

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

**IN THE MATTER OF THE *CONSTRUCTION LIEN ACT*,
R.S.O. 1990, c. C.30, AS AMENDED**

**AND IN THE MATTER OF AN APPLICATION MADE BY 144 PARK LTD.
FOR THE APPOINTMENT OF A TRUSTEE UNDER SECTION 68(1) OF THE
CONSTRUCTION LIEN ACT, R.S.O. 1990, c. C.30, AS AMENDED**

**AFFIDAVIT OF JEFF WELLER
(Sworn **January 13, 2016**)**

I, **JEFF WELLER**, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY AS FOLLOWS:**

1. I am an Assistant Vice-President, Real Estate Financing for Laurentian Bank of Canada (“**LBC**” or the “**Bank**”). At all material times, I was primarily responsible for the supervision and administration of the Bank’s loans to 144 Park Ltd. (“**144 Park**” or the “**Borrower**”) and, as such, I have knowledge of the facts to which I hereinafter depose. Unless I indicate to the contrary, the facts to which I depose herein are within my own personal knowledge and are true. Where I have indicated that I have obtained facts from other sources, I believe those facts to be true.
2. By Order dated August 5, 2015 (the “**Interim Distribution Order**”), the Court authorized the Trustee to (i) distribute \$14,000,000 to LBC on account of its secured indebtedness; and (ii) retain \$5.4 million (the “**Reserve**”) in an interest bearing account in

respect of lien claims pending further order of the Court. This affidavit is sworn in connection with the pending motion to determine the priority of the Bank's claim to the funds remaining in the Reserve. I understand from the Sixth Report of the Trustee dated November 30, 2015 that approximately \$3,794,065.69 remains in the Reserve.

Background

3. 144 Park owns lands known municipally as 142, 144 and 148 Park Street and 21 Allen Street West in Waterloo, Ontario (the "**Property**"), upon which it has constructed a 19-story residential condominium tower (the "**Project**").
4. According to the appraisal of the Property dated November 23, 2011 completed by MacKenzie Ray Heron & Edwardh (the "**Project Appraisal**"), the cumulative sell-out value of the net saleable area of Phase 1 of the Project was \$57,100,000. Attached as **Exhibit "A"** is a copy of the Project Appraisal.

Credit Facilities and Security

5. Pursuant to a commitment letter between, among others, the Bank and 144 Park dated March 7, 2012 (the "**Commitment Letter**"), the Bank, as agent for a syndicate of lenders, extended to 144 Park, as borrower, the following credit facilities:
 - (a) demand non-revolving construction loan facility limited to the lesser of (i) \$36,044,000; (ii) 75% of Project costs; and (iii) 69% of completed value (net of HST) of the Project (the "**Construction Loan**"). The purpose of the Construction Loan was to finance construction of the Project;
 - (b) letters of credit facility (the "**LC Facility**") limited to the principal amount of \$2,000,000 pursuant to which letters of credit were issued: (a) to municipal bodies and public utilities for development purposes in connection with the Project; and

- (b) where applicable, to Tarion Warranty Corporation in respect of purchaser deposits for the Project; and
- (c) operating line of credit (the “**Line of Credit**”) limited to the maximum principal amount of \$250,000. The Line of Credit was made available to assist the Borrower in financing approved Project costs between advances made under the Construction Loan.

A copy of the Commitment Letter is attached as **Exhibit “B”**.

6. Pursuant to the letter agreement between, among others, the Bank and 144 Park dated April 30, 2012 (the “**Amendment Letter**”), the Commitment Letter was amended to, among other things, reflect an increase in the hard construction costs of the Project from \$32,213,243 to \$34,128,801 and provide for a deferral of management fees in the amount of \$1,848,401. The Amendment Letter reflects an increase in the total sources and uses of funds for the Project from \$47,954,000 to \$49,802,131. A copy of the Amendment Letter is attached as **Exhibit “C”**.
7. Pursuant to the letter agreement between, among others, the Bank and 144 Park dated September 12, 2014 (the “**Bridge Loan Letter**”), the Bank on its own behalf made available to 144 Park a bridge loan in the maximum principal amount of \$3,600,000 (the “**Bridge Loan**”). As described below, the Bridge Loan was advanced to 144 Park to fund Project cost overruns already paid by 144 Park. A copy of the Bridge Loan Letter is attached as **Exhibit “D”**.
8. Hereafter, the Construction Loan, the LC Facility, the Line of Credit and the Bridge Loan are referred to collectively as the “**Credit Facilities**”.

