

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

IN THE MATTER OF Section 101 of the  
*Courts of Justice Act* and Section 243 of the *Bankruptcy and Insolvency Act*

BETWEEN:

**TREZ CAPITAL LIMITED PARTNERSHIP and COMPUTERSHARE TRUST**  
**COMPANY OF CANADA**

Applicants

and

**WYNFORD PROFESSIONAL CENTRE LTD. and GLOBAL MILLS INC.**

Respondents

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**FACTUM OF METRO TORONTO CONDOMINIUM CORPORATION NO. 1037**  
**(THE MOVING PARTY)**

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Date: April 17, 2015

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# **INDEX**

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**I N D E X**

<b>DESCRIPTION</b>	<b>PAGE NO.</b>
<b>I. NATURE OF THIS HEARING</b>	<b>1</b>
<b>II. FACTS</b>	<b>4</b>
A. Controlling Directors of MTCC 1037	4
B. The Lender and Priority of Repayment of Debt	8
<b>III. ISSUES</b>	<b>9</b>
<b>Issue # 1: Equitable Lien</b>	<b>9</b>
A. Equitable Lien as an Available Remedy	9
<b>Issue #2: Priority of the Equitable Lien</b>	<b>12</b>
A. The Status Certificate	12
B. Non-Arm's Length Relationship	14
C. Reserve Fund Balance	16
D. Annual Audited Financial Statements	17
E. Required Due Diligence	19
<b>Issue #3: Revive Condominium Lien</b>	<b>23</b>

<b>IV. ORDER SOUGHT</b>	<b>25</b>
<b>SCHEDULE “A” – Legislation</b>	<b>27</b>
<b>SCHEDULE “B” – Jurisprudence</b>	<b>38</b>



**1**

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**FACTUM OF METRO TORONTO CONDOMINIUM CORPORATION NO. 1037**  
**(THE MOVING PARTY)**

**I. NATURE OF THIS HEARING**

1. This is a motion brought by Metro Toronto Condominium Corporation No. 1037 (“**MTCC 1037**”). MTCC 1037 is claiming priority over common expense arrears totalling **\$1,284,508.23** (the “**Arrears**”) owing from Wynford Professional Centre Ltd. (“**Wynford**”), which the parties have agreed to set aside from the proceeds of sale of the units owned by Wynford (the “**Wynford Units**”).
2. The Respondents to this motion, Trez Capital Limited (the “**Lender**”) and Computershare Trust Company of Canada, claim that it has priority over the Arrears by operation of its first mortgage registered on title.

3. This is a novel case. MTCC 1037 seeks equitable remedies to ensure that the Court does “what ought to be done” to ensure that MTCC 1037 is granted priority over the Arrears which resulted from the alleged fraud, negligence and bad faith of Norma Walton (“**Norma**”) and Ronauld Walton (“**Ronauld**”). Norma and Ronauld are defined collectively as the “**Controlling Directors.**”
4. For the purposes of this Motion, both parties have agreed to proceed on a without prejudice presumption that MTCC 1037 will be able to subsequently establish, *inter alia*, fraud, negligence and bad faith against Ronauld and Norma in another action bearing Court File No. CV-14-513481 (the “**Fraud Action**”).
5. MTCC 1037’s position is that Wynford was unjustly enriched by not paying the Arrears, and that MTCC 1037 (and its unit owners) have been correspondingly deprived for no juristic reason. MTCC 1037 is now saddled with the responsibility to pay for the Controlling Directors’ alleged fraudulent, negligent and bad faith actions. MTCC 1037 submits that it should be granted an equitable lien against the Wynford Units in order to recover the Arrears.
6. If the Court is satisfied that MTCC 1037 has been unjustly enriched and should therefore be granted an equitable lien, MTCC 1037 submits that it should be given priority to be reimbursed for the Arrears before the Lender can collect its mortgage proceeds.
7. While the Lender was also deprived by the Controlling Directors’ alleged fraud, negligence and bad faith, MTCC 1037 submits that it could have discovered the Arrears had it exercised proper due diligence. The fact that there was no lien registered against title to the Wynford Units prior to the Lender advancing its mortgage was not a sufficient reason for the Lender to not conduct proper due diligence or to question the accuracy of the status certificate with

regards to the Wynford Units that was signed by Norma on March 6, 2013 (the “**Status Certificate**”). MTCC 1037, on the other hand, did not have any way to prevent the Controlling Directors’ actions. Therefore, the equities favor MTCC 1037.

8. MTCC 1037’s position is that the Lender did not exercise proper due diligence prior to advancing its mortgage to Wynford. MTCC 1037 has produced an expert report (and reply expert report) from Denise Lash, an experienced Ontario condominium lawyer, which details the deficiencies in the Lender’s due diligence. The Lender, *inter alia*:

- a) failed to recognize the issues arising from the fact that the borrower of the loan (Wynford), the guarantors (Norma and Ronauld), the property management company (The Rose and Thistle Group Ltd. (“**Rose and Thistle**”)) and the board of directors of MTCC 1037 (the “**Norma Board**”) were all owned and/or controlled by Norma and Ronauld;
- b) relied on an inaccurate status certificate (prepared and signed by Norma) which included out of date financial information, in contravention of the *Condominium Act*, S.O. 1998, Chapter 19 (the “*Act*”);
- c) relied on financial statements attached to the Status Certificate that were twenty-six (26) months old (from the year ended December 31, 2010) and included a reserve fund balance from October, 2010;
- d) relied on Wynford’s unaudited financial statements from December 31, 2011 that only included a line item representing “Common element condominium fees” as at December 31, 2011, without a corresponding line item representing common expenses owing (historical operating statements for the Wynford Units would

have shown revenue and expenses with respect to the Wynford Units up to the period ending December 31, 2012 and significant outstanding common expenses payable for the Wynford Units would have been evident);

- e) did not make further inquiries for updated and certified/audited financial statements, operating budgets and reserve fund balances for MTCC 1037 and/or Wynford; and
- f) did not ask for further documentation or explanations of these clearly curious circumstances.

9. The Lender is a sophisticated lending institution and identifying such problems and performing such due diligence should be part of its standard lending practice. The Controlling Directors' alleged fraudulent, negligent and bad faith actions could have been discovered had the Lender conducted proper due diligence. MTCC 1037 would have then been in a position to register a lien against the Wynford Units, pursuant to section 85 of the *Act*. This lien would then have been granted "super" priority over the Lender's mortgage (regardless of when the mortgage was registered), pursuant to section 86(1) of the *Act*.

10. In the alternative, if MTCC 1037 is not granted an equitable lien, it submits that it should be able to revive its right to lien against the Wynford Units pursuant to sections 85 and 86 of the *Act*.

## **II. FACTS**

### **A. *Controlling Directors of MTCC 1037***

11. MTCC 1037 is a commercial condominium corporation comprised of one hundred and nineteen (119) commercial units, three hundred and sixty-one (361) parking units and two (2)

storage units. MTCC 1037 was created by the registration of its declaration and description on October 6, 1992, as Instrument No. A721241, pursuant to the *Act* (the “**Declaration**”), to control, manage and administer the assets and common elements, among other things of the condominium premises located municipally at 18 Wynford Drive, Toronto, Ontario.

**Affidavit of Daleechand Naraine sworn on January 14, 2015, paragraph 2 in the Moving Party’s Motion Record dated January 30, 2015.**

12. In or about February 7, 2011, Wynford purchased the Wynford Units. Wynford owned the majority of units in MTCC 1037.

**Affidavit of Daleechand Naraine sworn on January 14, 2015, paragraphs 3 and 4 in the Moving Party’s Motion Record dated January 30, 2015.**

13. Norma, the President of Wynford, and Ronauld, Norma’s husband and Secretary of the Norma Board, were representatives of Wynford and the only active directors of the Norma Board. The other directors of the Norma Board (Dr. Stanley Bernstein, George Habib (“**Habib**”) and Jonathan Griffiths (“**Griffiths**”)) (collectively the “**Minority Directors**”) were not involved in and were excluded from the operations and decision making of the Norma Board.

