

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

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

**ONTARIO SECURITIES COMMISSION**

Applicant

- and -

**GO-TO DEVELOPMENTS HOLDINGS INC., OSCAR FURTADO, FURTADO HOLDINGS INC., GO-TO DEVELOPMENTS ACQUISITIONS INC., GO-TO GLENDALE AVENUE INC., GO-TO GLENDALE AVENUE LP, GO-TO MAJOR MACKENZIE SOUTH BLOCK INC., GO-TO MAJOR MACKENZIE SOUTH BLOCK LP, GO-TO MAJOR MACKENZIE SOUTH BLOCK II INC., GO-TO MAJOR MACKENZIE SOUTH BLOCK II LP, GO-TO NIAGARA FALLS CHIPPAWA INC., GO-TO NIAGARA FALLS CHIPPAWA LP, GO-TO NIAGARA FALLS EAGLE VALLEY INC., GO-TO NIAGARA FALLS EAGLE VALLEY LP, GO-TO SPADINA ADELAIDE SQUARE INC., GO-TO SPADINA ADELAIDE SQUARE LP, GO-TO STONEY CREEK ELFRIDA INC., GO-TO STONEY CREEK ELFRIDA LP, GO-TO ST. CATHARINES BEARD INC., GO-TO ST. CATHARINES BEARD LP, GO-TO VAUGHAN ISLINGTON AVENUE INC., GO-TO VAUGHAN ISLINGTON AVENUE LP, AURORA ROAD LIMITED PARTNERSHIP and 2506039 ONTARIO LIMITED**

Respondents

**APPLICATION UNDER SECTIONS 126 AND 129 OF THE *SECURITIES ACT*, R.S.O. 1990, c. S.5, AS AMENDED**

**FACTUM OF THE RECEIVER – RETURNABLE AUGUST 22, 2022**

August 18, 2022

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## PART I – INTRODUCTION

1. This factum is filed by KSV Restructuring Inc. (“**KSV**”), in its capacity as the Court-appointed receiver and manager (in such capacity, the “**Receiver**”) of the 23 parties listed on Schedule “B” of the Receivership Order (as defined below) (the “**Receivership Respondents**”), in support of the Receiver’s motion for two Orders.
2. The first Order contains, in substance, the following requested relief (the “**Stoney Creek AVO**”):
  - (a) approving the agreement of purchase and sale dated May 2, 2022 (as amended, the “**Stoney Creek APS**”) between the Receiver and Cedar City Homes Ltd. (the “**Original Stoney Creek Purchaser**”) for the purchase and sale of, amongst other things, the real property municipally known as Highland Road, Hamilton, ON, and legally described in PIN 17376-0025; and Upper Centennial Parkway, Hamilton, ON, and legally described in PIN 17376-0111 (collectively, the “**Stoney Creek Real Property**”), and authorizing the Receiver to complete the transaction contemplated thereby (the “**Stoney Creek Transaction**”);
  - (b) upon execution and delivery of a certificate by the Receiver containing confirmation of the closing of the Stoney Creek Transaction, vesting in Cedar City Upper Centennial Inc. (the “**Stoney Creek Purchaser**”)<sup>1</sup> all rights, title and interest in the Purchased Assets (as defined in the Stoney Creek APS) subject to certain encumbrances; and

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<sup>1</sup> Subsequent to service of the Fifth Report (as defined below), Cedar City Homes Ltd. advised that title would be taken by Cedar City Upper Centennial Inc., which is permitted subject to the terms and conditions of section 14.10 of the Stoney Creek APS.

- (c) authorizing and directing the Receiver to make distributions to: (i) Podesta Group Inc. and L M I Management Inc.; and (ii) 2106622 Ontario Ltd. and Vlasta Bukovsky, in respect of their respective mortgages registered on title to the Stoney Creek Real Property.
3. The second Order contains, in substance, the following requested relief (the **“Ancillary Order”**):
- (a) subject to certain conditions, authorizing and directing the Receiver to make distributions from the sale proceeds of certain completed transactions, namely:
    - (i) to Queen Properties Inc. (**“Queen Properties”**), in respect of its mortgage that was registered on title immediately prior to the closing of the Eagle Valley Transaction (as defined below); and
    - (ii) to Gabriele Fischer and Imperio SA Holdings Inc. (collectively, **“Imperio”**), in respect of their mortgage that was registered on title immediately prior to the closing of the Eagle Valley Transaction and the Beard Transaction (as defined below);
  - (b) approving, for the purposes of a stalking horse sale process by the Receiver (the **“Stalking Horse Sale Process”**), the agreement of purchase and sale dated August 8, 2022 (the **“Major Mackenzie APS”**) between the Receiver and 2357616 Ontario Inc. (the **“Major Mackenzie Stalking Horse Bidder”**) for the purchase and sale of the real property municipally known as 185, 191, 197, 203, 209 and 215 Major Mackenzie Drive East, Richmond Hill, ON, and legally described in PINs 03139-0047, 03139-0048, 03139-0049, 03139-0050, 03139-0051 and 03139-0052 (collectively, the **“Major Mackenzie Real**

**Property**”), together with the Expense Reimbursement and the Bidding Procedures (both as defined and described in the Major Mackenzie APS);

- (c) compelling Concorde Law Professional Corporation (“**Concorde Law**”), Louis Raffaghello and 255 (as defined below) to provide the information requested by the Receiver regarding the Flip Transactions (as defined below) by no later than five business days from the date of the Ancillary Order;
- (d) approving the Fifth Report of the Receiver to the Court dated August 11, 2022 (the “**Fifth Report**”) and the actions and activities of the Receiver and its counsel described therein;
- (e) approving the fees and disbursement of the Receiver and its counsel to and including June 30, 2022; and
- (f) sealing the confidential appendices to the Fifth Report.

## **PART II – THE FACTS**

### **A. Background**

- 4. Pursuant to an application by the Ontario Securities Commission (the “**OSC**”) under ss. 126 and 129 of the *Securities Act*, RSO 1990, c. S.5, as amended (the “**Securities Act**”), the Court made an Order on December 10, 2021 (the “**Receivership Order**”) appointing KSV as the Receiver of the 17 pieces of real property listed on Schedule “A” of the Receivership Order (the “**Real Property**”) and all the other assets, undertakings and properties of each of the Receivership Respondents, including all the assets held in trust or required to be held in trust by or for any of the Receivership

Respondents, or by their lawyers, agents and/or any other person, and all proceeds thereof (together with the Real Property, the “**Property**”).<sup>2</sup>

5. The Receivership Respondents were developers of nine, early-stage residential real estate projects in Ontario (the “**Projects**”).<sup>3</sup> The Receivership Respondents’ principal is Oscar Furtado (“**Mr. Furtado**”). Between 2016 and 2020, Mr. Furtado and the Receivership Respondents raised almost \$80 million from Ontario investors for the Projects. The vast majority of investors’ funds remain outstanding.<sup>4</sup>
6. Having regard to all the circumstances described in the OSC’s application, the Court determined that it was in the best interests of the Projects’ investors to appoint the Receiver.<sup>5</sup>
7. Mr. Furtado and the Receivership Respondents took steps to appeal the Receivership Order (the “**Appeal**”). They also brought a motion to stay the Receivership Order pending the Appeal (the “**Stay Motion**”).<sup>6</sup> The Court of Appeal for Ontario dismissed both the Appeal and the Stay Motion.<sup>7</sup>
8. On June 27, 2022, Mr. Furtado and the Receivership Respondents filed an application with the Supreme Court of Canada, seeking leave to appeal the Appeal’s dismissal.<sup>8</sup>

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<sup>2</sup> Receivership Order, at recitals and para. 3.

