

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

BETWEEN:

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant

-and-

**2011836 ONTARIO CORP., JEFFERSON PROPERTIES LIMITED PARTNERSHIP,
1000162801 ONTARIO CORP., AMERICAN CORPORATION
and 1000199992 ONTARIO CORP.**

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 THE RECEIVER (MOTION RETURNABLE NOVEMBER 5, 2024)

October 31, 2024

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Lawyers for the Receiver, Albert Gelman Inc.

TO: Service List

PART I. OVERVIEW

1. Albert Gelman Inc. (“**AGI**”), the receiver and manager (in such capacity, the “**Receiver**”) of 2011836 Ontario Corp. (“**201**”) and Jefferson Properties Limited Partnership (“**JPLP**” and, together with 201, the “**Debtors**”) seeks an order to, among other things, institute a lien claims process to adjudicate the value of outstanding lien claims against the Real Property (as defined below).
2. The Receiver was appointed pursuant to the order of Justice Cavanagh dated December 21, 2023 (the “**Appointment Order**”).
3. At the time of the appointment, the Debtors were in the midst of constructing a residential development project called Richmond Hill Grace (the “**Project**”) on certain real property owned by the Debtors (the “**Real Property**”). The Receiver presently intends to complete the construction of the Project and sell the units thereof.
4. As described in the Third Report (as defined below), there are a number of construction liens registered on title to the Real Property. The Receiver proposes a streamlined, comprehensive lien claims process to adjudicate these lien claims.
5. The Order sought by the Receiver will permit the Debtors’ stakeholders to achieve a resolution of all outstanding lien claims, while minimizing time and expense for all parties as well as the Court.
6. The Receiver also seeks the following ancillary relief on this motion:

- (a) the approval of its activities as set out in the Third Report, dated August 6, 2024 (the “**Third Report**”) and the Supplement to the Third Report, dated 31, 2024 (the “**Supplemental Report**”);
- (b) the approval of the fees of both the Receiver and its legal counsel; and
- (c) the approval of the Receiver’s interim statement of receipts and disbursements (the “**Interim SRD**”).

PART II. FACTS

A. Background

7. The Debtors are in the business of real estate development and are the owners of the Real Property. The Real Property is the site of the Project, which contemplates the construction of 60 stacked condominium units and 36 freehold townhomes. The Project is currently under construction.¹

8. On December 21, 2023, Albert Gelman Inc. was appointed Receiver of the Debtors. Presently, the Receiver is in the process of completing the Project for the benefit of the Debtors’ stakeholders.²

B. Construction Liens

9. As of the date of the Receiver’s appointment, the Debtors were significantly behind in paying their construction suppliers and trade payables. This resulted in the registration

¹ Third Report, at para. 3, Amended Motion Record of the Receiver (“**AMR**”), Tab 2, p. 15 ([E2566](#)).

² Third Report, at para. 1, AMR, Tab 2, p. 15 ([E2566](#)).

of numerous liens against title to the Real Property by various construction suppliers, trades and others (defined below as the “**Pre-Receivership Claims**”).³

10. Following the appointment of the Receiver, trades continued to work on the Project until January 24, 2024, when the Receiver shut-down work on the project as a result of various health and safety issues and Project deficiencies identified by the Receiver’s consultants.⁴ The Receiver identified a number of issues with invoices it received from Trades in connection with work performed by trades after its appointment. As a result, a number of post-receivership invoices submitted to the Receiver by trades remain unpaid, some of which have led to lien claims being registered on title to the Property (the “**Post-Receivership Claims**”).⁵

11. As of July 29, 2024, the following construction Pre-Receivership Claims and Post-Receivership Claims (collectively, the “**Lien Claims**”) were registered by various construction suppliers, trades and others (collectively, the “**Lien Claimants**”) on title to the Real Property:⁶

³ Third Report, at para. 21, AMR, Tab 2, pp. 18-19 ([E2569](#)).

⁴ Second Report at para. 82 ([E2841](#)).

⁵ Second Report, paras. 91-93 ([E2843](#)).