**Affidavit of Daleechand Naraine sworn on January 14, 2015, paragraphs 4, 5 and 7-14 in the Moving Party’s Motion Record dated January 30, 2015.**

14. Habib, the President and Chief Executive Officer of the Ontario Lung Association (the “**OLA**”), was never officially given notice that he was a director on the Norma Board. It was not until the OLA bought more units in MTCC 1037 in or about July, 2012 that it was given knowledge of such through the status certificate. Unbeknownst to Dr. Bernstein and without his consent, Norma put his name forward to be appointed as a director of MTCC 1037.

**Affidavit of Daleechand Naraine sworn on January 14, 2015, paragraphs 5, 7 and 11 in the Moving Party’s Motion Record dated January 30, 2015.**

15. The Minority Directors were never given notice of any Norma Board meetings or decisions. The Minority Directors were excluded from Norma Board meetings and decisions made regarding MTCC 1037. The Minority Directors were never informed about the financial status of and/or decisions made regarding MTCC 1037 and they were never given access to the bank records and relevant financial information. No annual general meetings (“AGM”) were held in 2012 and 2013.

**Affidavit of Daleechand Naraine sworn on January 14, 2015, paragraphs 8-14 in the Moving Party’s Motion Record dated January 30, 2015.**

16. Rose and Thistle acted as property management for MTCC 1037 until in or about February, 2014. Norma and Ronauld were also the sole officers and directors of Rose and Thistle. Prior to Rose and Thistle taking over property management, the Norma Board had hired Hazelton Property Management (“**Hazelton**”) as property management for MTCC 1037. Hazelton was a company also controlled by Norma and Ronauld.

**Affidavit of Daleechand Naraine sworn on January 14, 2015, paragraph 6 in the Moving Party’s Motion Record dated January 30, 2015.**

**Supplementary Affidavit of Daleechand Naraine sworn on February 18, 2015, paragraphs 6 and 7 in the Moving Party’s Supplementary Motion Record dated February 19, 2015.**

17. In or about December, 2013, the Minority Directors learned that the Controlling Directors potentially had been negligent, fraudulent and acted in bad faith as directors of MTCC 1037. In or about February, 2014, Norma, Ronauld and Dr. Bernstein were removed as Directors of MTCC 1037.

**Affidavit of Daleechand Naraine sworn on January 14, 2015, paragraphs 23-25 in the Moving Party’s Motion Record dated January 30, 2015.**

18. At a Court ordered AGM held on February 13, 2014, the Minority Directors and the other owners of MTCC 1037 learned about the Arrears for the first time. However, the exact amount of the Arrears owing was unknown. At that time it was also confirmed that Schonfeld

Inc. Receivers and Trustees (the “**Manager**”) the manager of Wynford’s assets at the time, intended to sell the Wynford Units. Upon the sale of the Wynford Units, it was expected that MTCC 1037 would be reimbursed for the Arrears. At this AGM a new board of directors was elected (the “**Current Board**”).

**Affidavit of Daleechand Naraine sworn on January 14, 2015, paragraphs 26-27 in the Moving Party’s Motion Record dated January 30, 2015.**

19. After reviewing the 2011 and 2012 financial statements of MTCC 1037 for the first time in or about March, 2014, the Current Board discovered that Wynford had paid part of its share of common expense fees for 2011, but had not paid any common expense fees for the subsequent years. The value of the Arrears is currently **\$1,284,508.23**. No lien was ever registered against the Wynford Units. The Controlling Directors were the only directors of the Norma Board who had knowledge of the Arrears until in or about February, 2014. By the time the Minority Directors and the Current Board had learned about the Arrears, it was too late to register a lien against the Wynford Units pursuant to section 86 of the *Act*. Had the Minority Directors had knowledge of the Arrears at the appropriate time, they would have registered a lien accordingly.

**Affidavit of Daleechand Naraine sworn on January 14, 2015, paragraphs 30, 37, 49-51 and 53 in the Moving Party’s Motion Record dated January 30, 2015.**

20. The Current Board has investigated all actions of the Controlling Directors and Rose and Thistle, trying to understand the significance of their apparent fraud, negligence and bad faith actions and with the intention of remedying the mistakes that have been made. The Current Board has been proactive and has done whatever it can to rectify this unfortunate situation and further protect the unit owners of MTCC 1037; including transferring all of MTCC 1037’s funds to a new bank account and discussing amending MTCC 1037’s by-laws to ensure that no single owner can have control of the board of directors of MTCC 1037.



Affidavit of Daleechand Naraine sworn on January 14, 2015, paragraphs 28, 31 and 32 in the Moving Party's Motion Record dated January 30, 2015.

**B. *The Lender and Priority of Repayment of Debt***

21. Wynford is also indebted to the Lender. On March 7, 2013, the Lender refinanced the Wynford Units for \$9,850,000.00. In negotiating the terms of the mortgage, Norma sent the Lender the Status Certificate, a status certificate for the parking spaces and a Statutory Declaration sworn by Norma on March 6, 2015. The Status Certificate was executed by Norma. Attached to the Status Certificate were financial statements for the year ended December 31, 2010. The Lender never requested updated financial statements or made further inquiries to MTCC 1037 prior to advancing the loan to Wynford. The Lender currently has the first mortgage registered on title.

Affidavit of Daleechand Naraine sworn on January 14, 2015, paragraphs 16-18 and 52 in the Moving Party's Motion Record dated January 30, 2015.

Supplementary Affidavit of Daleechand Naraine sworn on February 18, 2015, paragraphs 4, 5 and 8 in the Moving Party's Supplementary Motion Record dated February 19, 2015.

Affidavit of Gaetano Coscia sworn on February 9, 2015, paragraphs 19-22 in the Responding Motion Record of the Applicants dated February 10, 2015.

Affidavit of Robert Cohen sworn on February 16, 2015, paragraphs 9-11 in the Responding Motion Record of the Applicants dated February 10, 2015.

22. On March 28, 2014, the Lender commenced the within application against Wynford to appoint Collins Barrow Toronto Limited as the receiver and manager (the "Receiver") of Wynford's assets, which included the Wynford Units. The Lender commenced the within application since the Manager and Wynford had breached Justice Newbould's Order of January 20, 2014, as Wynford had further defaulted on its mortgage payments to the Lender and the Manager failed to put the Wynford Units for sale by February 28, 2014. In or about the time the Lender brought the within Application, it learned of the Arrears.

Affidavit of Daleechand Naraine sworn on January 14, 2015, paragraphs 19-20 and 34-35 in the Moving Party's Motion Record dated January 30, 2015.

Affidavit of Gaetano Coscia sworn on February 9, 2015, paragraphs 25-26 in the Responding Motion Record of the Applicants dated February 10, 2015.

23. On or about October 27, 2014, Colliers, Collins Barrow real estate agent, informed MTCC 1037 that it had a buyer who was interested in purchasing most of the Wynford Units. The closing is scheduled for the end of April, 2015. It has already been decided that \$1,284,508.23 will be “held” back and kept in trust pending the decision of this matter.

Affidavit of Daleechand Naraine sworn on January 14, 2015, paragraph 44 in the Moving Party’s Motion Record dated January 30, 2015.

Vesting Order of Justice McEwen dated March 27, 2015.

### III. ISSUES

1. Should MTCC 1037 be granted an equitable lien?;
2. If MTCC 1037 is granted an equitable lien, does it take priority over the Lender’s registered first mortgage?; and
3. In the alternative, if an equitable lien is not granted, should MTCC 1037 be granted the right to revive its lien rights with respect to the Arrears; pursuant to sections 85 and 86 of the *Act*?

#### ISSUE 1: EQUITABLE LIEN

##### *A. Equitable Lien as an Available Remedy*

24. Equitable liens generally arise where the imposition of the lien performs equity between the parties. An equitable lien is an equitable right, arising by operation of law, where the relationship between the parties is such that one party is entitled to charge the real or personal property of another so as to fulfil the objects of the relationship.

*574095 Alberta Ltd. v Brendanco Investments Inc.*, 2002 ABQB 277, [2002] AJ No 511 (ABQB) at paragraph 67 [*Brendanco*].