<sup>3</sup> Fifth Report, section 2.0.

<sup>4</sup> Endorsement of The Honourable Mr. Justice Pattillo dated December 10, 2021 [**Receivership Endorsement**], at para. 8.

<sup>5</sup> Receivership Endorsement, at para. 22.

<sup>6</sup> Fifth Report, section 1.0.

<sup>7</sup> Fifth Report, section 1.0.

<sup>8</sup> Fifth Report, section 1.0.

**B. The Sale Process and Its Results**

9. The Receivership Order grants the Receiver the authority to, *inter alia*, market the Property, sell the Property (with Court approval) and apply for vesting Orders.<sup>9</sup> The Receiver also obtained a further Order from the Court on February 9, 2022 (the “**Sale Process Order**”), which, in substance, approved a sale process for the Property (the “**Sale Process**”).<sup>10</sup> As part of the Sale Process, the Receiver retained:
- (a) Colliers Macaulay Nicolls Inc. to market the Property of Go-To Spadina Adelaide Square Inc. and Go-To Spadina Adelaide Square LP; and
  - (b) CBRE Limited (“**CBRE**”) to market the balance of the Property.<sup>11</sup> CBRE also engaged Internet Commercial Realty Inc., a broker based near Niagara Falls, to assist with its marketing efforts for the Property located in Southwestern Ontario.<sup>12</sup>
10. To date, the Court has granted Orders: (i) approving the sale and vesting of five of the nine groups of Property, all of which transactions have subsequently closed (the “**Completed Transactions**”); (ii) authorizing and directing the Receiver to distribute monies to certain mortgagees who were registered on title immediately prior to the closing of four of the five Completed Transactions; and (iii) approving the previous reports of the Receiver and the actions and activities of the Receiver and its counsel.<sup>13</sup>

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<sup>9</sup> Receivership Order, at paras. 4(j), 4(k) and 4(l).

<sup>10</sup> Fifth Report, section 1.0.

<sup>11</sup> Fifth Report, section 5.0.

<sup>12</sup> Fifth Report, section 5.0.

<sup>13</sup> Fifth Report, section 1.0.

*(i) The Completed Transactions and Associated Distributions<sup>14</sup>*

11. The St. Catharines Transaction closed on May 9, 2022 for total proceeds of \$7.25 million. Court-approved distributions were made shortly thereafter to the first two mortgagees on title, Meridian Credit Union Limited and Reciprocal Opportunities Incorporated, in the respective approximate amounts of \$1.193 and \$2.396 million.
12. The Eagle Valley Transaction closed on June 30, 2022. The purchase price was \$5.85 million.
13. The Beard Transaction closed on July 4, 2022. The purchase price was \$2.45 million. A Court-approved distribution was made shortly thereafter to the first registered mortgagee on title, Prudential Property Management Inc., in the approximate amount of \$830,000.
14. The Adelaide Transaction closed on July 7, 2022. The purchase price was \$90 million, plus a potential density bonus of \$3 million. Court-approved distributions were made shortly thereafter to the first two mortgagees on title, Cameron Stephens Mortgage Capital Ltd. and Northridge Maroak Developments Inc., in the respective approximate amounts of \$55.6 and \$18.0 million.
15. The Chippawa Transaction closed on July 27, 2022. The purchase price was \$4.25 million. A Court-approved distribution was made shortly thereafter to the only mortgagee on title, Green Leaf Financial Limited, in the approximate amount of \$2.1 million.

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<sup>14</sup> Unless otherwise stated, all references in this section are to, and all capitalized terms in this section are defined in, section 4.0 of the Fifth Report.

(ii) *The Proposed Stoney Creek Transaction*<sup>15</sup>

16. The Stoney Creek Real Property totals 31.6 acres along Upper Centennial Parkway and Highland Road East in the City of Hamilton. The site is located outside the existing urban boundary and is considered “*whitebelt*” lands, meaning they cannot presently be developed.
17. The Stoney Creek Real Property is zoned as agricultural and has no improvements or services. Given the “*whitebelt*” designation and location outside the urban boundary, the Receiver understands that Go-To Stoney Creek Elfrida Inc. and Go-To Stoney Creek Elfrida LP (collectively, “**Go-To Stoney Creek**”) had not submitted any development applications to the municipality.
18. The Stoney Creek Real Property was marketed for sale in accordance with the Court-approved Sale Process. This included CBRE preparing an offering summary, which it distributed on March 1, 2022 to an extensive list of prospective purchasers, including local, national and international builders, developers and investors. The acquisition opportunity was also published in trade journals and on social media platforms. CBRE also directly contacted parties that it believed would be interested in the opportunity.
19. CBRE received 21 signed confidentiality agreements, which interested parties were required to sign to access a virtual data room.
20. The initial bid deadline was April 7, 2022. The Receiver and CBRE reviewed the

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<sup>15</sup> Unless otherwise stated, all references in this section are to section 6.0 of the Fifth Report.

offers submitted by this date, and requested that bidders submit their final and best offers by April 14, 2022. Each of the offers submitted on April 14, 2022 still remained subject to further diligence.

21. The highest offer was submitted by a major Canadian developer (the “**Developer**”). On April 15, 2022, the Receiver advised the Developer that it would accept its offer provided that due diligence conditions were satisfied by April 29, 2022. The Receiver also provided the Developer with exclusivity until April 29, 2022. On April 26, 2022, the Developer advised the Receiver that it was not prepared to waive its conditions and that it decided not to proceed with the transaction.
22. The Receiver and CBRE then considered the remaining offers, including the purchase price, due diligence conditions and the financial ability of each of the other bidders to close a transaction.
23. After consulting with CBRE, and upon completing its review of the other offers, the Receiver and the Original Stoney Creek Purchaser executed the Stoney Creek APS on May 2, 2022. The Original Stoney Creek Purchaser paid an initial deposit of \$800,000 upon execution of the agreement. The Stoney Creek APS was subject to a “Contingency Period” (as defined in the Stoney Creek APS) for 15 business days from the date that the Stoney Creek APS was signed (the “**Inspection Date**”).
24. Prior to the Inspection Date, the Original Stoney Creek Purchaser’s counsel received a letter from Hamilton Conservation Authority (“**HCA**”), which identified several tributaries on the Stoney Creek Real Property and noted that written permission from HCA would be required for any development of the property. The Original Stoney

Creek Purchaser then advised the Receiver that it required more time to perform due diligence. Pursuant to an amending agreement made as of May 20, 2022, the Receiver and the Stoney Creek Purchaser extended the Inspection Date to June 7, 2022.

