

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

KINGSETT MORTGAGE CORPORATION

Applicant

- AND -

759 WINSTON CHURCHILL GP INC., 759 WINSTON CHURCHILL L.P., 688 SOUTHDOWN
GP INC., 688 SOUTHDOWN LP, 2226 ROYAL WINDSOR GP INC. and 2226 ROYAL
WINDSOR LP

Respondents

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

FACTUM OF KENAI DAN CONTRACTING LIMITED
(MOTION FOR AMENDMENT TO RECEIVERSHIP APPOINTMENT ORDER)

April 25, 2025

NORTON ROSE FULBRIGHT CANADA LLP

222 Bay Street, Suite 3000,
Toronto, Ontario M5K 1E7

Evan Cobb, LSO#: 55787N

Tel: +1 416.216.1929

evan.cobb@nortonrosefulbright.com

Meghan Fougere LSO#: 66623B

Tel: +1.613.780.1555

meghan.fougere@nortonrosefulbright.com

Lawyers for Kenaidan Contracting Limited

TO: **THE SERVICE LIST**

PART I - INTRODUCTION

1. Kenaidan Contracting Limited (“**KCL**”) was the construction manager on the project located at 759 Winston Churchill Boulevard (the “**Project**”) that is subject to these receivership proceedings.
2. Kenaidan held that role from May 2020 until its construction management contract was disclaimed by KSV Restructuring Inc., as receiver of 759 Winston Churchill GP Inc. and 759 Winston Churchill L.P., among others (the “**Receiver**”), in late 2024.
3. As a result of its role as construction manager, KCL accrued substantial claims on the Project pre-receivership that remain unpaid at this time. Those claims, which are the subject of perfected liens under the *Construction Act* (Ontario) exceed \$31 million. As part of those lien claims, KCL is owed over \$9 million on account of unpaid statutory holdback amounts alone.
4. In its role as construction manager, KCL acted as an intermediary between the owner of the Project and the various suppliers and service providers that were contracted to complete work on the Project. The significant majority of KCL’s lien claims are ‘passed through’ from work done by suppliers and service providers.
5. At this time, approximately \$7.14 million of receivables are claimed by these suppliers and service providers based on KCL’s records. These amounts have not been paid because KCL itself has not received its statutory holdback amounts described above, which KCL believes are priority claims in the receivership proceeding.
6. KCL now understands the receivership proceedings will be extended significantly to complete construction of two additional buildings. If that occurs, the time for KCL to receive its priority holdback amount, which is necessary to pay the suppliers and service

providers, will also be extended. As a result, it is important for KCL to seek additional clarity on the scope of the stay of proceedings to ensure it is not required to respond to claims for payment by suppliers and service providers for the same amounts KCL itself cannot collect due to the stay of KCL's own claims and the extension of these proceedings for additional construction work.

PART II - THE FACTS

KCL Claims

7. KCL was the construction manager on the Project pursuant to the Construction Management Contract (CCDC 5B) with 759 Winston Churchill L.P. (the "**Owner**") dated May 4, 2020 (the "**CM Agreement**").¹
8. As a result of work on the Project prior to the commencement of these Proceedings, including completion of "Building 3" of the Project, KCL is owed in excess of \$31 million. KCL holds registered and perfected lien claims against the Project in the aggregate amount of \$31,961,541 (the "**KCL Lien**").²
9. According to KCL's records, the statutory holdback not remitted to KCL by the Owner at this time, and that is included in the KCL Lien, is currently calculated as \$9,291,213.74 (the "**KCL Holdback**").³
10. These receivership proceedings were not the result of any issues regarding KCL's work, which was completed in accordance with the CM Agreement.⁴

¹ Motion Record of the Moving Party, Affidavit of G. Fortuna, Tab 2, pg. 21 at para. 6.

² Motion Record of the Moving Party, Affidavit of G. Fortuna, Tab 2, pg. 22 at para. 7.

³ Motion Record of the Moving Party, Affidavit of G. Fortuna, Tab 2, pg. 23 at para. 8.

⁴ Motion Record of the Moving Party, Affidavit of G. Fortuna, Tab 2, pg. 23 at para. 10.