25. The Court has an inherent equitable jurisdiction to declare that properties or assets encumbered by an equitable lien are charged and encumbered with that lien.

*Brendanco* at paragraph 67.

26. An equitable lien is granted in circumstances where a party has some good reason for receiving a lien that would not otherwise be available to it, such as unfairness or unjust enrichment. According to the English Courts, the victim of fraud may elect either to enforce a constructive trust upon the property in question or to convert the constructive trust into an equitable lien upon the assets for the amount of the loss.

*Magellan Aerospace Ltd. v First Energy Capital Corp.*, [2000] AJ No 1176, 274 AR 195 (ABQB) at paragraph 19 [*Magellan*].

*Re Hallett's Estate. Knatchbull v Hallett*, (1879) 13 Ch. D. 696 (CA) at 709 [*Hallett*]; Maria Elena Hoffstein (contributor), *Halsbury's Law of Canada - Trusts, Trusts Arising by Operation of Law, Constructive Trusts, Circumstances in Which Constructive Trusts Arise, Profits of Wrongs, Common Law Claims* (December, 2011 – current to March 15, 2014) at HTR-70 (QL).

27. In *Brendanco*, the Plaintiff demonstrated unjust enrichment on the basis of constructive trust and was granted an equitable lien on the working assets of the defaulting party.

*Brendanco* at paragraph 81.

28. The Courts have found that “the authorities dealing with equitable liens are sparse in terms of guiding principles.”

*Transwest Helicopters Ltd. v International Aviation Services*, 2002 BCSC 1244, [2002] BCJ No 1933 (Sup Ct) at paragraph 11 [*Transwest*].

29. A constructive trust is traditionally the remedial device found to prevent unjust enrichment.

The three requirements to establish unjust enrichment are:

- a) Unjust enrichment on behalf of one party;
- b) A corresponding deprivation on behalf of the other party; and
- c) Absence of any juristic reason for the enrichment.

*Brendanco* at paragraphs 78-80.

*Pettkus v Becker*, [1980] 2 SCR 834 (SCC) at pages 9-11 [*Pettkus*].

30. In the within matter, Wynford was unjustly enriched as it did not pay its share of common expense fees for 2012 and 2013 and it was able to continue to occupy its commercial units in MTCC 1037 and collect rental income from said units. MTCC 1037 was correspondingly deprived, as:

- a) It was unable to register a lien pursuant to section 85 of the *Act*, as the time period to register a lien for the Arrears had passed; and
- b) Its reserve fund was depleted due to such non-payment and the inability to register a lien accordingly.

**Affidavit of Daleechand Naraine sworn on January 14, 2015, paragraphs 30, 35 and 49-51 in the Moving Party's Motion Record dated January 30, 2015.**

31. There was no juristic reason or any justification for the enrichment. Pursuant to section 84(3) of the *Act*, there was no legal justification for the Controlling Directors to have withheld payment of the Arrears. This section provides that:

- An owner is not exempt from the obligation to contribute to the common expenses even if,
- (a) the owner has waived or abandoned the right to use the common elements or part of them;
  - (b) the owner is making a claim against the corporation; or
  - (c) the declaration, by-laws or rules restrict the owner from using the common elements or part of them.

***Condominium Act, 1998*, S.O. 1998, c. 19, section 84(3).**

32. Based on MTCC 1037's unjust enrichment, and the corresponding unfairness to MTCC 1037 and its unit owners if the Arrears are not re-paid, MTCC 1037 submits that it should be granted an equitable lien with respect to the Wynford Units to ensure that the Court does "what ought to be done".

***Re Merikallio*, [1969] OJ No 1448, [1970] 1 OR 244 (High Ct) at paragraph 6 [*Merikallio*].**

33. The *Act* is consumer protection legislation. A significant purpose of the *Act*, as confirmed by the Courts, is to protect innocent owners from suffering the consequences of misconduct and fraud perpetrated by directors of the condominium corporation. Therefore, MTCC 1037 should be protected and cured from the alleged fraudulent, negligent and bad faith actions of the Controlling Directors.

**Affidavit of Denise Lash sworn on March 2, 2015, paragraphs 4-5 in the Moving Party's Further Supplementary Motion Record dated March 3, 2015.**

## **ISSUE 2: PRIORITY OF THE EQUITABLE LIEN**

34. If MTCC 1037 is granted an equitable lien, then it submits that it should have priority over the Lender's mortgage so that it can recover the Arrears. MTCC 1037 relies on the failure of the Lender to take proper due diligence prior to advancing its mortgage.

**Affidavit of Daleechand Naraine sworn on January 19, 2015, paragraphs 16-18 and 52 in the Moving Party's Motion Record dated January 30, 2015.**

### ***A. The Status Certificate***

35. A status certificate is intended to ensure that a prospective purchaser or, in this case, a mortgagee has access to **all** material information relating to the condominium unit(s) in question and the condominium corporation itself. A status certificate is not meant to be used as a means to conceal the condominium corporation's financial position or to be used as a mechanism to commit fraud.

**Affidavit of Denise Lash sworn on March 2, 2015, paragraph 6 in the Moving Party's Further Supplementary Motion Record dated March 3, 2015.**

36. Pursuant to section 76(1) of the *Act*, the following documents or statements, amongst others, are required to be attached to the status certificate in order to be compliant with the *Act*:

- a) A copy of the budget of the condominium corporation for the current fiscal year, the last annual audited financial statements and the auditor's report on the statements; and
- b) A statement with respect to the balance of the condominium corporation's reserve fund as of no earlier than the end of a month within ninety (90) days of the date of the status certificate.

**Affidavit of Denise Lash sworn on March 2, 2015, paragraph 8 in the Moving Party's Further Supplementary Motion Record dated March 3, 2015.**

*Condominium Act, 1998, S.O. 1998, c. 19, sections 76(1)(i) and (m)(ii).*

37. The *Act* does not draw a distinction between the attachments and the paragraphs in the status certificate form; both form part of the material information contained in the status certificate pursuant to the *Act*. The attachments must be read in conjunction with the information stated in the status certificate. The entire status certificate, including the attachments, must be read and relied on as a whole. In her textbook, *Condominium Law and Administration* at page 9-4, Audrey Loeb, who is the Ontario condominium lawyer who has prepared an expert report (and reply) for the Lender, confirms that "the status certificate must be complete not only with respect to the responses contained therein but also with respect to the documents which are to be delivered with it".

**Affidavit of Denise Lash sworn on March 2, 2015, paragraphs 9, 11 and 15 in the Moving Party's Further Supplementary Motion Record dated March 3, 2015.**

38. Pursuant to the *Act*, a mortgagee who receives a status certificate is entitled to rely on the information contained, or deemed to be contained in the status certificate. The recipients of a status certificate need not satisfy themselves that the statements made in the status certificate are correct; however, if a recipient of a status certificate intends to rely on same, the recipient cannot rely only on a portion of the status certificate in its favour while simultaneously

disregarding obvious defects in the remainder of the status certificate. The entire status certificate must be read, and relied on, as a whole, with due regard to the attachments included in the status certificate. Relying on a status certificate that has clear defects on its face or that does not provide the financial information required in the prescribed form does not meet the standards that have been followed by solicitors for mortgagees and purchasers. It would be contrary to industry practice for a mortgagee to rely on a status certificate that has out dated financial statements or financial information.

**Affidavit of Denise Lash sworn on March 2, 2015, paragraphs 13 and 14 in the Moving Party's Further Supplementary Motion Record dated March 3, 2015.**

**Reply Affidavit of Denise Lash sworn on March 25, 2015, paragraph 3 in the Moving Party's Second Further Supplementary Motion Record dated March 30, 2015.**

**Affidavit of Audrey Loeb sworn on February 20, 2015, paragraph 23(c) in the Supplementary Responding Motion Record of the Applicants dated March 2, 2015.**

**Reply Affidavit of Audrey Loeb sworn on March 18, 2015, paragraph 6 in the Further Supplementary Responding Motion of the Applicants dated March 19, 2015.**

***Condominium Act, 1998, S.O. 1998, c. 19, section 76(6).***

### ***B. Non-Arm's Length Relationship***

39. The Lender and its solicitor had knowledge of the non-arm's length relationship and did not feel that this "raised any suspicions". It should have been a red flag to the Lender that the property management and board of directors of MTCC 1037 and the borrower (Wynford) were so intertwined:

- a) Norma and Ronauld were principals of Wynford;
- b) Wynford controlled the board of directors of MTCC 1037; and
- c) Norma and Ronauld were the sole officers and directors of the Rose and Thistle, the property management company of MTCC 1037.