25. On June 6, 2022, the Original Stoney Creek Purchaser advised the Receiver that it was prepared to waive its conditions but required a material reduction to the purchase price, largely because its due diligence identified uncertainty regarding the development potential of approximately 2.5 acres of the Stoney Creek Real Property.
26. As a result of the purchase price adjustment sought by the Original Stoney Creek Purchaser, its offer became financially inferior to other offers submitted in the Sale Process. The Receiver negotiated with the Original Stoney Creek Purchaser to keep its offer open for acceptance while affording the Receiver an opportunity to assess whether it could complete a superior transaction with other parties that had previously expressed an interest in the property. The Receiver advised the Original Stoney Creek Purchaser that if the Receiver accepted a superior bid on or prior to June 17, 2022, and subsequently closed same, the Receiver would pay a \$100,000 break fee to the Original Stoney Creek Purchaser, subject to Court approval. The Original Stoney Creek Purchaser was amenable to this arrangement, and the Stoney Creek APS was amended accordingly.
27. The Receiver and CBRE then corresponded with two parties that had submitted conditional offers at higher values than the Original Stoney Creek Purchaser's reduced offer. Each party was advised of the June 17, 2022 deadline. Neither party was ultimately able to provide a firm and binding commitment by the deadline of June 17,

2022,<sup>16</sup> and the transaction with the Original Stoney Creek Purchaser became firm on that date. The Receiver and the Original Stoney Creek Purchaser then entered into a subsequent amendment on June 24, 2022 to update the closing milestones.

28. A summary of the Receiver's proposed Stoney Creek Transaction is as follows:<sup>17</sup>

- (a) Purchaser: Subsequent to the issuance of the Fifth Report, the Original Stoney Creek Purchaser advised that title will be taken by the Stoney Creek Purchaser, as permitted subject to the terms and conditions of section 14.10 of the Stoney Creek APS. Both the Original Stoney Creek Purchaser and the Stoney Creek Purchaser are arm's length to the Receivership Respondents.
- (b) Purchased Assets: All of the Receiver's and Go-To Stoney Creek's right, title and interest in the Stoney Creek Real Property and certain contracts and permits specified in the Stoney Creek APS.
- (c) Purchase Price: The Receiver recommends that the Purchase Price be sealed pending closing. The Purchase Price is to be adjusted on closing for adjustments standard for a real estate transaction, including property taxes.
- (d) Deposit: The Original Stoney Creek Purchaser paid two deposits in the aggregate amount of \$1.8 million pursuant to the amendment dated June 10, 2022.
- (e) Closing Date: The later of: (i) the first Business Day following the date that is 30 days following the issuance of the Stoney Creek AVO; and (ii) the first Business Day following the date on which any appeals or motions to set aside or vary the Stoney Creek AVO have been finally determined, or such other date as mutually agreed in writing, provided that the Closing Date does not occur prior to September 9, 2022.
- (f) Material Conditions:
  - (i) there shall be no Claim, litigation or proceedings pending or threatened or order issued by a Governmental Authority against either of the Parties, or involving any of the Purchased Assets, for the purpose of

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<sup>16</sup> As set out in the Fifth Report, the Receiver and CBRE previously engaged with both of these parties during the Sale Process. The Receiver has been dealing with one of these parties extensively throughout these proceedings, which was unable to raise financing for an offer it submitted on another Property. The Receiver engaged extensively with this party about the current opportunity; however, it was apparent to the Receiver that this party would require an extended period of time to source financing for an acquisition of the Stoney Creek Real Property, and there was significant uncertainty as to whether it would be successful. The other party is a developer known to CBRE, and was unable to confirm by June 17, 2022 that it had financing available to complete a transaction.

<sup>17</sup> Capitalized terms not otherwise defined in this paragraph are defined in the Stoney Creek APS.

enjoining, preventing or restraining the completion of the Transaction or otherwise claiming that such completion is improper; and

- (i) the Court shall have issued the Stoney Creek AVO by no later than August 31, 2022.

**(iii) *The Major Mackenzie APS and the Proposed Stalking Horse Process***<sup>18</sup>

- 29. The Major Mackenzie Real Property is comprised of six vacant single detached houses with a total of 330 feet of frontage on Major Mackenzie Drive in Richmond Hill.
- 30. The Receiver understands that the site has an Official Plan Amendment (OPA), Zoning By-Law Amendment (ZBLA), Draft Plan of Subdivision and Site Plan application under review with the City of Richmond Hill to allow for the redevelopment of 30 18-foot townhomes with 64 parking spaces and access off Lawrence Avenue. The townhomes are proposed to be three storeys and up to 1,803 square feet.
- 31. The Major Mackenzie Real Property has been marketed for sale in accordance with the Court-approved Sale Process. This included CBRE preparing an offering summary, which it distributed on March 1, 2022 to an extensive list of prospective purchasers, including local, national and international builders, developers and investors. The opportunity was also published in trade journals and on social media platforms. CBRE also directly contacted parties that it believed would be the best candidates for the property.
- 32. CBRE received 35 signed confidentiality agreements, which interested parties were required to sign to access a virtual data room.
- 33. The initial bid deadline was April 7, 2022. The Receiver and CBRE reviewed the

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<sup>18</sup> Unless otherwise stated, all references in this section are to, and all capitalized terms in this section are defined in, section 7.0 of the Fifth Report.

offers submitted by this date, and requested that bidders submit their final and best offers by April 12, 2022.

34. On April 13, 2022, the party that submitted the highest offer, which was conditional on further diligence, withdrew its offer. On that same day, the party that had submitted the third highest bid, Consolidated Development Corporation (“**Consolidated**”), increased its offer such that it became the best offer and it was unconditional.
35. On April 27, 2022, the Receiver accepted an agreement of purchase and sale from Consolidated, subject to Court approval and receipt of a deposit of \$750,000 to be paid within three days of the acceptance date. On May 5, 2022, after repeated efforts to collect the deposit, the Receiver terminated the agreement with Consolidated, as it: (i) had not paid the deposit; (ii) had not provided evidence that it would pay the deposit shortly; and (iii) had not demonstrated that it had financing to complete the transaction.
36. The Receiver and CBRE then engaged with the parties that had submitted the next two highest bids, which were also both (supposedly) unconditional. On May 6, 2022, the Receiver accepted an offer from 11427865 Canada Ltd. (“**114**”) which required, amongst other things, that 114 pay a deposit of \$500,000. 114 also failed to pay a deposit, and the Receiver terminated the agreement of purchase and sale with 114.
37. The Receiver continued to correspond with Consolidated, 114 and another party that had submitted an offer; however, none of them was able to provide evidence of financing to complete a transaction or the availability of funds to pay the required deposit.
38. The Receiver then approached the second of two mortgagees on title (the “**Goh Parties**”) about the possibility of submitting a stalking horse offer. The Goh Parties

expressed an interest in doing so, subject to performing due diligence, and were provided access to the virtual data room upon signing a confidentiality agreement.

