness, Mr. Ball, admitted this frankly:

Q : [I]s it MOD's position that it should have to only pay 90 percent of the contract value for 100 percent of the contract work?

Mr. Ball: Correct.

81. Allowing MOD to receive 100% of the work but pay for only 90% would deprive Forma-Con's creditors of more than \$2 million. This would be unjust.

**K. CONCLUSION: THE MASSEY HOLDBACK IS "PROPERTY" AND THE RECEIVER IS ENTITLED TO PURSUE CLAIMS**

82. The dispute before this Court is whether the Receiver may continue to prosecute the lien claims against MOD, enforce remedies under the Contract and recover the Massey Holdback.

83. The Receivership Order expressly authorizes the Receiver to collect the Property (as such term is defined in the Receivership Order), enforce remedies and commence and pursue actions

with respect to the Property.<sup>104</sup> The Contract and the Massey Holdback fall within the definition of “Property” as it is defined in paragraph 2 of the Receivership Order:

THIS COURT ORDERS that pursuant to section 243(1) of the BIA and section 101 of the CJA, KSV is hereby appointed Receiver, without security, of (i) all of the assets, undertakings and properties of the Debtors acquired for, or used in relation to a business carried on by the Debtors, including all proceeds thereof... [emphasis added]

84. For all of the reasons elaborated in the previous sections in this factum, the Contract and the Massey Holdback are assets of the 803 and therefore Property.

85. In the alternative, even if the Contract and Massey Holdback were not an asset of 803—which the Receiver denies—the Contract and Holdback were nonetheless used in relation to the business carried out by 803 and are therefore still Property.

86. The Receiver therefore seeks an order that it is permitted to pursue claims against MOD in the Lien Action and the Delay Action and seek to recover the Massey Holdback. If the Receiver is not permitted to pursue the 10% of payment MOD owes to Forma-Con for work already performed, MOD will have unfairly defeated the interests of Forma-Con’s creditors.

#### **PART IV - ORDER REQUESTED**

87. The Receiver seeks an order as outlined in the notice of motion as well as its costs on this motion.

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<sup>104</sup> Receivership Order, para. 2, MR, Tab 2.A, p. 40.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 18th day of October, 2022.



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Jeremy Opolsky / Jake Babad / Scott Bomhof

Lawyers for KSV Restructuring Inc.,  
in its capacity as Court-appointed Receiver for  
1033803 Ontario Inc. and 1087507 Ontario  
Limited

**SCHEDULE A**  
**LIST OF AUTHORITIES**

1. Ajanta Management Ltd. v. 2445262 Manitoba Ltd. (1993), [91 Man. R. \(2d\) 17](#) (Man. Q.B.)
2. *Brown v. Belleville (City)*, [2013 ONCA 148](#)
3. *Canada (AG) v. Fairmont Hotels Inc.*, [2016 SCC 56](#)
4. *Dumbrell v. Regional Group of Cos.*, [2007 ONCA 59](#)
5. *Fram Elgin Mills 90 Inc. v. Romandale Farms Ltd.*, [2021 ONCA 201](#)
6. *Landmark Vehicle Leasing Corp. v. Mister Twister Inc.*, [2015 ONCA 545](#)
7. *Resolute FP Canada Inc. v. Ontario (Attorney General)*, [2019 SCC 60](#)
8. *Ryan v. Moore*, [2005 SCC 38](#)
9. *Sattva Capital Corp. v. Creston Moly Corp.*, [2014 SCC 53](#)

**SCHEDULE B**  
**TEXT OF STATUTES, REGULATIONS & BY - LAWS**

*Construction Act, R.S.O. 1990, c. C.30, ss. 22, 31(2)*

**Holdbacks**

**Basic holdback**

**22** (1) Each payer upon a contract or subcontract under which a lien may arise shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract until all liens that may be claimed against the holdback have expired or been satisfied, discharged or otherwise provided for under this Act. R.S.O. 1990, c. C.30, s. 22 (1); 2017, c. 24, s. 17 (1), 66.

**Separate holdback for finishing work**

(2) Where the contract has been certified or declared to be substantially performed but services or materials remain to be supplied to complete the contract, the payer upon the contract, or a subcontract, under which a lien may arise shall retain, from the date certified or declared to be the date of substantial performance of the contract, a separate holdback equal to 10 per cent of the price of the remaining services or materials as they are actually supplied under the contract or subcontract, until all liens that may be claimed against the holdback have expired or been satisfied, discharged or otherwise provided for under this Act. R.S.O. 1990, c. C.30, s. 22 (2); 2017, c. 24, s. 17 (2), 66.