**Supplementary Affidavit of Daleechand Naraine sworn on February 18, 2015, paragraph 6 in the Moving Party's Supplementary Motion Record dated February 19, 2015.**

**Affidavit of Gaetano Coscia sworn on February 9, 2015, paragraphs 16 and 17 in the Responding Motion Record of the Applicants dated February 10, 2015.**

**Affidavit of Robert Cohen sworn on February 16, 2015, paragraphs 6 and 13 in the Responding Motion Record of the Applicants dated February 10, 2015.**

40. In *XDG Ltd. v 1099606 Ontario Ltd.*, the Court commented on the importance of taking additional precautions or being alert to potential issues when a transaction involves several non-arm's length parties. Specifically, it was problematic that the lender failed to make further inquiries, notwithstanding its knowledge of the relationship between the involved parties. The Court stated, at paragraph 55, that the lender "knew enough about the relationship between [the parties] ... that necessitated further inquiry." In this case, MTCC 1037 submits that the Lender should have made further inquiries as a result of the intertwined relationships between Wynford, property management and the Controlling Directors.

***XDG Ltd. v 1099606 Ontario Ltd.*, [2002] OJ No 5307, [2002] OTC 1062 (Sup Ct) at paragraphs 35 and 55 [XDG].**

**Affidavit of Denise Lash sworn on March 2, 2015, paragraph 49 in the Moving Party's Further Supplementary Motion Record dated March 3, 2015.**

41. Norma was affiliated with the property management and board of directors of MTCC 1037, the owner of the majority of units in MTCC 1037, the recipient of the loan, the signatory of the status certificate. Norma and/or affiliated parties signed and/or provided all of the representations relied on by the Lender and its solicitors in the transaction. In these circumstances it was incumbent for the Lender and its lawyer to be alert to the potential red flags or issues that could arise in the transaction.

**Affidavit of Denise Lash sworn on March 2, 2015, paragraphs 18 and 19 in the Moving Party's Further Supplementary Motion Record dated March 3, 2015.**

**Supplementary Affidavit of Dalechand Naraine sworn on February 18, 2015, paragraphs 6 and 8 in the Moving Party's Supplementary Motion Record dated February 19, 2015.**



***C. Reserve Fund Balance***

42. The *Act* mandates that a condominium corporation must maintain a reserve fund. Pursuant to the *Act*, a status certificate must include the balance of the condominium corporation's reserve fund as of no earlier than the end of a month within ninety (90) days of the date of the status certificate. Since the Status Certificate was issued on January 18, 2013, the Status Certificate should have included an amount as of **no earlier** than October 31, 2012. However, contrary to the *Act*, the Status Certificate specified an amount as at December 31, 2010, a date over two (2) years before the date the Status Certificate was drafted. The delivery of a status certificate with no information as to the amount in the reserve fund, or with financial information that is greater than two years old, should constitute a significant red flag for any prospective purchaser or mortgagee.

**Affidavit of Denise Lash sworn on March 2, 2015, paragraphs 20-23 in the Moving Party's Further Supplementary Motion Record dated March 3, 2015.**

***Condominium Act, 1998, S.O. 1998, c. 19, sections 76(1)(m)(ii), 76(4) and 93.***

43. According to Ms. Lash, "it would be negligent to rely on a reserve fund balance from October 2010 to determine whether MTCC 1037 was in a good financial position as of January 8, 2013". Drastic changes in the state of the reserve fund are possible, especially since MTCC 1037 was registered in October, 1992. The Lender and/or its solicitor should have requested additional information or otherwise made inquiries to MTCC 1037 with respect to the deficiency. Denish Lash stated that based on her experience in the condominium industry, it is industry standard practice for a purchaser or mortgagee, or its counsel, to seek clarification where a reserve fund balance is missing or out of date.

**Affidavit of Denise Lash sworn on March 2, 2015, paragraphs 23 and 24 in the Moving Party's Further Supplementary Motion Record dated March 3, 2015.**

44. Ms. Lash further stated that, in her opinion:

it would fall below minimum acceptable standards of practice for a lawyer to not inquire further with respect to a status certificate that contains out of date information or that states “there is no information with respect to the reserve fund” and “there is no information with respect to the recent audited financial statements”.

**Affidavit of Denise Lash sworn on March 2, 2015, paragraph 33 in the Moving Party’s Further Supplementary Motion Record dated March 3, 2015.**

***D. Annual Audited Financial Statements***

45. The *Act* requires that a condominium corporation provide a copy of “the last audited financial statements and the auditor’s report on the statements” in the status certificate. The *Act* requires that a condominium corporation have audited financial statements prepared annually, prepared within six (6) months of its fiscal year end. The *Act* also requires the condominium corporation’s auditor to make an annual report with respect to the financial statements of the condominium corporation. The board of directors must approve the financial statements and the auditor’s report and place these documents before the unit owners before each AGM, which must occur within **six (6) months** of the end of each fiscal year of the condominium corporation.

**Affidavit of Denise Lash sworn on March 2, 2015, paragraphs 26 and 27 in the Moving Party’s Further Supplementary Motion Record dated March 3, 2015.**

***Condominium Act, 1998, S.O. 1998, c. 19, sections 45(2), 67(1), 69(1) and 76(2)(i).***

46. The “last audited financial statements” to be included must be the audited financial statements from the most recent fiscal year, unless those are incomplete and the condominium corporation is still within six (6) months of the fiscal year end and has not yet had its AGM. Audited financial statements from earlier than the immediately preceding fiscal year would not constitute audited financial statements as required by the *Act* to be included in the prescribed status certificate form, contrary to Ms. Loeb’s assertion in paragraph 23 her

Affidavit that the “last annual audited financial statements” as provided for in the prescribed status certificate form were included in the Status Certificate.

**Affidavit of Denise Lash sworn on March 2, 2015, paragraphs 29 and 30 in the Moving Party’s Further Supplementary Motion Record dated March 3, 2015.**

**Affidavit of Audrey Loeb sworn on February 20, 2015, paragraph 23 in the Supplementary Responding Motion Record of the Applicants dated March 2, 2015.**

47. The last audited financial statements included in the Status Certificate were from 2010. The Lender advanced its loan in February, 2013. Norma did not include the “last annual financial statements” as required by the *Act*, she included and the Lender relied upon financial statements that were **twenty-six (26) months** old. There was a clear breach of the *Act* on the face of the Status Certificate, a breach that should have led the Lender or its solicitor to make further inquiry to MTCC 1037, particularly when combined with the issues with the non-arm’s length parties involved and the out of date information with respect to the reserve fund balance. It should have also been a red flag to the Lender that it did not receive any financial statements that reflected the financial status of MTCC 1037 since Wynford, Norma and Ronauld took over the management and operations of MTCC 1037.

**Affidavit of Denise Lash sworn on March 2, 2015, paragraph 32 in the Moving Party’s Further Supplementary Motion Record dated March 3, 2015.**

**Supplementary Affidavit of Daleechand Naraine sworn on February 18, 2015, paragraphs 8 and 9 in the Moving Party’s Supplementary Motion Record dated February 19, 2015.**

48. Contrary to paragraphs 8-10 of Audrey Loeb’s Reply Affidavit, the up-to-date reserve fund and audited financial statements are significant to a prospective mortgagee, which is evidenced through the legislature’s requirements to include them in the status certificate. A review of these financial documents is fundamental when lending to a unit owner, especially to a mortgagor such as Wynford, who owns multiple units. The reserve fund outlines the ongoing operations of a condominium corporation. Each unit has a direct interest in the reserve fund and the financial status of a condominium corporation. Therefore, inadequate

reserve funds, arrears in common expense receivables, or deficits in MTCC 1037's operating budget would all have a significant and direct impact, as well as potential liability, on Wynford as the majority unit owner. If the Lender made further inquiries, significant financial issues would have been uncovered.