39. While the Goh Parties were performing their due diligence, the Receiver, in consultation with CBRE, amended the listing on June 6, 2022 to reflect an asking price of \$11.5 million. Prior to that date, the property had been marketed for sale on an unpriced basis (which was the case for all the Real Property).
40. CBRE continued to correspond with several parties, and additional confidentiality agreements were received. CBRE also received an offer on July 15, 2022 for an amount well less than the listing price and conditional on 60 days' due diligence.
41. During this period, the Receiver continued to engage with the Goh Parties. The Goh Parties submitted the firm Major Mackenzie APS stalking horse offer on August 9, 2022, which was accepted by the Receiver on that date, the terms of which are set out below:
  - (a) Purchaser: 2357616 Ontario Inc., an arm's length to the Receivership Respondents.
  - (b) Purchased Assets: All of the Receiver's and Go-To Major Mackenzie's right, title and interest in the Major Mackenzie Real Property and certain permits specified in the Major Mackenzie APS.
  - (c) Purchase Price: The greater of: (i) \$9.5 million; and (ii) the amount required to satisfy the Priority Payables<sup>19</sup> plus the amounts required to satisfy the two registered mortgages on title.<sup>20</sup> The First Mortgage Indebtedness shall be assumed by, or otherwise satisfied by, the Purchaser, and the Second Mortgage Indebtedness shall be credit bid by the Purchaser.

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<sup>19</sup> Represents all amounts owing (including all amounts accrued but not yet payable) by the Specified Receivership Respondents as of the Closing Date which rank *pari passu* or in priority to the First Mortgage Indebtedness, including, without limitation: (i) the amounts secured by, or to be secured by, the Receivership Charge and which are allocable to the Specified Real Property.

<sup>20</sup> The First Mortgage Indebtedness is owed to Cameron Stephens, which it has represented in the Claims Procedure (as defined below) to be \$6,774,310.66 as of June 2, 2022, plus accruing interest and expenses. The Second Mortgage Indebtedness is owed to the Goh Parties, which they have represented in the Major Mackenzie APS to be \$1,922,639.77 as of June 14, 2022, plus accruing interest and expenses.

- (d) Deposit: The Major Mackenzie Purchaser is required to pay a deposit in the amount of \$500,000. As at the date of the Fifth Report, the Major Mackenzie Purchaser provided evidence of a wire payment for the deposit, but the deposit was still outstanding. The deposit has now been received.
- (e) Closing Date: The latest of: (i) the first Business Day following the date that is ten days following the granting of the Approval and Vesting Order; (ii) the first Business Day following the date on which any appeals or motions to set aside or vary the Approval and Vesting Order have been finally determined; and (iii) November 25, 2022, or, such other date as the Receiver and the Major Mackenzie Purchaser agree in writing.
- (f) Expense Reimbursement: The Major Mackenzie Purchaser is to receive \$60,000 as an expense reimbursement (the “**Expense Reimbursement**”), if the Stalking Horse Bid is not the Successful Bidder. The Expense Reimbursement is to be paid from the sale proceeds generated from an alternative Successful Bid.
- (g) Material Conditions:
  - (i) there shall be no Claim, litigation or proceedings pending or threatened or order issued by a Governmental Authority against either of the Parties, or involving any of the Purchased Assets, for the purpose of enjoining, preventing or restraining the completion of the Transaction or otherwise claiming that such completion is improper; and
  - (ii) the Court shall have issued the Approval and Vesting Order by no later than November 30, 2022.
- (h) Bidding Procedures: The Major Mackenzie APS is a stalking horse bid (the “**Stalking Horse Bid**”) and will be made available to parties interested in acquiring the Major Mackenzie Real Property. Qualified Bidders are to submit, by no later than 5 p.m. on September 30, 2022, an agreement of purchase and sale with a purchase price equal to or greater than: (i) the Purchase Price of the Major Mackenzie APS; plus (ii) the Expense Reimbursement; (iii) CBRE’s incremental fee (in the amount of 2.25% or 3.25% of the purchase price<sup>21</sup>); and (iv) a \$100,000 bid increment. They are also required to pay a deposit of \$500,000.
- (i) Bidding: If no Qualified Bids are submitted by the Bid Deadline other than the Stalking Horse Bid, the Stalking Horse Bid shall be deemed to be the Successful Bidder. If one or more Qualified Bids is submitted by the Bid Deadline, other than the Stalking Horse Bid, the Receiver may engage with

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<sup>21</sup> The Major Mackenzie Purchaser is only willing to pay CBRE a fee of 0.75% of its purchase price. Pursuant to CBRE’s engagement letter, CBRE is entitled to a 4% or 3% commission if sold with or without a cooperating broker, respectively (if sold with a cooperating broker, a portion of CBRE’s fees would be provided to the cooperating broker). Any Superior Bid will be required to pay in full the amount of CBRE’s listing fee pursuant to its engagement letter, unless CBRE agrees otherwise. CBRE has advised the Receiver that it is prepared to proceed based on the preceding terms.

such Qualified Bidder(s) to improve their offers. The Receiver may invite Qualified Bidders to participate in as many rounds of bidding (which may be conducted by way of an auction) as is required to maximize the consideration and minimize closing risk. The Receiver may also seek to clarify terms of the offers submitted and to negotiate such terms. The Receiver will select the Successful Bidder, having regards to, amongst other things: (i) the total consideration (cash and assumed liabilities); (ii) any required third-party approvals; (iii) conditions, if any; and (iv) other factors affecting the speed and certainty of closing and the value of the Qualified Bids.

- (j) Acceptance of Successful Bid: The sale of the Purchased Assets to any Successful Bidder by the Receiver is conditional upon the approval of the Successful Bid by the Court at a subsequent hearing.

- 42. If the Stalking Horse Bid is the Successful Bid, there will be no recoveries for Go-To Major Mackenzie's: (i) sole construction lien claimant, Capital Build Construction Management Corp. ("**Capital Build**"), which guaranteed and postponed to the mortgages registered on title;<sup>22</sup> or (ii) unsecured creditors or investors.

### C. **The Flip Transactions and Related Requested Production Relief**

- 43. As previously reported, the Receiver has identified two historical transaction groups of concern (collectively, the "**Flip Transactions**"), as follows:

- (a) on April 21, 2017, 2557815 Ontario Inc ("**255**") purchased the two parcels of land comprising the Chippawa Real Property<sup>23</sup> for an aggregate purchase price of \$1.2 million. Later that same day, 255 transferred the Chippawa Real Property to certain of the Receivership Respondents for an aggregate purchase price of \$3 million, being a difference of \$1.8 million;<sup>24</sup> and

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<sup>22</sup> Pursuant to section 12 of the guarantees at Appendix "O" of the Fifth Report, Capital Build postponed all the present and future indebtedness of the mortgagors to Capital Build, to the present and future mortgage indebtedness of the mortgagors to the mortgagees.

<sup>23</sup> 4210 and 4248 Lyon's Creek Rd., Niagara Falls, ON (legally described in PINs 64258-0110 and 64258-0713).

<sup>24</sup> Fifth Report, section 4.5.