⁶ Third Report, at para. 21, AMR, Tab 2, p. 19 ([E2569](#)).

| Registration Date | Amount (\$) | Parties From |
|-------------------|-------------|--|
| 2023-12-21 | 112,303 | ECO BARRIERS INC. |
| 2023-12-21 | 838,295 | LEBLON CARPENTRY INC. |
| 2024-01-10 | 298,808 | Vinyl Window Designs Ltd. |
| 2024-01-18 | 49,654 | EDG COR INC. |
| 2024-01-23 | 75,687 | COOPER EQUIPMENT RENTALS LIMITED |
| 2024-01-25 | 735,918 | CORE CONSTRUCTORS LTD. |
| 2024-01-26 | 52,487 | STEPHENSON'S RENTAL SERVICES INC. |
| 2024-01-29 | 505,524 | RAMA IDEAL CONSTRUCTION INC. |
| 2024-01-31 | 714,167 | LUMBER CITY INC. |
| 2024-01-31 | 20,084 | JCL CONCRETE PUMPING LIMITED |
| 2024-02-07 | 203,196 | P.C. CAULKING & RESTORATIONS INC. |
| 2024-02-15 | 809,755 | MENDOZA, SANTIAGO ALFREDO |
| 2024-02-21 | 171,782 | RAFAT GENERAL CONTRACTOR INC. |
| 2024-02-29 | 128,954 | WYECROFT TRIM & DOORS GROUP INC. |
| 2024-03-05 | 41,974 | ONTARIO TRUCKING AND DISPOSAL LTD. |
| 2024-03-07 | 222,330 | MAVEN GROUP INC. |
| 2024-03-07 | 84,459 | LALA GLASS & RAILING LTD. |
| 2024-03-08 | 38,219 | DIRECT UNDERGROUND INC. |
| 2024-03-08 | 755,372 | OAKDALE DRYWALL & ACOUSTICS LTD. |
| 2024-03-11 | 197,139 | DON FRY SCAFFOLD SERVICE INC. |
| 2024-03-25 | 473,936 | 2035755 ONTARIO LTD; METRO AIR LTD.; 1822873 ONTARIO INC.; HERA SERVICES INC.; MATTHEW MERLA |
| 2024-03-28 | 310,620 | LEBLON CARPENTRY INC. |
| 2024-04-25 | 105,552 | EMERGENCY PROPANE SERVICES INC. ARTHUR AERIAL LIFTS INC. 207875 ONTARIO LTD. |

C. Consultation Regarding a Lien Claims Process

12. From August to October 2024, the Receiver engaged in consultation with the various Lien Claimants with a view to agreeing on a form of Lien Claims Process Order that is satisfactory to all Lien Claimants. As set out in further detail below, all of the Lien Claimants, save for the Sutherland Law Clients (as defined below) have either consented to or are not opposing the Lien Claims Process Order now being sought by the Receiver.

13. The Lien Claims Process Order being sought in this motion is also supported by the Debtors' senior secured lender.⁷

14. The key provisions of the proposed Lien Claims Process are as follows:

(i) The Lien Claims Process applies to both:

- 1) Claims for lien registered against the Property on or before the date of the Appointment Order (December 21, 2023); and
- 2) Claims against Jefferson Properties Limited Partnership, 2011836 Ontario Corp. and/or the Receiver in respect of services or materials supplied to improvements to the Property on or after the date of the Appointment Order (December 21, 2023) and before June 1, 2024, including any legal costs incurred in respect thereof;

(ii) each Lien Claimant must submit their Lien Claim on the prescribed Proof of Lien Claim Form together with the requisite supporting documentation within 30 days following the making of the Lien Claim Order (collectively, the "**Lien Documentation**"), after which any Lien Claimant who has not submitted the required Lien Documentation will be barred from asserting their Lien Claim;

⁷ First Supplement to the Third Report, October 31, 2024 ("**Supplemental Report**"), para. 11, Supplemental Motion Record ("**SMR**"), Tab 2, p. 20 ([E3160](#)).

- (iii) included in the required Lien Documentation is a proof of lien claim form which requires the Lien Claimant to set out, among other things, the amount claimed by the Lien Claimant in respect of services and materials supplied to the Project before the date of the Appointment Order and the amount claimed by the Lien Claimant in respect of services and materials supplied to the Project on or after the date of the Appointment Order;
- (iv) the Receiver will review the Lien Claim of each Lien Claimant and evaluate the timeliness and quantum of each Lien Claim, distinguishing between Claims in respect of services or materials supplied to improvements to the Property before December 21, 2023 (these Claims being “**Pre-Receivership Claims**”) and Claims in respect of services or materials supplied to improvements to the Property on or after December 21, 2023 (these Claims being “**Post- Receivership Claims**”);
- (v) the Receiver will provide each Lien Claimant that filed Lien Documentation with a notice setting out the Receiver’s determination as to the validity and quantum of, as applicable, the Lien Claimant’s Pre-Receivership Claim and/or Post-Receivership Claim (a “**Notice of Evaluation**”);
- (vi) Lien Claimants will have an opportunity to dispute any part of the Receiver’s assessment set out in a Notice of Evaluation by providing

the Receiver with a notice setting out full particulars of the dispute (the "**Notice of Dispute**") within 30 days of service of the Notice of Evaluation (the "**Dispute Bar Date**"); and