9. As security for the Credit Facilities, the Bank received from 144 Park, among other things, the following security (the “**Bank Security**”):
- (a) first-ranking charge registered against the Property in the amount of \$40,000,000 (the “**Mortgage**”). The Mortgage was registered on title to the Property on May 25, 2012;
 - (b) general security agreement granting to the Bank security over all of 144 Park’s personal property (the “**GSA**”); and
 - (c) guarantees from D. Mady Investments Inc., D. Mady Holdings Inc. and Charles Mady (collectively, the “**Guarantees**”).

Copies of the Mortgage, the GSA and the Guarantees are attached as **Exhibit “E”**.

10. In addition to the Bank Security, the Bridge Loan is secured by the following additional security (collectively, the “**Additional Bridge Loan Security**”):
- (a) guarantee from David Mady limited to the principal amount of \$3,600,000, plus interest and costs; and
 - (b) collateral first mortgage in favour of the Bank over certain commercial units in Phase 1 of the development owned by Jade-Kennedy Development Corporation known as South Unionville Square located at 32 South Unionville Avenue, Markham, Ontario.
11. On February 11, 2015, Collins Barrow Toronto Limited was appointed as Trustee of Jade-Kennedy Development Corporation under the *Construction Lien Act* (Ontario) (the “**Jade-Kennedy Proceedings**”). A copy of the court materials in respect of the Jade-

Kennedy Proceedings can be found on the Jade-Kennedy case website hosted by the Trustee at: <http://www.collinsbarrow.com/en/toronto-ontario/restructuring-and-recovery-engagements/jade-kennedy-development-corporation>.

Advances Under the Construction Loan

12. Pursuant to the terms of the Commitment Letter, O’Keefe & Associates Limited (the “**Cost Consultant**”) was retained by the Bank as the cost consultant for the Project.
13. In accordance with the Commitment Letter, advances to 144 Park under the Construction Loan (each, an “**Advance**”) were made pursuant to the following procedure:
 - (i) 144 Park provided to the Bank a written request for an Advance (each, an “**Advance Request**”). Each Advance Request specifies the amount of the Advance under the Construction Loan requested by the Borrower and includes, among other things, a summary of the Project costs incurred to date with respect to the Project. Attached hereto as **Exhibit “F”** are copies of all Advance Requests (including all supporting documentation) received by the Bank;
 - (ii) in conjunction with each Advance Request, the Bank received from the Cost Consultant a written report regarding the subject Advance Request (each, a “**Draw Report**”) as well as a certificate (the “**Project Monitor’s Certificate**”) certifying, among other things, the amount 144 Park was entitled to borrow in connection with the subject Advance Request. A copy of each Draw Report received by the Bank in connection with each Advance Request is attached hereto as **Exhibit “G”**. Each Project

Monitor's Certificate received by the Bank in connection with each Advance Request is attached hereto as **Exhibit "H"**;

- (iii) following receipt of the Draw Report and Project Monitor's Certificate for the subject Advance Request, the Bank prepared a construction draw worksheet (each, a "**Construction Draw Worksheet**") which sets out, among other things; (i) the authorized gross Advance under the Construction Loan; (ii) the amount of various deductions from the gross Advance amount; and (iii) the net Advance to 144 Park. Attached as **Exhibit "I"** are copies of all of the Construction Draw Worksheets and a summary thereof;
- (iv) after preparation of each Construction Draw Worksheet, the Bank deposited the amount of the subject Advance in the trust account of its lending counsel, Goldman Sloan Nash & Haber LLP ("**GSNH**") and delivered to GSNH a letter (each, an "**Instruction Letter**") advising GSNH to release the Advance to 144 Park upon satisfaction of certain conditions, including confirmation that no liens had been registered against the Property;
- (v) upon completion of an Advance, the Bank received a letter (each, an "**Advance Confirmation Letter**") from GSNH confirming the following:
 - a) completion of the Advance in accordance with the Bank's instructions;

- b) there were no changes in registered ownership of the Property;
- c) there were no outstanding liens or other encumbrances;
- d) there were no outstanding executions against, among others, 144 Park; and
- e) the status of realty tax levies.