(b) on June 22, 2017, 255 purchased the Eagle Valley Real Property<sup>25</sup> for \$3.7 million. Later that same day, 255 transferred the Eagle Valley Real Property to certain of the Receivership Respondents for a purchase price of \$5.1 million, being a difference of \$1.4 million.<sup>26</sup>

44. Based on certain closing documents in the Receiver's possession, the Receiver understands that the balance due to 255 on closing of the Flip Transactions was directed by 255 to be paid in trust to 255's counsel, Concorde Law.<sup>27</sup>
45. On June 21, 2022, the Receiver's counsel wrote to Louis Raffaghello, the lawyer at Concorde Law who represented 255 in connection with the Flip Transactions, asking for all non-privileged records (including, without limitation, all accounting records) evidencing who ultimately received the monies paid to Concorde Law by the Receivership Respondents in connection with the Flip Transactions. As set out in the Receivership Order, all Persons (as defined therein) are obligated to provide all non-privileged Records (as defined therein) to the Receiver on request.<sup>28</sup>
46. Mr. Raffaghello advised on June 28, 2022 that his files included trust ledger statements (the "**Trust Ledger Statements**"), which he would send to the Receiver's counsel "*tomorrow*."<sup>29</sup>
47. Despite advising that he would send the Trust Ledger Statements the following day, Mr. Raffaghello advised by email on June 29, 2022 that he had "*been instructed at this*

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<sup>25</sup> 2334 St. Paul Avenue, Niagara Falls, ON (legally described in PIN 64269-0559).

<sup>26</sup> Fifth Report, section 4.2.

<sup>27</sup> Fifth Report, section 4.2.

<sup>28</sup> Fifth Report, section 4.2.

<sup>29</sup> Fifth Report, section 4.2.

*time not to release any information [regarding the Flip Transactions]. As you know, the privilege is not mine but my client's so for the time being I have to comply with his instructions. I suggest that you obtain directions from the court to compel my firm to release the documents to you if you require them. I will take no position in the matter and will comply with any court order.”*<sup>30</sup>

48. The Receiver's counsel sent a follow up letter on July 5, 2022 to Mr. Raffaghello, which again set out the obligation of Concorde Law, Mr. Raffaghello and 255 to provide the requested information. The letter reiterated that: (i) only non-privileged Records were being sought; and (ii) Mr. Raffaghello had provided no basis to justify the accounting Records as privileged; which are neither communications of legal advice between a lawyer and its client, nor created for the dominant purpose of litigation.<sup>31</sup>
49. None of Concorde Law, Mr. Raffaghello or 255 has responded to this letter. Accordingly, the Receiver is seeking an order from the Court compelling each of them, by no later than five business days from the date of the Ancillary Order, to provide all non-privileged Records in their possession or control related to the Flip Transactions, including, without limitation, all accounting Records (including, for greater certainty, the Trust Ledger Statements).<sup>32</sup>
50. The Receiver was advised that there is a relationship between Capital Build and 255. The Receiver is not currently in a position to confirm the existence, nature or extent of such a relationship, if any. On June 12, 2022, the Receiver's counsel sent a letter to

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<sup>30</sup> Fifth Report, section 4.2.

<sup>31</sup> Fifth Report, section 4.2.

<sup>32</sup> Fifth Report, section 4.2.

Capital Build’s counsel requesting “*to the extent that you or any of your Clients has any information regarding any of the Flip Transactions, including, without limitation, who benefited economically from the Flip Transactions, the Receiver requires that you please provide such information to the Receiver forthwith, as described at paragraph 7 of the Receivership Order, and, in any event, by no later than the close of business on July 18, 2022.*” No response has been received to this letter.<sup>33</sup>

**D. Proposed Distributions**

51. On April 7, 2022, the Court approved a claims procedure (the “**Claims Procedure**”), pursuant to which the Receiver is authorized, directed and empowered to administer the Claims Procedure for the substantive purpose of calling for, assessing and determining claims against the Receivership Respondents.<sup>34</sup>
52. The Claims Bar Date (as defined in the Claims Procedure) was June 2, 2022 at 5 p.m. (ET). The Receiver and its counsel continue to review the claims filed in the Claims Procedure. Subject to addressing the claims of secured and/or priority creditors on an entity-by-entity basis, distributions to the Receivership Respondents’ other stakeholders will be recommended upon completion of the Claims Procedure (also on an entity-by-entity basis). This assumes that no other issues prevent the Receiver from recommending distributions at that time. In the case of certain Receivership Respondents, the proceeds of realization are not projected to be sufficient to make any distributions to their unsecured creditors and/or investors.<sup>35</sup>

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<sup>33</sup> Fifth Report, section 4.2.

<sup>34</sup> Fifth Report, sections 1.0 and 3.0.

<sup>35</sup> Fifth Report, section 3.0.

53. Having already made Court-approved distributions to certain mortgagees that were registered on title immediately prior to the closing of four of the five Completed Transactions, the Receiver is now prepared to recommend certain distributions in respect of the fifth Completed Transaction, being the Eagle Valley Transaction. With respect to the six construction liens that were registered on title to the Eagle Valley Real Property, the Receiver has not yet determined if any of these services were performed (whether for the amounts claimed or otherwise), but recommends that the Receiver hold back \$916,196.24 (the “**Eagle Valley Construction Lien Holdback**”) before making any distributions to mortgagees on this Property.<sup>36</sup>
54. The Eagle Valley Construction Lien Holdback represents the maximum aggregate construction lien that is capable of priming the second mortgage in favour of Imperio (as the first mortgage in favour of Queen Properties was a vendor takeback mortgage), inclusive of the statutory maximum of 25% for costs. As detailed in the Fifth Report, the Receiver has calculated the Eagle Valley Construction Lien Holdback based on:
- (a) any valid priority lien (if any) in favour of Capital Build ranking subordinate to the Imperio mortgage, given that Capital Build guaranteed and postponed to the Imperio mortgage;<sup>37</sup> and
  - (b) any valid priority lien (if any) in favour of the other construction lien claimants being limited to what they claimed in the Claims Procedure (plus the statutory maximum of 25% for costs).<sup>38</sup>

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<sup>36</sup> Fifth Report, section 4.2.

<sup>37</sup> Pursuant to section 12 of the guarantee at Appendix “F” of the Fifth Report, Capital Build postponed all the present and future indebtedness of the mortgagors to Capital Build, to the present and future mortgage indebtedness of the mortgagors to Imperio.

55. The Receiver's counsel has also spoken with counsel for each of Queen Properties and Imperio, both of whom have advised that their clients did not receive funds directly or indirectly from 255 in connection with the Flip Transactions.<sup>39</sup> Absent evidence to the contrary, and subject to the productions from Concorde Law, Mr. Raffaghello and 255 not altering the Receiver's views, the Receiver is inclined to accept this information that it has received from counsel for Queen Properties and Imperio.<sup>40</sup>
56. Accordingly, subject to the above conditions, the receipt of satisfactory payout statements and the holding back of sufficient amounts for the Receiver's fees and disbursements, those of its counsel and the Eagle Valley Construction Lien Holdback, the Receiver recommends that it be authorized and directed to distribute funds to Queen Properties and Imperio from the Eagle Valley Transaction.<sup>41</sup>
57. As Imperio will not be paid in full from the Eagle Valley Transaction, and as Imperio's mortgage was also registered on the Beard Real Property<sup>42</sup> (behind the first mortgagee, which the Receiver has already paid out), the Receiver recommends that it also be authorized and directed to distribute funds to Imperio from the Beard Transaction (subject to the receipt of satisfactory payout statements and the holding back of sufficient amounts for the Receiver's fees and disbursements and those of its counsel). The partial distributions recommended by the Receiver to Imperio from the

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<sup>38</sup> Fifth Report, section 4.2.