KCL's Suppliers and Service Providers

11. The KCL Lien includes claims of its suppliers and service providers who were also engaged on the Project, which KCL has passed through to the owner of the Project.⁵
12. Certain of those suppliers and service providers have amounts owing on account of statutory holdback under the *Construction Act* (Ontario), which has not been remitted by the Owner to KCL, and has therefore not been paid by KCL to the relevant suppliers. Those claimed amounts are included in the KCL Holdback mentioned above.⁶
13. KCL's agreements with its suppliers and service providers, including those retained on the Project, include the following provision:

The Subcontractor agrees that the obligation of the Contractor to pay the Subcontractor shall not in any case exceed the amount approved by the Certifier and paid by the Owner.⁷
14. During these proceedings, KCL has advised suppliers and service providers that payments would flow to them when KCL is paid by the Owner or the Receiver and, more specifically, when the KCL Holdback is released. The KCL Holdback claim and the claims of the KCL suppliers and subcontractors are in substance the same claims.⁸

Stay of Proceedings

15. KCL would be substantially prejudiced if suppliers and service providers were able to pursue claims against KCL for work on the Project while KCL's statutory lien claims, including the KCL Holdback, are not remitted by the Owner and KCL is stayed from

⁵ Motion Record of the Moving Party, Affidavit of G. Fortuna, Tab 2, pg. 22 at para. 11.

⁶ Motion Record of the Moving Party, Affidavit of G. Fortuna, Tab 2, pg. 22 at para. 12.

⁷ Motion Record of the Moving Party, Affidavit of G. Fortuna, Tab 2, pg. 22 at para. 13.

⁸ Motion Record of the Moving Party, Affidavit of G. Fortuna, Tab 2, pg. 22 at para. 14.

pursuing such amounts.⁹

16. This could result in claims against KCL in the amount of approximately \$7.14 million based on KCL's books and records for which KCL would have no available payments from the Owner as a result of the stay of proceedings, notwithstanding any priority provided at law to the KCL Holdback.¹⁰
17. KCL took some comfort from the terms of the Appointment Order, which provided:

no Proceeding against or in respect of any of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or leave of this Court, and any and all proceedings currently under way against or in respect of any of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court.¹¹
18. In any event, KCL expected that the Project would ultimately be sold and the KCL Holdback would be repaid in priority to other amounts by this time, thereby providing KCL with sufficient funds to flow through to the KCL suppliers and service providers.¹²

Extension of Receivership Proceedings

19. The Receiver believes the best option for the Project in the circumstances is the completion of Building 1 and Building 2. This results in the continuation of these proceedings until potentially the second quarter of 2026 given the anticipated completion date for construction in March 2026.¹³
20. This approach will delay the time of realization on the Project and the release of

⁹ Motion Record of the Moving Party, Affidavit of G. Fortuna, Tab 2, pg. 23 at para. 15.

¹⁰ Motion Record of the Moving Party, Affidavit of G. Fortuna, Tab 2, pg. 23 at para. 16.

¹¹ Motion Record of the Moving Party, Affidavit of G. Fortuna, Tab 2, pg. 23 at para. 17.

¹² [Construction Act, R.S.O. 1990, c C.30, at s. 78\(2\)](#); Motion Record of the Moving Party, Affidavit of G. Fortuna, Tab 2, pg. 23 at para. 19.

¹³ Motion Record of the Moving Party, Affidavit of G. Fortuna, Tab 2, pg. 24 at paras. 20 & 21.

distributions to KCL, including the KCL Holdback.¹⁴

21. The increased duration of these proceedings as a result of the proposed continuing construction, and any delays in receipt of the KCL Holdback amounts until that time, creates significant concern that KCL may need to respond to claims of suppliers and service providers, who do not believe their claims are stayed. KCL would then need to either (i) seek to enforce the stay of proceedings against these individual claims; or (ii) defend such claims, including on the basis of the payment provision in the subcontract agreements described above. In the alternative, KCL may need to seek to lift the stay of proceedings under the Appointment Order to pursue its claim to the KCL Holdback in order to fund any supplier or service provider claims.¹⁵