**Reply Affidavit of Denise Lash sworn on March 25, 2015, paragraphs 5 and 6 in the Moving Party's Second Further Supplementary Motion Record dated March 30, 2015.**

**Reply Affidavit of Audrey Loeb sworn on March 18, 2015, paragraphs 8-10 in the Further Supplementary Responding Motion Record of the Applicants dated March 19, 2015.**

***E. Required Due Diligence***

49. As a condition precedent to the loan, in paragraph 22 of the commitment letter from the Lender to Wynford dated February 19, 2013 (the "**Commitment Letter**"), it outlines the Lender's steps to fulfill its own due diligence and requires specified items to meet the Lender's approval. Paragraph 22(i) of the Commitment Letter provides that: "Historical operating statements for the previous two (2) years, the current years to date (if available) as well as the current year operating budget. On file." The Applicant's expert, Audrey Loeb, contends that the historical operating statements for the "Subject Property" does not refer to MTCC 1037's financial statements. If "historical operating statements" does not refer to MTCC 1037, it follows then, that it refers to the historical operating statements for the Wynford Units.

**Affidavit of Denise Lash sworn on March 2, 2015, paragraph 41 in the Moving Party's Further Supplementary Motion Record dated March 3, 2015.**

**Reply Affidavit of Denise Lash sworn on March 25, 2015, paragraph 7 in the Moving Party's Second Further Supplementary Motion Record dated March 30, 2015.**

**Affidavit of Gaetano Coscia sworn on February 9, 2015, paragraph 13 in the Responding Motion Record of the Applicants dated February 10, 2015.**

**Reply Affidavit of Audrey Loeb sworn on March 18, 2015, paragraph 11 in the Further Supplementary Responding Motion Record of the Applicants dated March 19, 2015.**

50. MTCC 1037 does not agree with this interpretation. The *Act* requires financial statements for a condominium corporation to be included with the status certificate. The financial viability of MTCC 1037 should have clearly been relevant to the Lender, especially given the significant number of units being financed.

51. In any event, even if the reference to the “historical operating statements” in the Commitment Letter is referring to Wynford’s financial statement, the only financial statements provided to the Lender with respect to the Wynford Units were unaudited operating expenses from December 31, 2011 (the “**Wynford Statements**”). The Wynford Statements did not satisfy all parts of paragraph 22 of the Commitment Letter, as:

- a) The Wynford Statements do not appear to be certified by an accountant;
- b) The due diligence requirement in paragraph 22(i) appears to remain outstanding;
- c) Historical operating statements for the Wynford Units would have shown revenue and expenses with respect to the Wynford Units up to the period ending December 31, 2012 and significant outstanding common expenses payable for the Wynford Units would have been evident; and
- d) The Wynford Statements only included a line item expense entitled “Common element condominium fees”, without a corresponding line item representing common expenses owing; making it impossible for the Lender to confirm that common expenses were not outstanding for the Wynford Units.

Reply Affidavit of Denise Lash sworn on March 25, 2015, paragraph 8 in the Moving Party’s Second Further Supplementary Motion Record dated March 30, 2015.

52. The case of *XDG Ltd. v. 1099606 Ontario Ltd.* illustrates the importance of conducting proper due diligence in mortgage transactions. In *XDG*, where the lender failed to act in a manner consistent with its usual practice in conducting due diligence prior to providing a

mortgage, good faith could not be established by the lender. A review of the financial statements by the Lender, in accordance with its due diligence outlined in the Commitment Letter, would have caused further inquiry.

**Affidavit of Denise Lash sworn on March 2, 2015, paragraphs 46-47 in the Moving Party's Further Supplementary Motion Record dated March 3, 2015.**

*XDG* at paragraphs 52, 58 and 69.

53. The Lender is a “sophisticated financial institution that well knows the necessity of a due diligence investigation”. Ms. Lash further elaborated on this point by stating:

As a sophisticated lending institution dealing with a \$9,850,000 transaction, the Lender and its solicitor knew or ought to have known the necessity of up to date financial statements and should have conducted its ordinary due diligence. Failure to do so constituted wilful blindness. Moreover, even an unsophisticated party should have made further inquiry upon receipt of the Status Certificate.

**Affidavit of Denise Lash sworn on March 2, 2015, paragraph 48 in the Moving Party's Further Supplementary Motion Record dated March 3, 2015.**

*XDG* at paragraph 55.

54. The Court in *XDG* concluded that “It would be unconscionable and inequitable to allow a mortgagee to obtain priority based upon its willful blindness or negligence”. Similar to the Court's finding in this case even the simplest of investigations by the Lender would have revealed the alleged fraudulent, negligent and bad faith actions of the Controlling Directors. MTCC 1037 would have then been able to register a lien against the Wynford Units pursuant to section 85 of the *Act*.

*XDG* at paragraph 100.

55. In the recent case of *CIBC Mortgages Inc. (c.o.b. Firstline Mortgages) v Computershare Trust Co. of Canada*, Computershare held the first mortgage on a property and without its knowledge or consent, the mortgage was fraudulently discharged by the mortgagors.

***CIBC Mortgages Inc. (c.o.b. Firstline Mortgages) v Computershare Trust Co. of Canada*, 2015 ONSC 543, [2015] OJ No 403 (Sup Ct) at paragraphs 6 and 7 [Firstline].**

56. CIBC was approached to refinance the property. CIBC granted the mortgagors the mortgage and became the first mortgage registered on title. The mortgagors later obtained a second mortgage through Secure Capital. The mortgagors indebtedness to Computershare was not disclosed to either CIBC or Secure Capital. The mortgagors eventually defaulted on both mortgages. Shortly after this occurred, Computershare learned that its mortgage had been fraudulently discharged.

*Firstline* at paragraphs 10-15.

57. The issue in *Firstline* was similar to the case at hand, namely which “innocent” party adversely affected by the fraudulent actions of the mortgagors should have the priority of its debt repayment.

*Firstline* at paragraph 41.

58. The Court in *Firstline* found that CIBC had the opportunity to investigate the transaction, realize that the discharge was not valid and avoid the fraud before Secure Capital entered the picture. CIBC should have made further inquiries and conducted proper due diligence. The Court found that Computershare retained its priority as the first mortgage in the property and CIBC and Secure Capital ranked second and third accordingly.

*Firstline* at paragraphs 53-58 and 62.

59. As was the case with CIBC in the *Firstline* decision, the Lender failed to conduct proper due diligence prior to advancing its first mortgage. MTCC 1037 submits that the Lender could have avoided the alleged fraud if proper due diligence was conducted. Since the Lender did not conduct proper due diligence, the Lender, like CIBC, should not be entitled to maintain its priority.

### **ISSUE 3: REVIVE CONDOMINIUM LIEN**

60. In the alternative, if MTCC 1037 is not granted an equitable lien, it submits that it should be able to revive its right to lien against the Wynford Units.

61. Pursuant to the *Act*, owners shall contribute to the common expenses in the proportion specified in the condominium corporation's declaration. No owner is exempt from the obligation to contribute to the common expenses. Pursuant to section 119(1) of the *Act* an owner must comply with the *Act* and the condominium corporation's declaration and bylaws.

*Condominium Act, 1998, S.O. 1998, c. 19, sections 84(1), 84(3) and 119(1).*

62. Pursuant to section 85(1) of the *Act*:

If an owner defaults in its obligation to contribute to the common expenses, the condominium corporation has a lien against the owner's unit and its appurtenant common interest for the unpaid amount together with all interest owing and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount.

*Condominium Act, 1998, S.O. 1998, c. 19, section 85(1).*

63. The lien expires three (3) months after the default occurs, unless the condominium corporation registers a certificate of lien.