<sup>39</sup> Other than, in the case of Queen Properties, the monies rightly payable to it in connection with the initial sale of the Eagle Valley Real Property and the corresponding vendor takeback mortgage.

<sup>40</sup> As set out in the Fifth Report, section 4.2: (i) the Receiver has no evidence of any improper payments to these stakeholders by or on behalf of 255; (ii) no one has suggested to the Receiver that these stakeholders received any improper payments by or on behalf of 255; and (iii) neither Queen Properties nor Imperio is a stakeholder of Go-To Chippawa, where the other set of Flip Transactions occurred involving 255.

<sup>41</sup> Fifth Report, section 4.2.

Eagle Valley Transaction and the Beard Transaction will still be insufficient to discharge the secured indebtedness to Imperio.<sup>43</sup>

58. Finally, subject to the closing of the proposed Stoney Creek Transaction, the Receiver is also recommending that it be authorized and directed to make distributions to the first- and second-ranking mortgagees presently registered on title to the Stoney Creek Real Property (which are the only two charges registered on title, excluding the super-priority Court-ordered charges granted by the Receivership Order).<sup>44</sup>

59. The Receiver's independent legal counsel, Aird & Berlis LLP, has provided opinions to the Receiver, which, subject to the standard assumptions and qualifications contained therein, conclude that the applicable real property security upon which the proposed distributions are based is valid and enforceable.<sup>45</sup>

#### **E. Professional Fees**

60. The Receiver is also seeking approval of its fees and disbursements and those of its counsel for the period to and including June 30, 2022. Fee affidavits and accompanying invoices in support of this relief are attached to the Fifth Report. As noted therein, professional time has been recorded, wherever possible, on an entity-by-entity basis.<sup>46</sup>

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<sup>42</sup> 19 Beard Place, St. Catharines, ON (legally described in PIN 46265-0022).

<sup>43</sup> Fifth Report, section 4.3.

<sup>44</sup> Fifth Report, section 6.0.

<sup>45</sup> Fifth Report, sections 4.2, 4.3 and 6.6.

<sup>46</sup> Fifth Report, section 11.0.

### **PART III – ISSUES AND THE LAW**

61. The substantive issues on the Receiver's motion are the granting of the Stoney Creek AVO and the Ancillary Order, inclusive of the proposed relief regarding the Stalking Horse Bid, the productions,<sup>47</sup> the proposed distributions, approval of the professional fees, disbursements and activities and the sealing of the confidential appendices.

### **PART IV – LAW AND ARGUMENT**

62. In determining whether to approve a proposed sale of assets by a Court-appointed receiver, Ontario courts have consistently and uniformly applied the principles set out by the Court of Appeal for Ontario in *Royal Bank v. Soundair*,<sup>48</sup> namely:
- (a) *whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;*
  - (b) *whether the interests of all parties have been considered;*
  - (c) *the efficacy and integrity of the process by which offers are obtained; and*
  - (d) *whether there has been unfairness in the working out of the process.*
63. The reasonableness and adequacy of the Stalking Horse Bid and related relief are also informed in light of the *Soundair* principles, in which case the Court should consider:
- (a) *the fairness, transparency and integrity of the proposed process;*
  - (b) *the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and*

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<sup>47</sup> As described earlier in this factum, the Receivership Order already requires the productions be made to the Receiver.

- (c) *whether the sale process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.*<sup>49</sup>

64. The Receiver submits that the applicable *Soundair* principles have been satisfied in respect of both the proposed Stoney Creek Transaction and the proposed Stalking Horse Bid and related relief. The “facts” section of this factum, together with the analysis in the Fifth Report and the appendices thereto, reflect the significant effort undertaken by the Receiver to obtain the best prices possible, and to act fairly, efficiently and with integrity in considering the interests of all stakeholders. Without limiting the generality of the foregoing, the Receiver notes that:

- (a) the sale processes undertaken by the Receiver that led to the Stoney Creek Transaction and the Stalking Horse Bid were commercially reasonable and conducted in accordance with the Sale Process previously approved by the Court;
- (b) CBRE has extensive experience selling development properties in and around the GTA, widely canvassed the market for prospective purchasers and is of the view that the Stoney Creek Transaction is the best available in the circumstances;
- (c) the Receiver is of the view that the Stoney Creek purchase price is fair, reasonable and maximizes value, and that the Stalking Horse Bid represents a fair and reasonable floor price, based on (amongst other things):
  - (i) the offers received;
  - (ii) the Stoney Creek Purchaser having provided the Receiver an opportunity

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<sup>48</sup> (1991), 4 O.R. (3d) 1 (C.A.) (CanLII: <http://canlii.ca/t/1p78p>) [*Soundair*].

<sup>49</sup> *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750 [Comm. List] (CanLII: <https://canlii.ca/t/fqlpb>).

to secure a superior transaction, which did not materialize;

- (iii) the Bidding Procedures provide an opportunity to assess whether a superior transaction can be completed to the Stalking Horse Bid, the Expense Reimbursement is reasonable in the circumstances (less than 1% of the purchase price) and the Major Mackenzie Purchaser is not seeking a break fee, which is a common stalking horse feature;
  - (iv) estimates of value for both Real Properties that were provided to the Receiver by four realtors that participated in its broker solicitation process previously approved by the Court, and the appraised value of the Major Mackenzie Real Property based on a report by Altus Group; and
  - (v) rapidly changing dynamics in the real estate sector, including rapidly rising interest rates, further increases in construction costs<sup>50</sup> and foreign buyer restrictions announced by the federal government;
- (d) the significant deposits made by the purchasers and their ability to close; and
  - (e) the transactions satisfying all mortgage indebtedness on both Real Properties.<sup>51</sup>

65. The Receiver's rationale for its acceptance of the Stoney Creek Transaction and the Stalking Horse Bid reflects sound business judgment. The Receiver has also obtained independent opinions in respect of the security for which distributions are being sought, and the Eagle Valley Construction Lien Holdback is statutorily sufficient to protect valid

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<sup>50</sup> This is more relevant to the Major Mackenzie Real Property, given the present development restrictions on the Stoney Creek Real Property described at paragraphs 16 and 17 of this factum.

<sup>51</sup> Fifth Report, sections 6.5 and 7.5.

construction lien claimants, if any.<sup>52</sup> As such, the requested relief falls within “*the general principle that the court will be loathe to interfere with the business judgment of a Receiver and refuse to approve a transaction recommended by the Receiver acting properly in the fulfillment of its obligations as an officer of the court.*”<sup>53</sup>

66. The confidential appendices are limited to commercially-sensitive information, which the Receiver recommends be sealed until closing of their respective transactions or further Order of the Court. If disclosed, they would likely have a detrimental impact on the sale efforts for the Property. The requested sealing relief is the least restrictive means available, and, as such, complies with *Sierra Club*, *Sherman Estate* and the CJA.<sup>54</sup>
67. The fees, disbursements and activities of the Receiver and its counsel are fair, appropriate and reasonable. They reflect the proper and diligent execution of the Receiver’s duties, and should be approved by this Court.<sup>55</sup>

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** as of the date first written above.

*Aird & Berlis LLP*

**AIRD & BERLIS LLP, lawyers for the Receiver**

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<sup>52</sup> See sections 14(1), 31, 34(1) and 44(1) of the *Construction Lien Act* (Ontario) & the *Construction Act* (Ontario).