Proposed Modification to Appointment Order

22. KCL requests that the Court provide clarification on the scope of the stay of proceedings at this time and seeks confirmation that the status quo can be maintained for the Project, KCL, the suppliers and service providers, pending completion of the Project and release of the KCL Holdback (and any other recoveries of the KCL Lien) that could be used to fund supplier and service provider recoveries.¹⁶
23. Specifically, KCL requests that the Appointment Order be modified to provide that claims and proceedings between KCL and its subcontractors, suppliers and service providers in connection with the Project are in all cases covered by the stay of proceedings, subject to any further order the court may make.¹⁷

¹⁴ Motion Record of the Moving Party, Affidavit of G. Fortuna, Tab 2, pg. 24 at para. 22.

¹⁵ Motion Record of the Moving Party, Affidavit of G. Fortuna, Tab 2, pg. 24 at para. 23.

¹⁶ Motion Record of the Moving Party, Affidavit of G. Fortuna, Tab 2, pg. 25 at para. 26.

¹⁷ Motion Record of the Moving Party, Affidavit of G. Fortuna, Tab 2, pg. 25 at para 27.

PART III - ISSUES AND THE LAW

24. The issue on KCL's motion is whether, in the context of the proposed extension of these receivership proceedings, it is appropriate to amend the stay of proceedings as requested by KCL.

The Court Has Jurisdiction To Grant Stays In Favour Of Third Parties

25. The Court's authority to grant a stay of proceedings in favour of a third party in a receivership proceeding is found in section 101(2) of the *Courts of Justice Act* (Ontario) (the "CJA"), which states an order appointing a receiver may include such terms as are considered just.¹⁸
26. The Supreme Court of Canada has stated that Section 243 of the *Bankruptcy and Insolvency Act* (Canada) (the "BIA")¹⁹ regarding receiverships provides judges the broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise.²⁰ The jurisdiction permits the court "to do not only what 'justice dictates' but also what 'practicality demands'".²¹
27. In the receivership of the Toronto condominium project known as "The One", this court was satisfied that Section 243 of the BIA and Section 101 of the CJA provide jurisdiction to grant third party stay orders in a receivership. In that case, the stay was extended to the condominium developer.²²

¹⁸ [Courts of Justice Act, R.S.O. 1990, c. C.43 at s. 101\(2\).](#)

¹⁹ [Bankruptcy and Insolvency Act, R.S.C. 1985 c. B-3, as amended, at s. 243.](#)

²⁰ [Peace River Hydro Partners v. Petrowest Corp. \[2022\] SCC 41 \(CanLII\) at para. 148.](#)

²¹ [Canada \(Minister of Indian Affairs & Northern Development\) v. Curragh Inc. 1994 CanLII 7468 \(ON SC\) at para. 16.](#)

²² [KEB Hana Bank, as Trustee v. Mizrahi Commercial \(The One\) LP et al., 2023 ONSC 5881 \(CanLII\) at para. 54.](#)

The Order Sought Clarifies The Terms Of The Existing Stay

28. Currently, the relevant stay of proceedings in the Appointment Order in this proceeding is as follows:

9. THIS COURT ORDERS that no Proceeding against or in respect of any of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of any of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court.²³

29. The stay of proceedings as currently drafted would extend to any claims “in respect of” the Property. The words “in respect of” connotes the broadest possible connection between two subject matters.²⁴ In the current case, any claim by a supplier or service provider against KCL would be a claim in respect of the Property, arising from work done on the Property and resulting in a lien claim arising against the Property, which is incorporated into KCL’s own claim on the Project.

30. KCL submits the order it is seeking at this time only clarifies the scope of the stay of proceedings that already should properly extend to claims by suppliers and service providers against KCL that are in substance claims for recovery against the Project.

Balance Of Prejudice Favours Granting The Requested Order

31. The suppliers and service providers whose claims may be impacted by the proposed stay of proceedings have contracts with KCL that state:

The Subcontractor agrees that the obligation of the Contractor to pay the Subcontractor shall not in any case exceed the amount approved by the Certifier and paid by the Owner.²⁵

²³ Motion Record of the Moving Party, Tab 3, pg. 94 at para. 2.