(vii) If the Receiver and the relevant Lien Claimants and stakeholders are unable to resolve a Lien Claim on consent, a hearing will be held before an adjudicator with expertise in constructions lien matters to be agreed upon by the parties or appointed by the Court (the "**Adjudicator**");

1) in the case of Pre-Receivership Claims, the final and binding determination of the outstanding Pre-Receivership Claims on an appellate standard of review of the Receiver's initial determination of the claim; and

2) in the case of Post-Receivership Claims, a hearing *de novo* with a further right of appeal to the Court therefrom.

15. The Receiver believes that the proposed Lien Claims Process is an appropriate and cost-effective process for the determination of the validity and quantum of the pre- and post-receivership Lien Claims and recommends that this Court grant the order sought.

D. Negotiations with Sutherland Law Clients

16. As noted above, the Lien Claims Process Order remains contested by Edg Cor Inc., Core Constructors Ltd., Stephenson's Rental Services Inc., Mendoza Santiago

Alfredo and Wyecroft Trim & Doors Group Inc. (collectively, the “**Sutherland Law Clients**”) all of whom are clients of the Sutherland Law Group.⁸

17. The Sutherland Law Clients’ main objection to the Lien Claims Process Order is that for a Pre-Receivership Claim, a Lien Claimant will only have one right of appeal from the Receiver’s initial determination of the Lien Claim. As noted above, this right of appeal will be to the Adjudicator.⁹

18. In respect of a Post-Receivership Claim, following the Receiver’s evaluation of the claim, Lien Claimants will have the opportunity to have their claim heard on a *de novo* basis by the Adjudicator. Lien Claimants will then have a further right of appeal from the Adjudicator’s *de novo* decision to the Court.

19. The justification for this distinction between Pre- and Post-Receivership Claims is that, in the case of Post-Receivership Claims, the Receiver itself was, at least notionally, engaged in retaining or hiring the services of the Lien Claimants.

1. Information Requests

20. As the Receiver understands it, the Sutherland Law Clients’ principal reason for contesting the Lien Claims Process Order (and specifically, the rights of appeal for Pre- Receivership Claims contemplated therein) is their position that their requests for information from the Receiver have not been adequately addressed.¹⁰

⁸ Supplemental Report, para. 12, SMR, Tab 2, p. 20 ([E3160](#)).

⁹ Supplemental Report, para. 13, SMR, Tab 2, p. 20 ([E3160](#)).

¹⁰ Supplemental Report, para. 16, SMR, Tab 2, p. 21 ([E3161](#)).

21. In particular, on October 3, 2024, the Sutherland Law Clients requested the production of information concerning the construction lien holdbacks maintained by the Debtors and the advances made to the Debtors by its secured lender.¹¹

22. The Receiver is of the view that the production of this information is irrelevant to this stage of the proceeding, given that the purpose of the Lien Claims Process, in the case of Pre-Receivership Claims, is only to value the claims, without determining their priority or providing for distribution. Nevertheless, the Receiver has provided the Sutherland Law Clients with this information.¹²

2. Proposed Interim Resolution

23. The Receiver's motion for a Lien Claims Process Order was originally scheduled to be heard on August 19, 2024, which hearing was then adjourned to October 4, 2024.¹³

24. On October 3, 2024, counsel for the Sutherland Law Clients sent a letter to counsel for the Receiver objecting to the Lien Claims Process Order then sought by the Receiver.¹⁴

25. As a means of expediently resolving this motion, prior to the return of this motion on October 4, 2024 (and repeatedly since then), the Receiver proposed a form of order that would have preserved the Sutherland Law Clients' rights to contest the appeal process for Pre-Receivership Lien Claims within 30 days from the date that they are in

¹¹ Supplemental Report, para. 17, SMR, Tab 2, p. 21 ([E3161](#)).

¹² Supplemental Report, para. 18, SMR, Tab 2, p. 21 ([E3161](#)).