<sup>53</sup> *Soundair*, at para. 16; *Morganite Canada Corp. v. Wolfhollow Properties Inc.* (2003), 47 CBR (4th) 89 (ONSC) (CanLII: <http://canlii.ca/t/4qkp>) at para. 7; *B&M Handelman Investments Limited v. Drotos*, 2018 ONCA 581 (CanLII: <http://canlii.ca/t/hsp9r>) at para. 43.

<sup>54</sup> *Sierra Club of Canada v. Canada (Minister of Finance)* [2002] 2 S.C.R. 522 (CanLII: <http://canlii.ca/t/51s4>) [*Sierra Club*] at para. 53; *Sherman Estate v. Donovan*, 2021 SCC 25 (CanLII: <https://canlii.ca/t/jgc4w>) [*Sherman Estate*] at para 38; *Courts of Justice Act* (Ontario) [CJA], s. 137(2).

<sup>55</sup> Paragraphs 21 and 22 of the Receivership Order provide, amongst other things, that the Receiver and its counsel shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts.

**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. *Royal Bank of Canada v. Soundair Corp.*, (1991) 4 O.R. (3d) 1 (C.A.).
2. *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750 [Comm. List].
3. *Morganite Canada Corp. v. Wolfhollow Properties Inc.*, (2003) 47 CBR (4th) 89 (ONSC).
4. *B&M Handelman Investments Limited v. Drotos*, 2018 ONCA 581.
5. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522.
6. *Sherman Estate v. Donovan*, 2021 SCC 25.

## **SCHEDULE “B” RELEVANT STATUTES**

### **Securities Act, R.S.O. 1990, c. S.5**

#### **Freeze direction**

**126** (1) If the Commission considers it expedient for the due administration of Ontario securities law or the regulation of the capital markets in Ontario or expedient to assist in the due administration of the securities laws or the regulation of the capital markets in another jurisdiction, the Commission may,

- (a) direct a person or company having on deposit or under its control or for safekeeping any funds, securities or property of any person or company to retain those funds, securities or property;
- (b) direct a person or company to refrain from withdrawing any funds, securities or property from another person or company who has them on deposit, under control or for safekeeping; or
- (c) direct a person or company to maintain funds, securities or property, and to refrain from disposing of, transferring, dissipating or otherwise dealing with or diminishing the value of those funds, securities or property.

#### **Duration**

(1.1) A direction under subsection (1) applies until the Commission in writing revokes the direction or consents to release funds, securities or property from the direction, or until the Superior Court of Justice orders otherwise.

#### **Application**

(2) A direction under subsection (1) that names a bank or other financial institution shall apply only to the branches of the bank or other financial institution identified in the direction.

#### **Exclusions**

(3) A direction under subsection (1) shall not apply to funds, securities or property in a recognized clearing agency or to securities in process of transfer by a transfer agent unless the direction so states.

#### **Certificate of pending litigation**

(4) The Commission may order that a direction under subsection (1) be certified to a land registrar or mining recorder and that it be registered or recorded against the lands or claims identified in the direction, and on registration or recording of the certificate it shall have the same effect as a certificate of pending litigation.

#### **Review by court**

(5) As soon as practicable, but not later than 10 days after a direction is issued under subsection (1), the Commission shall serve and file a notice of application in the Superior Court of Justice to continue the direction or for such other order as the court considers appropriate.

#### **Grounds for continuance or other order**

(5.1) An order may be made under subsection (5) if the court is satisfied that the order would

be reasonable and expedient in the circumstances, having due regard to the public interest and,

- (a) the due administration of Ontario securities law or the securities laws of another jurisdiction; or
- (b) the regulation of capital markets in Ontario or another jurisdiction.

#### **Notice**

(6) A direction under subsection (1) may be made without notice but, in that event, copies of the direction shall be sent forthwith by such means as the Commission may determine to all persons and companies named in the direction.

#### **Clarification or revocation**

(7) A person or company directly affected by a direction may apply to the Commission for clarification or to have the direction varied or revoked.

#### **Appointment of receiver, etc.**

**129** (1) The Commission may apply to the Superior Court of Justice for an order appointing a receiver, receiver and manager, trustee or liquidator of all or any part of the property of any person or company.

#### **Grounds**

- (2) No order shall be made under subsection (1) unless the court is satisfied that,
  - (a) the appointment of a receiver, receiver and manager, trustee or liquidator of all or any part of the property of the person or company is in the best interests of the creditors of the person or company or of persons or companies any of whose property is in the possession or under the control of the person or company or the security holders of or subscribers to the person or company; or
  - (b) it is appropriate for the due administration of Ontario securities law.

#### **Application without notice**

(3) The court may make an order under subsection (1) on an application without notice, but the period of appointment shall not exceed fifteen days.

#### **Motion to continue order**

(4) If an order is made without notice under subsection (3), the Commission may make a motion to the court within fifteen days after the date of the order to continue the order or for the issuance of such other order as the court considers appropriate.

#### **Powers of receiver, etc.**

(5) A receiver, receiver and manager, trustee or liquidator of the property of a person or company appointed under this section shall be the receiver, receiver and manager, trustee or liquidator of all or any part of the property belonging to the person or company or held by the person or company on behalf of or in trust for any other person or company, and, if so directed by the court, the receiver, receiver and manager, trustee or liquidator has the authority to wind up or manage the business and affairs of the person or company and has all powers necessary or incidental to that authority.

**Directors' powers cease**

(6) If an order is made appointing a receiver, receiver and manager, trustee or liquidator of the property of a person or company under this section, the powers of the directors of the company that the receiver, receiver and manager, trustee or liquidator is authorized to exercise may not be exercised by the directors until the receiver, receiver and manager, trustee or liquidator is discharged by the court. .

**Fees and expenses**

(7) The fees charged and expenses incurred by a receiver, receiver and manager, trustee or liquidator appointed under this section in relation to the exercise of powers pursuant to the appointment shall be in the discretion of the court. 194, c. 11, s. 375.

**Variation or discharge of order**

(8) An order made under this section may be varied or discharged by the court on motion.

**Limitation period**

**129.1** Except where otherwise provided in this Act, no proceeding under this Act shall be commenced later than six years from the date of the occurrence of the last event on which the proceeding is based.

**Directors and officers**

**129.2** For the purposes of this Act, if a company or a person other than an individual has not complied with Ontario securities law, a director or officer of the company or person who authorized, permitted or acquiesced in the non-compliance shall be deemed to also have not complied with Ontario securities law, whether or not any proceeding has been commenced against the company or person under Ontario securities law or any order has been made against the company or person under section 127.

**Courts of Justice Act, R.S.O. 1990, c. C.43****137(2) Sealing documents**

A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

**Construction Lien Act, R.S.O. 1990, c. C.30****Creation of lien**

**14** (1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials. R.S.O. 1990, c. C.30, s. 14 (1); 2017, c. 24, s. 12 (1), 66.

### **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 forty-five-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 or abandoned; 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 forty-five-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. R.S.O. 1990, c. C.30, s. 31 (2); 2017, c. 24, s. 26 (4), 66.