**When obligation to retain applies**

(3) The obligation to retain the holdbacks under subsections (1) and (2) applies irrespective of whether the contract or subcontract provides for partial payments or payment on completion. R.S.O. 1990, c. C.30, s. 22 (3).

**Permissible forms of holdback**

(4) Some or all of any holdbacks may, instead of being retained in the form of funds, be retained in one or more of the following forms:

1. A letter of credit in the prescribed form.
2. A demand-worded holdback repayment bond in the prescribed form.
3. Any other form that may be prescribed. 2017, c. 24, s. 17 (3).

...

**Expiry of liens**



**31** (1) Unless preserved under section 34, the liens arising from the supply of services or materials to an improvement expire as provided in this section. R.S.O. 1990, c. C.30, s. 31 (1); 2017, c. 24, s. 67.

### **Contractor's liens**

(2) Subject to subsection (4), the lien of a contractor,

- (a) for services or materials supplied to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the 60-day period next following the occurrence of the earlier of,
  - (i) the date on which a copy of the certificate or declaration of the substantial performance of the contract is published as provided in section 32, and
  - (ii) the date the contract is completed, abandoned or terminated; and
- (b) for services or materials supplied to the improvement where there is no certification or declaration of the substantial performance of the contract, or for services or materials supplied to the improvement after the date certified or declared to be the date of substantial performance, expires at the conclusion of the 60-day period next following the occurrence of the earlier of,
  - (i) the date the contract is completed, and
  - (ii) the date the contract is abandoned or terminated. R.S.O. 1990, c. C.30, s. 31 (2); 2017, c. 24, s. 26 (1-5), 66.

*Conveyancing and Law of Property Act, R.S.O. 1990, c. C.34, s. 53(1).*

### **Assignments of debts and choses in action**

**53** (1) Any absolute assignment made on or after the 31st day of December, 1897, by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action is effectual in law, subject to all equities that would have been entitled to priority over the right of the assignee if this section had not been enacted, to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor. R.S.O. 1990, c. C.34, s. 53 (1).

*Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Sched A, s.141.2.*

### **Construction work, obligations respecting certificates**

## **Application**

**141.2** (1) This section applies in respect of a person who directly retains a contractor or subcontractor to perform construction work. 2008, c. 20, s. 5.

## **Obtaining certificate**

(2) Before permitting the contractor or subcontractor to begin construction work, the person shall obtain a certificate or a copy of a certificate issued under subsection (3). 2008, c. 20, s. 5.

## **Issuance by Board**

(3) If the Board is satisfied that the contractor or subcontractor has registered with the Board and complied with the payment obligations under this Act, it shall issue to the contractor or subcontractor or to the person, on request, a certificate that,

- (a) confirms the registration and compliance; and
- (b) states the period during which the certificate is in effect. 2008, c. 20, s. 5.

## **Revocation**

(4) The Board may, at any time, revoke the certificate by giving a written notice of revocation to the contractor or subcontractor. 2008, c. 20, s. 5.

## **Notice**

(5) On receiving the notice of revocation under subsection (4), the contractor or subcontractor shall immediately inform the person. 2008, c. 20, s. 5.

## **New certificate**

(6) The person shall obtain a new certificate from the Board or from the contractor or subcontractor if, before the construction work is completed,

- (a) the certificate expires; or
- (b) the certificate is revoked and the person becomes aware of the fact. 2008, c. 20, s. 5.

## **Prohibition**

(7) The contractor or subcontractor shall not perform construction work for the person during a period for which no certificate is in effect. 2008, c. 20, s. 5.

## **Same**

(8) The person shall not permit the contractor or subcontractor to perform construction work for the person during a period for which the person is aware that no certificate is in effect. 2008, c. 20, s. 5.

**Retention of certificate or copy**

(9) The person shall keep a certificate or copy of a certificate obtained under this section for at least three years after the date it is obtained, and shall produce it for inspection at the request of the Board or of a person appointed or authorized by the Board. 2008, c. 20, s. 5.

**Exempt home renovation work**

(10) Subsections (1) to (9) do not apply in respect of a person who directly retains a contractor or subcontractor to perform exempt home renovation work as defined in subsection 12.2 (10). 2008, c. 20, s. 5.