¹³ Supplemental Report, para. 20, SMR, Tab 2, p. 22 ([E3162](#)).

¹⁴ Supplemental Report, para. 21, SMR, Tab 2, p. 22 ([E3162](#)).

receipt of all information that they reasonably requested from the Receiver (the “**Interim Resolution**”).¹⁵

26. The Interim Resolution was explicitly without prejudice to any position either the Sutherland Law Clients or the Receiver may take on this appeal process issue, thereby preserving the rights of both parties.¹⁶

27. This Interim Resolution was first proposed to the Sutherland Law Clients by the Receiver’s counsel on October 3, 2024, following Sutherland Law’s letter to the Receiver’s counsel of that same date. The Sutherland Law Clients have refused this Interim Resolution despite the fact that it fully preserved the Sutherland Law Clients’ rights concerning Post-Receivership Claims.¹⁷

PART III. ISSUES

28. This motion raises the following issues:

- (a) Should the Court approve the Lien Claims Process Order?; and
- (b) Should the Court approve the Third Report, the Supplemental Report, the Interim SRD and the fees and disbursements of the Receiver and its counsel?

29. The Receiver submits that both of these questions should be answered affirmatively.

¹⁵ Supplemental Report, para. 22, SMR, Tab 2, p. 22 ([E3162](#)).

¹⁶ Supplemental Report, para. 23, SMR, Tab 2, p. 22 ([E3162](#)).

¹⁷ Supplemental Report, para. 24, SMR, Tab 2, p. 23 ([E3163](#)).

PART IV. LAW

A. *The Court should approve the Lien Claims Process*

1. **The Court Possesses the Authority to Grant the Order Sought**

30. The Court's jurisdiction to make a claims process order in the course of an insolvency, including in the context of a receivership, is well established.¹⁸ The *Bankruptcy and Insolvency Act* confers on Courts a broad, discretionary jurisdiction, which recognizes the need for practicality in often fast-moving insolvency situations.¹⁹

31. In the context of claims processes, Courts have recognized that the BIA needs to be interpreted in a commercially reasonable manner, having regard to the need to proceed in an expedited fashion.²⁰

2. **Merits of Proposed Order**

32. A claims process in an insolvency is intended to be an efficient and flexible process in order that the claims of creditors can be established expeditiously with a view to the distribution of available assets as soon as reasonably possible.²¹ These purposes and objectives recognize:

¹⁸ *Romspen Investment Corporation v. Atlas Healthcare (Richmond Hill) Ltd. et al.*, CV-18-607303-00CL ([Order](#) of and [Endorsement](#) of Justice Penny, Ont. S.C.J. [Commercial List], December 12, 2019) [*Atlas Healthcare*]. See also *Quality Rugs of Canada Limited v. Waygar Capital Inc.*, CV-23-00703933-00CL, CV-23-00703292-00CL and CV-23-00703874-00CL ([Order](#) and [Endorsement](#) of Justice Penny, Ont. S.C.J., November 24, 2023) and *Peoples Trust Company et al. v. Vandyk-Backyard Queensview Limited et al.*, CV-24-00713783-00CL ([Order](#) and [Endorsement](#) of Justice Cavanagh, Ont. S.C.J., March 6, 2024).

¹⁹ *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ss. [183\(1\)](#), [243\(1\)](#) [*BIA*]; *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001 SCC 92](#) at [para. 38](#); *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#), [paras. 72-73](#).

²⁰ *San Juan Resources Inc. Re.*, [2009 ABQB 55](#) at [para. 30](#) [*San Juan*].

²¹ *Computershare Trust Co. of Canada v. Cookstown Holding Ltd.*, [2014 ONSC 685](#) at [para. 13](#) [*Cookstown*].

- (a) the reality of limited judicial resources and inherent systemic delays that disrupt timely reviews by the court;²²
- (b) that it is creditors who will suffer prejudice if there is delay in receipt of whatever recovery they can expect from an insolvent estate;²³ and
- (c) a claims process that is unduly costly will simply exacerbate the already insolvent circumstances of a debtor's estate and further reduce creditor recovery.²⁴

33. The Lien Claims Process sought by the Receiver fulfills these purposes while conserving judicial resources by minimizing further Court attendance by the parties. The Lien Claims Process also provides the Debtors' stakeholders with an efficient and fair process for the adjudication of Lien Claims while ensuring that, if a party disputes the Receiver's determination, that party is entitled to have their dispute reviewed by an independent adjudicator. In particular:

- (a) the proposed Order contemplates that each Lien Claimant file their Proof of Lien Claim within 30 days of the Order and, if applicable, dispute the Receiver's evaluation of their claim within 20 days of the determination. This provides an efficient timeline for the resolution of all Lien Claims;
- (b) adjudication of the Lien Claims by an independent adjudicator that has expertise in construction law will provide the parties with considerably more

²² *Pacer Construction Holdings Corporation v Pacer Promec Energy Corporation*, [2018 ABCA 113](#) at [para. 102](#).