Attached as **Exhibit “J”** are copies of the Instruction Letter and Advance Confirmation Letters in respect of each Advance;

- (vi) following each Advance, 144 Park executed and delivered to GSNH a Certificate of Advance with respect to each Advance under the Construction Loan (each, a “**Certificate of Advance**”) certifying, among other things, that all hard and soft costs incurred and payable with respect to the Project had been paid in full as of the date of the last Advance. Attached hereto as **Exhibit “K”** are copies of the all of the Certificates of Advance for each Advance, except for the Certificate of Advance dated July 8, 2014, which could not be located by GSNH.

The Bank Did Not Make Any Advances After Receiving a Written Notice of Lien

- 14. The first construction lien was registered against the Property on October 24, 2014 at 3:03 p.m. As described below, the final Advance was completed on October 24, 2014 prior to registration of this lien. I am not aware of the Bank receiving a written notice of lien or otherwise receiving written notice that a party which had supplied goods or

services to improve the Project had not been paid in connection with the provision of those goods or services prior to completion of the final Advance on October 24, 2014.

The October 8 Advance

15. LBC made a net Advance to 144 Park of \$3,562,796.22 under the Bridge Loan on October 8, 2014 (the “**October 8 Advance**”) to, as noted above, fund certain cost overruns at the Project previously paid by 144 Park. As set out in the Draw Report dated July 3, 2014, which was the last Draw Report before the October 8 Advance, hard Project construction costs increased by approximately \$3,745,348 (the “**Cost Overruns**”) from \$49,802,131 (as set out in the Commitment Letter, as amended by the Amendment Letter) to \$53,547,479.
16. As described above, the Bridge Loan is secured by the Bank Security and the Additional Bridge Loan Security. LBC required the Additional Bridge Loan Security as a condition of funding the Cost Overruns.
17. Since the Cost Overruns were already set out in the July 3, 2014 Draw Report, the Bank neither required nor received a Draw Report for the October 8 Advance.
18. Under the terms of the Bridge Loan Letter, the Borrower certified to the Bank that:
 - (a) all funds to be advanced pursuant to the Bridge Loan Letter must be utilized for the benefit of the Project, and
 - (b) all hard and soft costs incurred and payable with respect to the Project have been paid in full up to the date of the last Advance.

19. The Bank received from GSNH an Advance Confirmation Letter for the October 8 Advance, certifying that, at the time of the October 8 Advance, there were no outstanding liens or other encumbrances registered against the Property. A copy of the October 8 Advance Confirmation Letter is attached as **Exhibit “L”**.


The October 24 Advance

20. Attached as **Exhibit “M”** is a copy of the Affidavit of Nicole Yap sworn November 18, 2015 (the “**Yap Affidavit**”), which sets out the particulars of the October 24, 2014 Advance (the “**October 24 Advance**”). I am advised by Asim Iqbal, a lawyer at Thornton Grout Finnigan LLP, counsel for the Bank, that a copy of the Yap Affidavit with exhibits has previously been provided to the Service List.
21. The Yap Affidavit confirms that the October 24 Advance was completed prior to the registration of the first construction lien against the Property, which, as noted above at paragraph 14, took place on October 24, 2014 at 3:03 p.m.
22. As set out in Draw Report No. 28, which the Cost Consultant prepared for the October 24 Advance (the “**28th Draw Report**”), the October 24 Advance related to a partial release of the holdback to various lien claimants. Attached as **Exhibit “N”** are copies of the statutory declarations included with the 28th Draw Report.

Bank Indebtedness

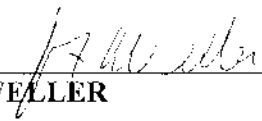
23. Attached as **Exhibit "O"** is a statement (the "**Statement of Indebtedness**") as at January 6, 2016 of the total amount owing to the Bank by 144 Park, including interest and professional fees incurred up to that date. As at January 6, 2016, 144 Park is indebted to the Bank in the amount of \$17,772,528.46.

SWORN before me at the City of Toronto,
in the Province of Ontario, this 13th day of
January, 2016.