**SCHEDULE C**  
**CHRONOLOGY OF RELEVANT FACTS**

(See Tenth Report, MR, Tab 2, pp. 21-22)

EVENT	DATE	REPORT REFERENCE
Incorporation of 1033803	June 16, 1993	2.0(1)
Incorporation of Second Floor Ltd. (1428502)	July 6, 2000	2.3(11)
Incorporation of 1428508	July 6, 2000	2.3(6)
Dissolution of Second Floor Ltd. (1428502)	February 19, 2007	2.3(11)
Forma-Con registered as Business Tradename by 1033803	April 14, 2011	2.3(10)
Execution of Massey Tower Project Agreement	December 19, 2014	2.3(1)
1428508 Dissolution Agreement	December 31, 2014	2.4(3)
Tucker advised that proper party is 1428508 in writing re: Terraprobe insurance	October 26, 2015	2.3 (12)
Delivery to MOD of first 1428508 Insurance Certificate (included in Progress Billing No. 1)	October 30, 2015	2.3(15)
1428508 Progress Billing Nos. 1-9	October 31, 2015 – June 20, 2016	2.5(1)
1428508 Articles of Dissolution Issued	June 21, 2016	2.4(7)
1428508 Progress Billing Nos. 10-15	July 20, 2016- Decemeber 21, 2016	2.5(1)
Delivery to MOD of first 1033803 Insurance Certificate (included in Progress Billing No. 16)	January 20, 2017	2.5(2)
1033803 Progress Billing No. 16*	January 20, 2017	2.5(2)
1033803 Progress Billing No. 17*	February 17, 2017	2.5(2)
1033803 Progress Billing No. 18	March 20, 2017	2.5(2)
Email exchange with Tucker re: addition of 1033803 as "loss payee" on Primo insurance	April 4, 2017	2.5(10)
Delivery of revised Primo Insurance Certificate showing 1033803 as "loss payee"	April 4, 2017	2.5(12)
1033803 Progress Billing Nos. 19-21	April 20, 2017 – June 20, 2017	2.5(2)
Tucker provides insurance certificate from Toro Glasswall Inc. identifying 1033803 as "loss payee"	June 26, 2017	2.5(18)

EVENT	DATE	REPORT REFERENCE
1033803 Progress Billing Nos. 22-29	July 20, 2017 – February 28, 2018	2.5(2)
E-mail exchange between Tucker and Toro Aluminum regarding addition of 1033803 as an additional insured to Toro Aluminum's policy	March 7, 2018	2.5(18)
1033803 Progress Billing Nos. 30-32	March 20, 2018 – May 23, 2018	2.5(2)
Tucker provides insurance certificate from Thyssen identifying 1033803 as a "loss payee"	May 23, 2018	2.5(18)
1033803 Progress Billing Nos. 33-35	June 30, 2018 – August 20, 2018	2.5(2)
Receivership Order	November 19, 2018	1.0(1)
1033803 Progress Billing No. 36	November 22, 2018	2.5(2)
GF Agreement	November 23, 2018	2.0(3)
Receiver's First Progress Billing	December 15, 2018	2.5(4)
MOD notifies Receiver of 1428502 Issue	December 21, 2018	2.6(4)
Receiver's Second Progress Billing	December 21, 2018	2.5(4)
Close-Out Agreement	December 27, 2018	2.6(7)
Application to Vacate Lien	February 19, 2019	2.6(16)
Receiver's Statement of Claim in Massey Tower Lien Action	March 13, 2019	2.6(15)
MOD Lien Statement of Defence and Counterclaim	July 15, 2019	2.6(19)
Lien Litigation Timetable Endorsement	November 1, 2021	2.6(20)
Deliveries of Affidavits of Documents	February 3/February 15, 2021	2.6(21)
Delivery of Motion for Leave by MOD to Dismiss Massey Tower Lien Action	November 1, 2021	2.6(19)

**SCHEDULE D**  
**CONTRACTUAL PROVISIONS**

**ARTICLE A-1      THE WORK**

The *Trade Contractor* shall:

1.1            perform the *Work* required by the *Contract Documents* for

Concrete forming and falsework, void forming, concrete placing and finishing, temporary shoring, re-shoring, hoisting, and placing of all reinforcing steel and concrete accessories

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*(insert above the description of the Work for the Project)*

for the Project

Massey Tower, Forma-Con

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*(insert above the title of the Project)*

located at

197 Yonge Street, Toronto, Ontario, Canada

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*(insert above the Place of the Project)*

for which the Agreement has been signed by the parties and for which

Tucker HiRise Construction Inc.