*Condominium Act, 1998, S.O. 1998, c. 19, section 85(2).*

64. With the exception of certain unrelated claims, a lien pursuant to section 85(1) has priority over every registered and unregistered encumbrance, even if the encumbrance existed before the lien arose.

*Condominium Act, 1998, S.O. 1998, c. 19, section 86(1).*

65. Wynford did not pay its full share of common expenses for 2011 nor did it pay its share of common expenses for 2012 and 2013. The Minority Directors were unaware of the Arrears, as the Controlling Directors had concealed them. The Controlling Directors did not register a lien against the Wynford Units within the three (3) month period as prescribed by the *Act*.



Since no other owners or the Minority Directors had knowledge of the Arrears before February, 2014, the time period had lapsed to register a lien accordingly.

Affidavit of Daleechand Naraine sworn on January 14, 2015, paragraphs 30, 37, 49, 50, 51 and 53 in the Moving Party's Motion Record dated January 30, 2015.

66. MTCC 1037 submits that pursuant to section 134 of the *Act*, the court has the authority to revive MTCC 1037's lien rights and to award the Arrears to MTCC 1037 as a form of "damages" against Wynford, as unit owner. Section 134(1) of the *Act* provides:

Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement.

Section 134(3) of the *Act* provides:

- (3) On an application, the court may, subject to subsection (4),
  - (a) grant the order applied for;
  - (b) require the persons named in the order to pay,
    - (i) the damages incurred by the applicant as a result of the acts of non-compliance, and
    - (ii) the costs incurred by the applicant in obtaining the order; or
  - (c) grant such other relief as is fair and equitable in the circumstances.

*Condominium Act, 1998, S.O. 1998, c. 19, section 134.*

67. In *Toronto Standard Condominium Corp. No. 1908 v StefcO Plumbing & Mechanical Contracting Inc.*, the condominium corporation sought to "revive" its lien rights that had otherwise expired.

*Toronto Standard Condominium Corp. No. 1908 v StefcO Plumbing & Mechanical Contracting Inc.*, 2013 ONSC 7709, [2013] OJ No 5760 (Sup Ct) at paragraphs 1 and 21 [*Stefco*].

68. While the Court in *Stefco* ordered that the lien rights could not be revived based on the facts presented, **there was no allegation of fraud, negligence and bad faith** which is a significant factual difference from the present case. MTCC 1037 is not aware of any case where the right to lien under section 85 of the *Act* has passed as the result of the fraudulent, negligent and bad faith actions of directors of a condominium corporation.

*Stefco* at paragraph 54.

69. The Courts have found that section 85 of the *Act* is supposed to fairly balance the rights of various stakeholders (i.e. the owners, tenants, mortgagees, the condominium corporation itself). The fair balance that the Courts seek would not be disturbed in this situation. The balance would be restored, as MTCC 1037 would be able to return to its position of priority that it would have been in if it had not been the victim of the alleged fraudulent, negligent and bad faith actions of the Controlling Directors and/or if the Lender or its counsel had conducted the proper due diligence to discover such actions and the Arrears.

*Toronto Standard Condominium Corp. No. 1908 v Stefco Plumbing & Mechanical Contracting Inc.*, 2014 ONCA 696, [2014] OJ No 4806 (ONCA) at paragraph 41[*CA Stefco*].

70. The Wynford Units are being sold to a third party purchaser. If MTCC 1037 were granted the right to register a lien on account of the Arrears, the lien would be immediately discharged once MTCC 1037 receives the monies that are currently being held in trust.

71. Since there is already an agreement to set aside the Arrears following the sale of the Wynford Units, MTCC 1037 submits that it would not be practical or necessary to commence a separate application under section 134 of the *Act* in view of the within motion.

#### **IV. ORDER SOUGHT**

72. MTCC 1037 seeks:

- a) an Order that due to the Controlling Directors' alleged fraudulent, negligent and bad faith actions, and the resulting unjust enrichment of Wynford, MTCC 1037 has an equitable lien against the Wynford Units, granting MTCC 1037 priority to be reimbursed for the Arrears before the Lender can collect its mortgage proceeds accordingly;

- b) an Order granting MTCC 1037 priority to be reimbursed for the Arrears before the Lender can collect its mortgage proceeds accordingly;
- c) An Order requiring the Lender to pay the costs of these proceedings on a partial indemnity basis; and
- d) Such further and other relief as counsel may advise and this Honourable Court will permit.

73. In the alternative, MTCC 1037 seeks an Order:

- a) reviving MTCC 1037's right to lien against the Wynford Units pursuant to sections 85 and 86 of the *Act*;
- b) granting MTCC 1037 priority to be reimbursed for the Arrears before the Lender can collect its mortgage proceeds accordingly; and
- c) requiring the Lender to pay the costs of these proceedings on a partial indemnity basis.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

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Date: April 17, 2015



**Shawn Pulver**

Counsel for Metro Toronto Condominium  
Corporation No. 1037

**2**

**SCHEDULE "A" – LEGISLATION****CONDOMINIUM ACT, 1998, S.O. 1998, C. 19****OWNERS****Meetings**

**45. (1)** Subject to the other requirements of this Act, anything that this Act requires to be approved by a vote of any of the owners shall be approved only at a meeting of owners duly called for that purpose. 1998, c. 19, s. 45 (1).

**Annual general meeting**

**(2)** The board shall hold a general meeting of owners not more than three months after the registration of the declaration and description and subsequently within six months of the end of each fiscal year of the corporation. 1998, c. 19, s. 45 (2).

**Matters for annual general meeting**

**(3)** At an annual general meeting, an owner may raise for discussion any matter relevant to the affairs and business of the corporation. 1998, c. 19, s. 45 (3).

**Other meetings**

**(4)** The board may at any time call a meeting of owners for the transaction of any business, and the notice of the meeting shall specify the nature of the business. 1998, c. 19, s. 45 (4).

**Audit**

**67. (1)** The auditor shall, every year, make the examination that is necessary in order to make an annual report on the financial statements to the corporation on behalf of the owners. 1998, c. 19, s. 67 (1).

**Right of access**

**(2)** The auditor has right of access at all times to all records, documents, accounts and vouchers of the corporation and is entitled to require from the directors, officers and employees of the corporation or from persons under contract to the corporation to manage the property or its assets the information and explanations that, in the auditor's opinion, are necessary in order to make the report. 1998, c. 19, s. 67 (2).

**Standards**

**(3)** The auditor's report shall be prepared in the prescribed manner and in accordance with generally accepted auditing standards as are prescribed. 1998, c. 19, s. 67 (3).

### **Contents of report**

(4) The auditor shall include in the report the statements that the auditor considers necessary if the corporation's financial statements are not in accordance with the requirements of this Act and the regulations made under it. 1998, c. 19, s. 67 (4).

### **Same, reserve fund study**

(5) The auditor shall state in the report whether the statement of reserve fund operations and any other prescribed information relating to the operation of the reserve fund and contained in the financial statements do not fairly present the information contained in the reserve fund studies that the auditor has received. 1998, c. 19, s. 67 (5).

### **Presentation of report**

(6) The auditor shall present the auditor's report to the audit committee described in subsection 68 (1) or to the board if there is no audit committee. 1998, c. 19, s. 67 (6).

### **Immunity**

(7) Except with respect to the contents of the report, no action or other proceeding for damages shall be instituted against an auditor or a former auditor for any oral or written statement made in good faith in the execution or intended execution of the duty as auditor under this Act. 1998, c. 19, s. 67 (7).

### **Delivery of statements**

69. (1) The board shall place before each annual general meeting,

- (a) the financial statements as approved by the board;
- (b) the auditor's report; and
- (c) all further information respecting the financial position of the corporation that the by-laws of the corporation require. 1998, c. 19, s. 69 (1).

### **Copy with notice of meeting**

(2) The corporation shall attach to the notice of the annual general meeting a copy of the financial statements and the auditor's report. 1998, c. 19, s. 69 (2).