### **Liens of other persons**

(3) Subject to subsection (4), the lien of any other person,

(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 forty-five-day period next following the occurrence of the earliest 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,

(ii) the date on which the person last supplies services or materials to the improvement, and

(iii) the date a subcontract is certified to be completed under section 33, where the services or materials were supplied under or in respect of that subcontract; 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 the substantial performance of the contract, expires at the conclusion of the forty-five-day period next following the occurrence of the earlier of,

- (i) the date on which the person last supplied services or materials to the improvement, and
- (ii) the date a subcontract is certified to be completed under section 33, where the services or materials were supplied under or in respect of that subcontract. R.S.O. 1990, c. C.30, s. 31 (3).

### **Separate liens when ongoing supply**

(4) Where a person has supplied services or materials to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract and has also supplied, or is to supply, services or materials after that date, the person's lien in respect of the services or materials supplied on or before the date of substantial performance expires without affecting any lien that the person may have for the supply of services or materials after that date. R.S.O. 1990, c. C.30, s. 31 (4); 2017, c. 24, s. 67.

### **Declaration of last supply**

(5) Where a person who has supplied services or materials under a contract or subcontract makes a declaration in the prescribed form declaring,

- (a) the date on which the person last supplied services or materials under that contract or subcontract; and
- (b) that the person will not supply any further services or materials under that contract or subcontract,

then the facts so stated shall be deemed to be true against the person making the declaration. R.S.O. 1990, c. C.30, s. 31 (5); 2017, c. 24, s. 65, 66.

### **How lien preserved**

**34** (1) A lien may be preserved during the supplying of services or materials or at any time before it expires,

- (a) where the lien attaches to the premises, by the registration in the proper land registry office of a claim for lien on the title of the premises in accordance with this Part; and
- (b) where the lien does not attach to the premises, by giving to the owner a copy of the claim for lien. R.S.O. 1990, c. C.30, s. 34 (1); 2010, c. 16, Sched. 2, s. 2 (5); 2017, c. 24, s. 63, 64, 68, 70, 71.

## **Vacating lien by payment into court**

### **Without notice**

**44** (1) Upon the motion of any person, without notice to any other person, the court shall make an order vacating,

(a) where the lien attaches to the premises, the registration of a claim for lien and any certificate of action in respect of that lien; or

(b) where the lien does not attach to the premises, the claim for lien,

where the person bringing the motion pays into court, or posts security in an amount equal to, the total of,

(c) the full amount claimed as owing in the claim for lien; and

(d) the lesser of \$50,000 or 25 per cent of the amount described in clause (c), as security for costs. R.S.O. 1990, c. C.30, s. 44 (1); 2017, c. 24, s. 63, 64, 70.

## **Construction Act, R.S.O. 1990, c. C.30**

### **Creation of lien**

**14** (1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials. R.S.O. 1990, c. C.30, s. 14 (1); 2017, c. 24, s. 12 (1), 66.

### **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.

### **Workers' trust fund lien**

(2.1) Subject to subsection (4), the lien of the trustee of a workers' trust fund on behalf of a worker or workers,

(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 earliest 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,

(ii) the date on which the final worker who is a beneficiary of the workers' trust fund last supplies services or materials to the improvement,

(iii) the date the contract is completed, abandoned or terminated, and

(iv) the date a subcontract is certified to be completed under section 33, where the services or materials were supplied under or in respect of that subcontract; 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 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 the final worker who is a beneficiary of the workers' trust fund last supplied services or materials to the improvement,

(ii) the date the contract is completed, abandoned or terminated, and

(iii) the date a subcontract is certified to be completed under section 33, where the services or materials were supplied under or in respect of that subcontract. 2017, c. 24, s. 26 (6).

### **Liens of other persons**

(3) Subject to subsection (4), the lien of any other person,

(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 earliest 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,
- (ii) the date on which the person last supplies services or materials to the improvement,
- (ii.1) the date the contract is completed, abandoned or terminated, and
- (iii) the date a subcontract is certified to be completed under section 33, where the services or materials were supplied under or in respect of that subcontract; 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 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 the person last supplied services or materials to the improvement,
- (i.1) the date the contract is completed, abandoned or terminated, and
- (ii) the date a subcontract is certified to be completed under section 33, where the services or materials were supplied under or in respect of that subcontract. R.S.O. 1990, c. C.30, s. 31 (3); 2017, c. 24, s. 26 (7-10).

### **Separate liens when ongoing supply**

(4) Where a person has supplied services or materials to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract and has also supplied, or is to supply, services or materials after that date, the person's lien in respect of the services or materials supplied on or before the date of substantial performance expires without affecting any lien that the person may have for the supply of services or materials after that date. R.S.O. 1990, c. C.30, s. 31 (4); 2017, c. 24, s. 67.

### **Declaration of last supply**

(5) Where a person who has supplied services or materials under a contract or subcontract makes a declaration in the prescribed form declaring,

- (a) the date on which the person last supplied services or materials under that contract or subcontract; and
- (b) that the person will not supply any further services or materials under that contract or subcontract,

then the facts so stated shall be deemed to be true against the person making the declaration. R.S.O. 1990, c. C.30, s. 31 (5); 2017, c. 24, s. 65, 66.

### **Notice of termination**

(6) If a contract is terminated, either the owner or the contractor or other person whose lien is subject to expiry shall publish, in the manner set out in the regulations, a notice of the termination in the prescribed form and, for the purposes of this section, the date on which the contract is terminated is the termination date specified in the notice for the contract. 2017, c. 24, s. 26 (11).

### **Validity of termination**

(7) Subsection (6) does not prevent a person from contesting the validity of a termination. 2017, c. 24, s. 26 (11).

### **How lien preserved**

**34** (1) A lien may be preserved during the supplying of services or materials or at any time before it expires,

(a) where the lien attaches to the premises, by the registration in the proper land registry office of a claim for lien on the title of the premises in accordance with this Part; and

(b) where the lien does not attach to the premises, by giving to the owner a copy of the claim for lien. R.S.O. 1990, c. C.30, s. 34 (1); 2010, c. 16, Sched. 2, s. 2 (5); 2017, c. 24, s. 63, 64, 68, 70, 71.

### **Vacating lien by payment into court**

#### **Without notice**

**44** (1) Upon the motion of any person, without notice to any other person, the court shall make an order vacating,

(a) where the lien attaches to the premises, the registration of a claim for lien and any certificate of action in respect of that lien; or

(b) where the lien does not attach to the premises, the claim for lien,

where the person bringing the motion pays into court, or posts security in an amount equal to, the total of,

(c) the full amount claimed as owing in the claim for lien; and

(d) the lesser of \$250,000 or 25 per cent of the amount described in clause (c), as security for costs. R.S.O. 1990, c. C.30, s. 44 (1); 2017, c. 24, s. 36 (1), 63, 64, 70; 2018, c. 17, Sched. 8, s. 12 (1).

**ONTARIO SECURITIES COMMISSION**

Applicant

and

**GO-TO DEVELOPMENTS**

**HOLDINGS INC. et al**

Respondents

Court File No: CV-21-00673521-00CL

***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**  
**COMMERCIAL LIST**

Proceeding commenced at TORONTO

**FACTUM OF THE RECEIVER**  
**(RETURNABLE AUGUST 22, 2022)**

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