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*(insert above the name of the Construction Manager)*

is acting as and is hereinafter called the *Construction Manager*, and for which

Hariri Pontarini Architects

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*(insert above the name of the Consultant)*

is acting and is hereinafter called the *Consultant*, and for which

the *Construction Manager*\*/*Consultant*\* is acting as the *Payment Certifier*, and

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*(\* strike out inapplicable term)*

1.2            do and fulfill everything indicated by the *Contract Documents*: and

1.3            perform the *Work*;

.1    in accordance with a schedule provided by the *Owner* at the time of signing of the *Contract*, or

.2    in accordance with a schedule mutually agreed upon if provided by the *Owner* after the signing of the *Contract*, or

- .3 if no schedule is provided by the *Owner*, commence the *Work* by the \_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_ and, subject to adjustment in *Contract Time* as provided for in the *Contract Documents*, attain *Substantial Performance of the Work*, by the \_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_.

...

#### **ARTICLE A-4 CONTRACT PRICE**

- 4.1 The *Contract Price*, which excludes *Value Added Taxes*, is:
- Twenty Million Four Hundred Twenty-Nine Thousand Dollars / 100 dollars \$20,429,000.00
- 4.2 *Value Added Taxes* (at 13 %) payable by the *Owner* to the *Trade Contractor* are:
- Two Million Six Hundred Fifty-Five Thousand Seven Hundred & Seventy Dollars / 100 dollars \$2,655,770.00
- 4.3 Total amount payable by the *Owner* to the *Trade Contractor* for the *Work* is:
- Twenty-Three Million Eighty-Four Thousand Seven Hundred & Seventy Dollars /100 dollars \$23,084,770.00
- 4.4 These amounts shall be subject to adjustments as provided in the *Contract Documents*.
- 4.5 All amounts are in Canadian funds.

#### **ARTICLE A-5 PAYMENT**

- 5.1 Subject to the provisions of the *Contract Documents*, and in accordance with legislation and statutory regulations respecting holdback percentages and, where such legislation or regulations do not exist or apply, subject to a holdback of Ten percent (10%), the *Owner* shall:
- .1 make progress payments to the *Trade Contractor* on account of the *Contract Price* when due in the amount certified by the *Payment Certifier* together with such *Value Added Taxes* as may be applicable to such payment, and
  - .2 upon *Substantial Performance of the Work*, pay to the *Trade Contractor* the unpaid balance of the holdback amount when due together with such *Value Added Taxes* as may be applicable to such payment, and
  - .3 upon the issuance of the final certificate for payment, pay to the *Trade Contractor* the unpaid balance of the *Contract Price* when due together with such *Value Added Taxes* as may be applicable to such payment.
- 5.2 in the event of loss or damage occurring where payment becomes due under the property and boiler insurance policies, payments shall be made to the *Trade Contractor* in accordance with the provisions of GC 11.1 —INSURANCE.
- 5.3 Interest
- .1 Should either party fail to make payments as they become due under the terms of the *Contract* or in an award by arbitration or court, interest at the following rates on such unpaid amounts shall also become due and payable until payment:

- (1) 2% per annum above the prime rate for the first 60 days.
- (2) 4% per annum above the prime rate after the first 60 days.

Such interest shall be compounded on a monthly basis. The prime rate shall be the rate of interest quoted by

The Royal Bank of Canada

*(insert name of chartered lending institution where prime rate is to be used)*

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or prime business loans as it may change from time to time.

- .2 Interest shall apply at the rate and in the manner prescribed by paragraph 5.3.1 of this Article on the settlement amount of any claim in dispute that is resolved either pursuant to Part 8 of the General Conditions — DISPUTE RESOLUTION or otherwise, from the date the amount would have been due and payable under the *Contract*, had it not been in dispute, until the date it is paid.

## **ARTICLE A-6        COMMUNICATION**

6.1 Except for the direct communications described in paragraph 6.2 of this Article, all communications between the *Trade Contractor*, and the *Owner*, the *Consultant* or the *Payment Certifier* that relate to the *Contract* shall be forwarded through the *Construction Manager*.

6.2 The parties shall inform the *Construction Manager* of the following direct communications:

- .1 between the *Payment Certifier* and the *Owner*, *Consultant* or *Trade Contractor* as described in Part 5 of the General Conditions — PAYMENT;
- .2 among the *Owner*, *Consultant* and *Trade Contractor* with respect to *Notices in Writing*; and
- .3 as otherwise expressly specified in the *Contract Documents*.

...

## **ARTICLE A-9        SUCCESSION**

9.1 The *Contract* shall enure to the benefit of and be binding upon the parties hereto, their respective heirs, legal representatives, successors. and assigns.