²⁴ [*Stegenga v. Economical Mutual Insurance Company*, 2019 ONCA 615 \(CanLII\) at para. 42.](#) ²⁵ Motion Record of the Moving Party, Affidavit of G. Fortuna, Tab 2, pg. 22 at para. 13.

32. The suppliers and service providers have no enforceable contractual payment right as against KCL to recover their portion of holdback funds until KCL recovers the KCL Holdback from the Project.
33. This is an essential part of the arrangement between KCL and its suppliers and service providers. KCL will not have funds to pay, and could not commit to pay, these suppliers and subcontractors until it is paid by the Project owner. Any obligation to do so at this time would be a significant burden on KCL's liquidity.
34. KCL's proposed amendment to the stay of proceedings is consistent with this contractual arrangement. It does not prejudice any supplier or subcontractor as those parties have already contractually acknowledged that in the current circumstances their right to payment from KCL is restricted.
35. The proposed amendment to the stay of proceedings also relieves the prejudice KCL could face as a result of the continuation of these proceedings that permits the completion of Buildings 1 and 2 of the Project. If the Project was monetized in its current form at this time, then priority claims such as the KCL Holdback would be paid out of those proceeds and would be available to pay KCL's suppliers and service providers. Instead, the continuing build requires KCL to wait for the payment of the KCL Holdback in order to potentially maximize value for all stakeholders. The status quo should be maintained to avoid any prejudice to KCL while the build is continuing.
36. The proposed order places suppliers and service providers in the same position as KCL, which is reasonable in the circumstances where the claims of those suppliers and service providers are simply passed through by KCL to the owner of the Project.

37. To the extent any party believes they are prejudiced by the proposed relief sought, KCL proposes that a comeback right be provided to such party on seven days notice.

PART IV - ORDER REQUESTED

38. KCL requests that paragraph 9 of the Appointment Order be amended as follows:

9. THIS COURT ORDERS that no Proceeding against or in respect of any of the Debtors or the Property, or against Kenaidan Contracting Limited ("KCL") or its suppliers and subcontractors solely in connection with any supplies of goods or services to the Property. shall be commenced or continued except with the written consent of the Receiver (other than in the case of claims against KCL or its suppliers and subcontractors) or with leave of this Court and any and all Proceedings currently under way against or in respect of any of the Debtors or the Property, or against KCL or its suppliers and subcontractors solely in connection with any supplies of goods or services to the Property. are hereby stayed and suspended pending further Order of this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of April, 2025.



NORTON ROSE FULBRIGHT CANADA LLP
Lawyers for Kenaidan Contracting Limited

**SCHEDULE “A”
LIST OF AUTHORITIES**

Peace River Hydro Partners v. Petrowest Corp. [2022] SCC 41 (CanLII)

Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc. 1994 CanLII 7468 (ON SC)

KEB Hana Bank, as Trustee v. Mizrahi Commercial (The One) LP et al., 2023 ONSC 5881 (CanLII)

Stegenga v. Economical Mutual Insurance Company, 2019 ONCA 615 (CanLII)

SCHEDULE “B” RELEVANT STATUTES

Courts of Justice Act, R.S.O. 1990, c. C.43.

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

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

Building mortgage

78(2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.

Kingsett Mortgage Corporation

-and-

759 Winston Churchill GP Inc. ,et
al.

Court File No. CV-24-00714543-00CL

Applicant

Respondent

ONTARIO
**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

FACTUM OF KENAIIDAN CONTRACTING LIMITED

NORTON ROSE FULBRIGHT CANADA LLP

222 Bay Street, Suite 3000,
Toronto, Ontario M5K 1E7

Evan Cobb, LSO#: 55787N

Tel: +1 416.216.1929

evan.cobb@nortonrosefulbright.com

Meghan Fougere LSO#: 66623B

meghan.fougere@nortonrosefulbright.com

Tel: 613.780.1555

Lawyers for Kenaidan Contracting Limited