²³ *Walter Energy Canada Holdings Inc., Re.*, [2017 BCSC 709](#) at [para. 16](#) [*Walter Energy*].

²⁴ *Walter Energy* at [para. 16](#).

procedural flexibility than litigation before the Court and will, therefore, very likely lead to the more expeditious resolution of the Lien Claims; and

- (c) by resolving the value of the Lien Claims now, while construction of the Project is still ongoing, the Lien Claims Process paves the way for the distribution of the Debtors' assets to Lien Claimants (as well as other creditors) as soon as reasonably possible, if and when such assets become available for distribution.

34. The Order sought by the Receiver is similar to past Orders made by this Court. For example, in *Atlas Healthcare*, Justice Penny made a lien claims process order that contained the following key provisions:

- (a) lien claimants had approximately one month to file a proof of lien claim, after which, if the lien claimant did not file a proof of lien claim, their lien claim was extinguished;²⁵
- (b) the receiver was required to evaluate each proof of lien claim received and provide parties with an opportunity to dispute the receiver's evaluation by filing a notice of dispute;²⁶ and
- (c) parties had the right to appeal the receiver's evaluation of a disputed lien claim, and such appeals were true appeals (subject to a correctness standard on questions of law and a palpable and overriding error standard

²⁵ *Atlas Healthcare*, [ss. 2-5](#).

²⁶ *Atlas Healthcare*, [ss. 7-10](#).

on questions of fact) and not *de novo* hearings (as is proposed for Post- Receivership Claims).²⁷

35. By conferring the authority on the Receiver sought under the proposed Lien Claims Process Order, the proposed Lien Claims Process will minimize litigation (and associated costs), conserve judicial resources and, thereby, facilitate the efficient distribution of the Debtors' assets, if and when such a distribution becomes appropriate.

3. Decision-Making Power of Receiver

36. While the Sutherland Law Clients have taken issue with the amount of decision-making power afforded to the Receiver in the proposed lien claims process,²⁸ an adjudicative mechanism that confers considerable decision-making power on the Receiver is the norm and consistent with the Court's guidance that the appeal process for a receiver's evaluation of a creditor's claim "should be one that maintains the onus on any party who disputes the receiver's decision."²⁹

37. This not only protects the efficiency of the Lien Claims Process but also recognizes that the Receiver is not a normal litigant. The Receiver is an officer of the Court whose decisions should be accorded deference.³⁰

²⁷ *Atlas Healthcare*, [ss. 11-12](#).

²⁸ Affidavit of Karla Toma, sworn October 30, 2024, at para. 7, Motion Record of Various Lien Claimants, Tab 1, p. 8 ([F683](#)).

²⁹ *Coast Capital Savings Credit Union v. Symphony Development Corp*, [2011 BCSC 333](#) at [para. 20](#) [**"Coast Capital"**]. See also: *Ontario Securities Commission v. Paramount Equity Financial Corporation et al.*, [2018 ONSC 5327](#) at [para. 35](#); *Faurschou v. Faurschou Farms*, [2021 MBQB 106](#) at [para. 16](#); *Comfort Capital Inc. v. Yeretsian*, [2020 ONCA 846](#) at [para. 17](#); *DBCD Spadina Ltd et al v. Norma Walton et al*, [2015 ONSC 5608](#) at [para. 2](#) [**"DBDC"**].

³⁰ *DBDC* at [para. 2](#).

4. The Appeal Procedures Contemplated by the Lien Claims Process are Appropriate for the Circumstances

38. The Lien Claims Process contemplates two types of appeal procedures, in the event a claimant disagrees with the Receiver's determination of their Lien Claim:

- (a) for Pre-Receivership Claims: an appeal to an independent adjudicator with expertise in construction liens; and
- (b) for Post-Receivership Claims: a hearing *de novo* before an independent adjudicator with expertise in construction liens with a further right of appeal to the Court.