### **Status certificate**

76. (1) The corporation shall give to each person who so requests a status certificate with respect to a unit in the corporation, in the prescribed form, that specifies the date on which it was made and that contains,

- (a) a statement of the common expenses for the unit and the default, if any, in payment of the common expenses;
- (b) a statement of the increase, if any, in the common expenses for the unit that the board has declared since the date of the budget of the corporation for the current fiscal year and the reason for the increase;
- (c) a statement of the assessments, if any, that the board has levied against the unit since the date of the budget of the corporation for the current fiscal year to increase the contribution to the reserve fund and the reason for the assessments;
- (d) a statement of the address for service of the corporation;
- (e) a statement of the names and address for service of the directors and officers of the corporation;
- (f) a copy of the current declaration, by-laws and rules;
- (g) a copy of all applications made under section 109 to amend the declaration for which the court has not made an order;
- (h) a statement of all outstanding judgments against the corporation and the status of all legal actions to which the corporation is a party;
- (i) a copy of the budget of the corporation for the current fiscal year, the last annual audited financial statements and the auditor's report on the statements;
- (j) a list of all current agreements mentioned in section 111, 112 or 113 and all current agreements between the corporation and another corporation or between the corporation and the owner of the unit;
- (k) a statement that the person requesting the status certificate has the rights described in subsections (7) and (8) with respect to the agreements mentioned in clause (j);
- (l) a statement whether the parties have complied with all current agreements mentioned in clause 98 (1) (b) with respect to the unit;
- (m) a statement with respect to,
  - (i) the most recent reserve fund study and updates to it,
  - (ii) the amount in the reserve fund no earlier than at the end of a month within 90 days of the date of the status certificate, and
  - (iii) current plans, if any, to increase the reserve fund under subsection 94 (8);

(n) a statement of those additions, alterations or improvements to the common elements, those changes in the assets of the corporation and those changes in a service of the corporation that are substantial and that the board has proposed but has not implemented, together with a statement of the purpose of them;

(o) a statement of the number of units for which the corporation has received notice under section 83 that the unit was leased during the fiscal year preceding the date of the status certificate;

(p) a certificate or memorandum of insurance for each of the current insurance policies;

(q) a statement of the amounts, if any, that this Act requires be added to the common expenses payable for the unit;

(r) a statement whether the Superior Court of Justice has made an order appointing an inspector under section 130 or an administrator under section 131;

(s) all other material that the regulations made under this Act require. 1998, c. 19, s. 76 (1); 2000, c. 26, Sched. B, s. 7 (5).

#### **Fee for certificate**

(2) The corporation may charge the prescribed fee for providing the status certificate. 1998, c. 19, s. 76 (2).

#### **Time for giving certificate**

(3) The corporation shall give the status certificate within 10 days after receiving a request for it and payment of the fee charged by the corporation for it. 1998, c. 19, s. 76 (3).

#### **Omission of information**

(4) If a status certificate that a corporation has given under subsection (1) omits material information that it is required to contain, it shall be deemed to include a statement that there is no such information. 1998, c. 19, s. 76 (4).

#### **Default in giving certificate**

(5) A corporation that does not give a status certificate within the required time shall be deemed to have given a certificate on the day immediately after the required time has expired stating that,

(a) there has been no default in the payment of common expenses for the unit;

(b) the board has not declared any increase in the common expenses for the unit since the date of the budget of the corporation for the current fiscal year; and



(c) the board has not levied any assessments against the unit since the date of the budget of the corporation for the current fiscal year to increase the contribution to the reserve fund. 1998, c. 19, s. 76 (5).

#### **Effect of certificate**

(6) The status certificate binds the corporation, as of the date it is given or deemed to have been given, with respect to the information that it contains or is deemed to contain, as against a purchaser or mortgagee of a unit who relies on the certificate. 1998, c. 19, s. 76 (6).

#### **Examination of agreements**

(7) Upon receiving a written request and reasonable notice, the corporation shall permit a person who has requested a status certificate and paid the fee charged by the corporation for the certificate, or an agent of the person duly authorized in writing, to examine the agreements mentioned in clause (1) (k) at a reasonable time and at a reasonable location. 1998, c. 19, s. 76 (7).

#### **Copies of agreements**

(8) The corporation shall, within a reasonable time, provide copies of the agreements to a person examining them, if the person so requests and pays a reasonable fee to compensate the corporation for the labour and copying charges. 1998, c. 19, s. 76 (8).

## **PART VI**

### **OPERATION**

#### **COMMON EXPENSES**

#### **Contribution of owners**

**84. (1)** Subject to the other provisions of this Act, the owners shall contribute to the common expenses in the proportions specified in the declaration. 1998, c. 19, s. 84 (1).

#### **Common surplus**

(2) A common surplus in a corporation shall be applied either against future common expenses or paid into the reserve fund, and except on termination, shall not be distributed to the owners or mortgagees of the units. 1998, c. 19, s. 84 (2).

#### **No avoidance**

(3) An owner is not exempt from the obligation to contribute to the common expenses even if,

(a) the owner has waived or abandoned the right to use the common elements or part of them;

(b) the owner is making a claim against the corporation; or

(c) the declaration, by-laws or rules restrict the owner from using the common elements or part of them. 1998, c. 19, s. 84 (3).

### **Lien upon default**

85. (1) If an owner defaults in the obligation to contribute to the common expenses, the corporation has a lien against the owner's unit and its appurtenant common interest for the unpaid amount together with all interest owing and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount. 1998, c. 19, s. 85 (1).

### **Expiration of lien**

(2) The lien expires three months after the default that gave rise to the lien occurred unless the corporation within that time registers a certificate of lien in a form prescribed by the Minister. 1998, c. 19, s. 85 (2).

### **Certificate of lien**

(3) A certificate of lien when registered covers,

(a) the amount owing under all of the corporation's liens against the owner's unit that have not expired at the time of registration of the certificate;

(b) the amount by which the owner defaults in the obligation to contribute to the common expenses after the registration of the certificate; and

(c) all interest owing and all reasonable legal costs and reasonable expenses that the corporation incurs in connection with the collection or attempted collection of the amounts described in clauses (a) and (b), including the costs of preparing and registering the certificate of lien and a discharge of it. 1998, c. 19, s. 85 (3).

### **Notice to owner**

(4) At least 10 days before the day a certificate of lien is registered, the corporation shall give written notice of the lien to the owner whose unit is affected by the lien. 1998, c. 19, s. 85 (4).

### **Service of notice**

(5) The corporation shall give the notice by personal service or by sending it by prepaid mail addressed to the owner at the address for service that appears in the record of the corporation maintained under subsection 47 (2). 1998, c. 19, s. 85 (5).

### **Lien enforcement**

(6) The lien may be enforced in the same manner as a mortgage. 1998, c. 19, s. 85 (6).

### **Discharge of lien**

(7) Upon payment of the amounts described in subsection (3), the corporation shall prepare and register a discharge of the certificate of lien in the form prescribed by the Minister and shall advise the owner in writing of the particulars of the registration. 1998, c. 19, s. 85 (7).

### **Priority of lien**

**86. (1)** Subject to subsection (2), a lien mentioned in subsection 85 (1) has priority over every registered and unregistered encumbrance even though the encumbrance existed before the lien arose but does not have priority over,

(a) a claim of the Crown other than by way of a mortgage;

(b) a claim for taxes, charges, rates or assessments levied or recoverable under the *Municipal Act, 2001*, the *City of Toronto Act, 2006*, the *Education Act*, the *Local Roads Boards Act* or the *Statute Labour Act*; or

(c) a lien or claim that is prescribed. 1998, c. 19, s. 86 (1); 2002, c. 17, Sched. F, Table; 2006, c. 32, Sched. C, s. 7.

### **Exception, non-residential lien**

(2) A lien in respect of a unit for non-residential purposes does not have priority under this section in respect of the amount by which the owner of the unit has defaulted in the obligation to contribute to the common expenses before the coming into force of this section. 1998, c. 19, s. 86 (2).

### **Notice of lien**

(3) The corporation shall, on or before the day a certificate of lien is registered, give written notice of the lien to every encumbrancer whose encumbrance is registered against the title of the unit affected by the lien. 1998, c. 19, s. 86 (3).