Commissioner for Taking Affidavits

Asim Iqbal



JEFF WELLER

EXHIBIT “A” - Project Appraisal

Please click the link below to be directed to the Drop Box Folder containing this Exhibit:

<https://www.dropbox.com/sh/93aohdlyn8k5jt8/AAC66DQLXsteQ2S1GSDkHVTwa?dl=0>

EXHIBIT “B” - Commitment Letter

Please click the link below to be directed to the Drop Box Folder containing this Exhibit:

<https://www.dropbox.com/sh/vxze4fupwwek4rr/AAAER9bQeWs5a3ifecYO-O1Da?dl=0>

EXHIBIT “C” – Amendment Letter

Please click the link below to be directed to the Drop Box Folder containing this Exhibit:

<https://www.dropbox.com/sh/n4flchpnellfr4j/AAAXVEkvnWLLlsMRVvsCaHUka?dl=0>

EXHIBIT “D” – Bridge Loan Letter

Please click the link below to be directed to the Drop Box Folder containing this Exhibit:

<https://www.dropbox.com/sh/mcufsvgyawiauor/AADcSk0AIdP9dD2VJuZFmPSda?dl=0>

EXHIBIT “E” – Mortgage, GSA, Guarantees

Please click the link below to be directed to the Drop Box Folder containing this Exhibit:

<https://www.dropbox.com/sh/jdvt8gch45ma8vi/AABx8f4vIzwedHmF9E34fA2Ja?dl=0>

**EXHIBIT “F” - Advance Requests (including supporting documentation) for each
Construction Draw**

Please click the link below to be directed to the Drop Box Folder containing this Exhibit:

<https://www.dropbox.com/sh/q8e98rbax4jw67e/AAAC9X28qdQyLIVzY8qivX5la?dl=0>

EXHIBIT “G” – Draw Reports

Please click the link below to be directed to the Drop Box Folder containing this Exhibit:

<https://www.dropbox.com/sh/yuec4vukuot11dj/AADvPBzKn2gsUqilJlhZIsHya?dl=0>

EXHIBIT “H” – Project Monitor’s Certificates

Please click the link below to be directed to the Drop Box Folder containing this Exhibit:

<https://www.dropbox.com/sh/w6giy5jw0p9a0qd/AAD90HNr3GepIJmhsCXRT5WEa?dl=0>

EXHIBIT “I” – Construction Draw Worksheets

Please click the link below to be directed to the Drop Box Folder containing this Exhibit:

https://www.dropbox.com/sh/gs2ak8xk9b0umzk/AACf1Ld_u0AfW3OVWfQFA2sfa?dl=0

EXHIBIT “J” – Instruction Letters and Advance Confirmation Letters

Please click the link below to be directed to the Drop Box Folder containing this Exhibit:

https://www.dropbox.com/sh/j14lgoen5ho2v7u/AABla_d6bHCDu2Oeeih8DQkra?dl=0

EXHIBIT “K” – Certificates of Advance

Please click the link below to be directed to the Drop Box Folder containing this Exhibit:

<https://www.dropbox.com/sh/ejofuyu15ybw84p/AAC2L45MWzYpU4IPLWRj0aLa?dl=0>

EXHIBIT “L” - October 8 Advance Confirmation Letter

Please click the link below to be directed to the Drop Box Folder containing this Exhibit:

<https://www.dropbox.com/sh/2g3xsjphkqxorim/AADyIUyDfBbBK8zSOB1GRjdFa?dl=0>

EXHIBIT “M” – Yap Affidavit

Please click the link below to be directed to the Drop Box Folder containing this Exhibit:

<https://www.dropbox.com/sh/euzjap4uu6oewmw/AAD35TAspN0myQSm-WtwJHgJa?dl=0>

EXHIBIT “N” - Statutory Declarations Included in 28th Draw Report

Please click the link below to be directed to the Drop Box Folder containing this Exhibit:

https://www.dropbox.com/sh/6742xgtucaxu8ui/AAD1aWwtm9gdL0IsaG_VPJo6a?dl=0

EXHIBIT "O" - Statement of Indebtedness as at January 6, 2016

Please click the link below to be directed to the Drop Box Folder containing this Exhibit:

<https://www.dropbox.com/sh/h2q1qhhjvt82y3l/AAC0ABRzH03pf-iSg0hgzij3a?dl=0>

AND IN THE MATTER OF AN APPLICATION MADE BY 144 PARK LTD. FOR THE APPOINTMENT OF A TRUSTEE UNDER SECTION 68(1) OF THE *CONSTRUCTION LIEN ACT*, R.S.O. 1990, c. C.30, AS AMENDED

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

Proceedings commenced at **Toronto**

AFFIDAVIT OF JEFF WELLER

(Sworn January 13, 2016)

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