39. The Sutherland Law Clients have objected to these appeal procedures contemplated in the Lien Claims Process on the basis that they derogate from recourse against the Debtors that they would otherwise have at law. This position misconstrues the purpose of claims processes and the *BIA*, more generally.

40. First, it is important to remember that the rights afforded to litigants in non-insolvency situations are not automatically available to claimants under the *BIA*. On the contrary, courts have recognized that it is appropriate to deal with creditors' claims in a summary fashion in the context of an insolvency.³¹

41. Second, enabling Lien Claimants to challenge the finding of the Receiver with respect to Pre-Receivership Claims on a *de novo* basis would entirely defeat the purpose of the claims process,³² being the efficient and cost-effective resolution of creditor claims.

³¹ *San Juan* at [para. 30](#).

³² *Coast Capital* at [para 21](#).

42. Third, as noted above, the Courts have repeatedly recognized that, in a claims process appeal, it is appropriate to put the onus on the party appealing the receiver's decision, given the receiver's role as a neutral, court-appointed officer.³³

43. Together, these factors support a relatively limited set of appeal rights for Lien Claimants, as contemplated in the Lien Claims Process Order.

5. The Lien Claims Process is the Product of Consultation and Collaboration

44. As set out above, of the many Lien Claimants in this matter, the Lien Claims Process is opposed by only the Sutherland Law Clients.

45. The Receiver has worked diligently with other Lien Claimants to develop a form of order that balances the interests of all of the Debtors' stakeholders, recognizing the need for an efficient determination of the Lien Claims, as repeatedly established in the case law. The Receiver asks the Court to infer from these consultations that the Lien Claims Process now being sought is carefully tailored to the needs of Lien Claimants and represents a commercially reasonable means of resolving the Lien Claims.

46. There are 22 individual Lien Claimants with liens registered on title to the Real Property. But for the lien claims process proposed herein, which envisions a minor role for the Court, parties will likely need to wait months for the final determination of their claims by an Associate Judge.

47. Such an outcome would be contrary to the purpose of a claims process and the *BIA* more broadly, which is intended to be an efficient and flexible process in order that

³³ *San Juan* at [para. 30](#).

the claims of creditors can be established expeditiously with a view to the distribution of available assets as soon as reasonably possible.³⁴

48. The proposed Lien Claims Process accomplishes exactly that and, accordingly, the Receiver submits that the Court should approve the Lien Claims Process.

6. The Information Requested by the Sutherland Law Clients is Irrelevant to this Motion

49. The Sutherland Law Clients have requested certain information from the Receiver concerning the *Construction Act* holdbacks maintained by the Debtors and the advances made by the Debtors' lenders to the Project. The Sutherland Law Clients have based their opposition to this motion, in part, on their dissatisfaction with the Receiver's response to these requests.³⁵

50. The Receiver has endeavored to provide the Sutherland Law Clients with the relevant information available to it, however, the production of this information is irrelevant to this motion.³⁶

51. Though deficiencies in the holdback to be maintained by an owner under the *Construction Act* can affect the priority of a lien claim against a mortgage,³⁷ this is fundamentally irrelevant to the validity and quantum of a claim for lien, the determination of which is the purpose of this Lien Claims Process.

³⁴ *Cookstown*, [para. 13](#).

³⁵ *Construction Act*, R.S.O. 1990, c. C.30, [s. 22](#) ("**Construction Act**"); Supplemental Report, para. 17, SMR, Tab 2, p. 21 ([E3161](#)).

³⁶ Email correspondence between counsel for the Receiver and counsel to Sutherland Law Clients, Appendix D to the Supplemental Report, SMR, Tab 2, pp. 77-87 ([E3217](#)).

³⁷ *Construction Act*, [s. 78](#).

52. For Pre-Receivership Claims,³⁸ the purpose of the Lien Claims Process is not to establish the priority of Lien Claims as against the many other creditors with claims against the Debtors. This would be impossible, given that no other creditor claims have been valued.

53. Instead, the purpose of the Lien Claims Process is merely to value the labour and materials supplied by Lien Claimants and establish the validity of their claim for lien. This valuation will then enable the parties and the Court to establish the appropriate waterfall of distributions, if and when it becomes appropriate to do so. To address issues of priority for Pre-Receivership Claims through an investigation of the Debtors' holdback obligations now would, accordingly, be premature.