### **Service of notice**

(4) The corporation shall give the notice by personal service or by sending it by registered prepaid mail addressed to the encumbrancer at the encumbrancer's last known address. 1998, c. 19, s. 86 (4).

### **Effect of no notice**

(5) Subject to subsection (6), the lien loses its priority over an encumbrance unless the corporation gives the required notice to the encumbrancer. 1998, c. 19, s. 86 (5).

**Priority if notice late**

(6) If a corporation gives notice of a lien to an encumbrancer after the day the certificate of lien is registered, the lien shall have priority over the encumbrance to the extent of,

(a) the arrears of common expenses that accrued during the three months before the day notice is given and that continue to accrue subsequent to that day; and

(b) all interest owing on the arrears and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the arrears. 1998, c. 19, s. 86 (6).

**Reserve fund**

93. (1) The corporation shall establish and maintain one or more reserve funds. 1998, c. 19, s. 93 (1).

**Purpose of fund**

(2) A reserve fund shall be used solely for the purpose of major repair and replacement of the common elements and assets of the corporation. 1998, c. 19, s. 93 (2).

**Designation not required**

(3) A fund set up for the purpose mentioned in subsection (2) shall be deemed to be a reserve fund even though it may not be so designated. 1998, c. 19, s. 93 (3).

**Contributions to fund**

(4) The corporation shall collect contributions to the reserve fund from the owners, as part of their contributions to the common expenses. 1998, c. 19, s. 93 (4).

**Amount of contributions**

(5) Unless the regulations made under this Act specify otherwise, until the corporation conducts a first reserve fund study and implements a proposed plan under section 94, the total amount of the contributions to the reserve fund shall be the greater of the amount specified in subsection (6) and 10 per cent of the budgeted amount required for contributions to the common expenses exclusive of the reserve fund. 1998, c. 19, s. 93 (5).

**Same, after first reserve fund study**

(6) The total amount of the contributions to the reserve fund after the time period specified in subsection (5) shall be the amount that is reasonably expected to provide sufficient funds for the major repair and replacement of the common elements and assets of the corporation, calculated on the basis of the expected repair and replacement costs and the life expectancy of the common elements and assets of the corporation. 1998, c. 19, s. 93 (6).

**Income earned**

(7) Interest and other income earned from the investment of money in the reserve fund shall form part of the fund. 1998, c. 19, s. 93 (7).

**Compliance with Act**

**119. (1)** A corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold condominium corporation, an owner, an occupier of a unit and a person having an encumbrance against a unit and its appurtenant common interest shall comply with this Act, the declaration, the by-laws and the rules. 1998, c. 19, s. 119 (1).

**Responsibility for occupier**

(2) An owner shall take all reasonable steps to ensure that an occupier of the owner's unit and all invitees, agents and employees of the owner or occupier comply with this Act, the declaration, the by-laws and the rules. 1998, c. 19, s. 119 (2).

**Right against owner**

(3) A corporation, an owner and every person having a registered mortgage against a unit and its appurtenant common interest have the right to require the owners and the occupiers of units to comply with this Act, the declaration, the by-laws and the rules. 1998, c. 19, s. 119 (3).

**Proposed unit**

(4) Until the declarant registers a declaration and description and the by-laws and rules of the corporation come into force, an occupier of a proposed unit shall comply with this Act, the declaration and the by-laws and rules proposed by the declarant; the declarant shall take all reasonable steps to ensure that the occupier complies with this section. 1998, c. 19, s. 119 (4).

**Right against occupier**

(5) Until the declarant registers a declaration and description and the by-laws and rules of the corporation come into force, an occupier of a proposed unit has the right to require the occupiers of the other units in the proposed corporation to comply with this Act, the declaration and the by-laws and rules proposed by the declarant. 1998, c. 19, s. 119 (5).

**Compliance order**

**134. (1)** Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement. 1998, c. 19, s. 134 (1); 2000, c. 26, Sched. B, s. 7 (7).

**Pre-condition for application**

(2) If the mediation and arbitration processes described in section 132 are available, a person is not entitled to apply for an order under subsection (1) until the person has failed to obtain compliance through using those processes. 1998, c. 19, s. 134 (2).

**Contents of order**

(3) On an application, the court may, subject to subsection (4),

(a) grant the order applied for;

(b) require the persons named in the order to pay,

(i) the damages incurred by the applicant as a result of the acts of non-compliance, and

(ii) the costs incurred by the applicant in obtaining the order; or

(c) grant such other relief as is fair and equitable in the circumstances. 1998, c. 19, s. 134 (3).

**Order terminating lease**

(4) The court shall not, under subsection (3), grant an order terminating a lease of a unit for residential purposes unless the court is satisfied that,

(a) the lessee is in contravention of an order that has been made under subsection (3); or

(b) the lessee has received a notice described in subsection 87 (1) and has not paid the amount required by that subsection. 1998, c. 19, s. 134 (4).

**Addition to common expenses**

(5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit. 1998, c. 19, s. 134 (5).

**RULES OF CIVIL PROCEDURE, R.R.O. 1990, Reg. 194****RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL****WHERE AVAILABLE*****To Any Party on a Question of Law***

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b). R.R.O. 1990, Reg. 194, r. 21.01 (2).

### ***To Defendant***

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

### **Jurisdiction**

(a) the court has no jurisdiction over the subject matter of the action;

### **Capacity**

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

### **Another Proceeding Pending**

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

### **Action Frivolous, Vexatious or Abuse of Process**

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (3).

**3**



## SCHEDULE "B" – JURISPRUDENCE

*574095 Alberta Ltd. v Brendanco Investments Inc.*, 2002 ABQB 277, [2002] AJ No 511 (ABQB) [*Brendanco*]

*CIBC Mortgages Inc. (c.o.b. Firstline Mortgages) v Computershare Trust Co. of Canada*, 2015 ONSC 543, [2015] OJ No 403 (Sup Ct) [*Firstline*]

*In re Hallett's Estate. Knatchbull v Hallett*, (1879) 13 Ch. D. 696 (CA) [*Hallett*]; Maria Elena Hoffstein (contributor), *Halsbury's Law of Canada - Trusts, Trusts Arising by Operation of Law, Constructive Trusts, Circumstances in Which Constructive Trusts Arise, Profits of Wrongs, Common Law Claims* (December, 2011 – current to March 15, 2014) at HTR-70 (QL)

*Magellan Aerospace Ltd. v First Energy Capital Corp.*, [2000] AJ No 1176, 274 AR 195 (ABQB) [*Magellan*]

*Pettkus v Becker*, [1980] 2 SCR 834 (SCC) [*Pettkus*]

*Re Merikallio*, [1969] OJ No 1448, [1970] 1 OR 244 (High Ct) [*Merikallio*]

*Toronto Standard Condominium Corp. No. 1908 v Stefco Plumbing & Mechanical Contracting Inc.*, 2013 ONSC 7709, [2013] OJ No 5760 (Sup Ct) [*Stefco*]

*Toronto Standard Condominium Corp. No. 1908 v Stefco Plumbing & Mechanical Contracting Inc.*, 2014 ONCA 696, [2014] OJ No. 4806 (ONCA) [*CA Stefco*]

*Transwest Helicopters Ltd. v International Aviation Services*, 2002 BCSC 1244, [2002] BCJ No 1933 (Sup Ct) [*Transwest*]

*XDG Ltd. v 1099606 Ontario Ltd.*, [2002] OJ No 5307, [2002] OTC 1062 (Sup Ct) [*XDG*]

**TREZ CAPITAL LIMITED PARTNERSHIP** - and -  
**and COMPUTERSHARE TRUST COMPANY OF CANADA**  
Applicants

**WYNFORD PROFESSIONAL CENTRE LTD. and**  
**GLOBAL MILLS INC.**

Respondents  
Court File No. CV-14-10493-00CL

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

Proceedings Commenced at Toronto

**FACTUM OF METRO TORONTO**  
**CONDOMINIUM CORPORATION NO. 1037**  
**(THE MOVING PARTY)**

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