...

## **GENERAL CONDITIONS OF THE CONTRACT**

### **PART 1        GENERAL CONDITIONS**

#### **GC 1.1        *Contract Documents***

...

GC1.1.6 If there is a conflict within the *Contract Documents*:

- .1 the order of priority of documents, from highest to lowest, shall be



- the Agreement between the *Owner* and *Trade Contractor*,
  - the Definitions,
  - *Supplementary Conditions*,
  - the General Conditions of the *Contract*,
  - Division 1 of the *Specifications*,
  - technical *Specifications*,
  - material and finishing schedules,
  - the *Drawings*.
- .2 *Drawings* of larger scale shall govern over those of smaller scale of the same date.
- .3 dimensions shown on *Drawings* shall govern over dimensions scaled from *Drawings*.
- .4 later dated documents shall govern over earlier documents of the same type.
- .5 noted materials and annotations shall govern over graphic indications.

...

#### **GC 1.4      *Assignment***

GC1.4.1      Neither party to the *Contract* shall assign the *Contract* or a portion thereof without the written consent of the other, which consent shall not be unreasonably withheld.

...

### **PART 2      ADMINISTRATION OF THE CONTRACT**

#### **GC 2.2      *Roles of the Construction Manager and the Consultant***

GC 2.2.1      The *Construction Manager* will:

- .1 provide administration of the *Contract* as described in the *Contract Documents*;
- .2 in the first instance, receive all questions in writing by the *Owner* or the *Trade Contractor* for interpretations and findings relating to the performance of the *Work* or the interpretation of the *Contract Documents* except with respect to GC 5.1 — FINANCING INFORMATION REQUIRED OF THE OWNER;
- .3 in the first instance, give interpretations and make findings on matters in question relating to the performance of the *Work* or the requirements of the *Contract Documents*, except with respect to any and all architectural and engineering aspects of the *Work* or GC 5.1 — FINANCING INFORMATION REQUIRED OF THE OWNER; and
- .4 during the progress of the *Work*, issue *Supplemental Instructions* to the *Trade Contractor* with reasonable promptness or in accordance with a schedule for such instructions agreed to by the *Construction Manager* and the *Trade Contractor*.

GC 2.2.2. The *Consultant* will:

- .1 visit the *Place of the Project* at intervals appropriate to the progress of construction to become familiar with the progress and quality of the *Work* and to determine if the *Work* is proceeding in general conformity with the *Contract Documents*; and
- .2 in the first instance, give interpretations and make findings on matters in question relating to the requirements of the design.

...

## **PART 3 EXECUTION OF THE WORK**

### **GC 3.1 Control of the *Work***

GC 3.1.1 The *Trade Contractor* shall have total control of the *Work* and shall effectively direct and supervise the *Work* so as to ensure conformity with the *Contract Documents*.

GC 3.1.2 The *Trade Contractor*, and not the *Owner*, the *Construction Manager* or the *Consultant*, shall be responsible for construction means, methods, techniques, sequences, and procedures and for coordinating the various parts of the *Work* under the *Contract*.

...

## **PART 8 DISPUTE RESOLUTION**

### **GC 8.2 Negotiations, Mediation and Arbitration**

GC 8.2.2 A party shall be conclusively deemed to have accepted a finding of the *Construction Manager* or the *Consultant* under GC 2.2 — -ROLES OF THE CONSTRUCTION MANAGER AND THE CONSULTANT and to have expressly waived and released the other party from any claims in respect of the particular matter dealt with in that finding unless, within 15 *Working Days* after receipt of that finding, the party sends a *Notice in Writing* of dispute to the other party, the *Construction Manager* and the *Consultant*, which contains the particulars of the matter in dispute and the relevant provisions of the *Contract Documents*. The responding party shall send a *Notice in Writing* of reply to the dispute within 10 *Working Days* after receipt of such *Notice in Writing* setting out particulars of this response and any relevant provisions of the *Contract Documents*.

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## **SUPPLEMENTARY CONDITIONS**

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### **SC 1.4 ARTICLE A-6 COMMUNICATION**

SCI 1.4.1 At paragraph 6.1 add, “or” before “the *Consultant*” and delete, “or the *Payment Certifier*”.

BRIDGING FINANCE INC., AS AGENT v. 1033803 ONTARIO INC. et al.  
FOR 2665405 ONTARIO LIMITED  
Applicant Respondents

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at TORONTO

**FACTUM OF KSV KOFMAN INC.**

**Torys LLP**

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