B. The Activities, Fees and Interim SRD of the Receiver, and the Fees of its Legal Counsel, Should be Approved

54. The Receiver submits that the fees and disbursements of the Receiver and those of its legal counsel should be approved because the Receiver and its counsel engaged diligently since the date of the Appointment Order to, among other things:

- (a) respond to extensive correspondence and requests for information from the Debtors' and their principal, Mr. Wang, as well as other stakeholders;
- (b) work with its construction consultant to carry out a comprehensive assessment of the Project which included identifying health and safety issues on the site and reviewing the records of the Debtors' concerning the

³⁸ To the extent Post-Receivership Claims are found to be valid, the Order contemplates that they will be paid out in full.

Project, which contained significant gaps and identifying construction deficiencies in the Project;

- (c) manage the review and remediation of health and safety issues;
- (d) establish a new process for the review and payment of invoices submitted by trades and suppliers to replace the inadequate recordkeeping processes that prevailed before the Appointment Date;
- (e) engage in tendering processes for prospective trades and suppliers; and
- (f) review the invoices and contracts of trades and suppliers; and
- (g) engage extensively with the Receiver's construction manager, consultants and trades and suppliers concerning the construction of the Project.³⁹

55. The fees and disbursements of the Receiver and its counsel were incurred at each respective party's standard rates and charges for this type of matter as set out in their respective fee affidavits. Given the complicated nature of Project's prospective completion and the significant issues with the management of the construction up to the Appointment Date, these fees and disbursements are fair, reasonable and justified in the circumstances.⁴⁰

56. Finally, the Receiver seeks approval of the Interim SRD. The Receiver has received and paid monies on behalf of the Debtors for the benefit of all stakeholders, and

³⁹ Affidavit of Bryan Gelman, sworn August 6, 2024 ("**Gelman Affidavit**"), Appendix J to the Third Report, AMR, Tab 2, pp. 111-228 ([E2662](#)); Affidavit of Beatrice Loschiavo, sworn August 1, 2024 ("**Loschiavo Affidavit**"), Appendix K to the Third Report, AMR, Tab 2, pp. 230-254 ([E2781](#)).

⁴⁰ Gelman Affidavit, Appendix J to the Third Report, AMR, Tab 2, pp. 111-228 ([E2662](#)); Loschiavo Affidavit, Appendix K to the Third Report, AMR, Tab 2, pp. 230-254 ([E2781](#)).

with a view to completing the Project, as set out in the Interim SRD and the Third Report.⁴¹ Accordingly, this Court should approve the Interim SRD.

PART IV – ORDER REQUESTED

57. The Receiver requests that this Court make an order in the form of the draft order included in the Receiver’s Supplemental Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of October, 2024.



Jeffrey Larry / Kartiga Thavaraj / Ryan
Shah

⁴¹ Interim SRD, Appendix I to the Third Report, AMR, Tab 2, p. 109 ([E2660](#)).

SCHEDULE "A" – AUTHORITIES CITED

1. *Coast Capital Savings Credit Union v. Symphony Development Corp.*, [2011 BCSC 333](#).
2. *Comfort Capital Inc. v. Yeretsian*, [2020 ONCA 846](#)
3. *Computershare Trust Co. of Canada v. Cookstown Holding Ltd.*, [2014 ONSC 685](#).
4. *Construction Holdings Corporation v Pacer Promec Energy Corporation*, [2018 ABCA 113](#)
5. *DBCD Spadina Ltd et al v. Norma Walton et al*, [2015 ONSC 5608](#)
6. *Faurschou v. Faurschou Farms*, [2021 MBQB 106](#)
7. *Peoples Trust Company et al. v. Vandyk-Backyard Queensview Limited et al.*, CV-24-00713783-00CL ([Order](#) and [Endorsement](#) of Justice Cavanagh, Ont. S.C.J., March 6, 2024).
8. *Quality Rugs of Canada Limited v. Waygar Capital Inc.*, CV-23-00703933-00CL, CV-23-00703292-00CL and CV-23-00703874-00CL ([Order](#) and [Endorsement](#) of Justice Penny, Ont. S.C.J., November 24, 2023).
9. *Romspen Investment Corporation v. Atlas Healthcare (Richmond Hill) Ltd. et al.*, CV-18-607303-00CL ([Order](#) and [Endorsement](#) of Justice Penny, Ont. S.C.J. [Commercial List], December 12, 2019).
10. *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001 SCC 92](#)
11. *San Juan Resources Inc. Re*, [2009 ABQB 55](#)
12. *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#)
13. *Walter Energy Canada Holdings Inc., Re.*, [2017 BCSC 709](#)

SCHEDULE “B” – STATUTORY PROVISIONS CITED

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Courts vested with jurisdiction

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

- **(a)** in the Province of Ontario, the Superior Court of Justice;
- **(b)** [Repealed, 2001, c. 4, s. 33]
- **(c)** in the Provinces of Nova Scotia and British Columbia, the Supreme Court;
- **(d)** in the Provinces of New Brunswick and Alberta, the Court of Queen’s Bench;
- **(e)** in the Province of Prince Edward Island, the Supreme Court of the Province;
- **(f)** in the Provinces of Manitoba and Saskatchewan, the Court of Queen’s Bench;
- **(g)** in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and
- **(h)** in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice

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, RSO 1990, c. C.30.

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).

Priority over mortgages, etc.

78 (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises. R.S.O. 1990, c. C.30, s. 78 (1); 2017, c. 24, s. 70.

Building mortgage

(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. R.S.O. 1990, c. C.30, s. 78 (2).

Prior mortgages, prior advances

(3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

- (a) the actual value of the premises at the time when the first lien arose; and
- (b) the total of all amounts that prior to that time were,
 - (i) advanced in the case of a mortgage, and
 - (ii) advanced or secured in the case of a conveyance or other agreement. R.S.O. 1990, c. C.30, s. 78 (3); 2017, c. 24, s. 70, 71.

Prior mortgages, subsequent advances

(4) Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled under subsection (3), over the liens arising from the improvement, to the extent of any advance made in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien. R.S.O. 1990, c. C.30, s. 78 (4); 2017, c. 24, s. 53 (1), 70.

Special priority against subsequent mortgages

(5) Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the

holdbacks required to be retained by the owner under Part IV. R.S.O. 1990, c. C.30, s. 78 (5); 2017, c. 24, s. 70.

General priority against subsequent mortgages

(6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien. R.S.O. 1990, c. C.30, s. 78 (6); 2017, c. 24, s. 53 (1), 70.

Advances to trustee under Part IX

(7) Despite anything in this Act, where an amount is advanced to a trustee appointed under Part IX as a result of the exercise of any powers conferred upon the trustee under that Part,

- (a) the interest in the premises acquired by the person making the advance takes priority, to the extent of the advance, over every lien existing at the date of the trustee's appointment; and
- (b) the amount received is not subject to any lien existing at the date of the trustee's appointment. R.S.O. 1990, c. C.30, s. 78 (7); 2017, c. 24, s. 70.

Where postponement

(8) Despite subsections (4) and (6), where a preserved or perfected lien is postponed in favour of the interest of some other person in the premises, that person shall enjoy priority in accordance with the postponement over,

- (a) the postponed lien; and
- (b) where an advance is made, any unpreserved lien in respect of which no written notice has been received by the person in whose favour the postponement is made at the time of the advance,

but nothing in this subsection affects the priority of the liens under subsections (2) and (5). R.S.O. 1990, c. C.30, s. 78 (8); 2017, c. 24, s. 70.

Saving

(9) Subsections (2) and (5) do not apply in respect of a mortgage that was registered prior to the 2nd day of April, 1983. R.S.O. 1990, c. C.30, s. 78 (9).

Financial guarantee bond

(10) A purchaser who takes title from a mortgagee takes title to the premises free of the priority of the liens created by subsections (2) and (5) where,

(a) a bond of an insurer licensed under the *Insurance Act* to write surety and fidelity insurance; or

(b) a letter of credit or a guarantee from a bank listed in Schedule I or II to the *Bank Act* (Canada),

in the prescribed form is registered on the title to the premises, and, upon registration, the security of the bond, letter of credit or the guarantee takes the place of the priority created by those subsections, and persons who have proved liens have a right of action against the surety on the bond or guarantee or the issuer of the letter of credit. R.S.O. 1990, c. C.30, s. 78 (10); 1997, c. 19, s. 30; 2017, c. 24, s. 53 (2), 70.

Home buyer's mortgage

(11) Subsections (2) and (5) do not apply to a mortgage given or assumed by a home buyer. R.S.O. 1990, c. C.30, s. 78 (11).

**CAMERON STEPHENS MORTGAGE
CAPITAL LTD.**

Applicant

and **2011836 ONTARIO CORP., et al.**

Respondents

Court File No. CV-23-00710795-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
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**
Proceeding commenced at Toronto

**FACTUM OF THE RECEIVER (MOTION
RETURNABLE NOVEMBER 5, 2024)**

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