

**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**

**FACTUM OF THE TRUSTEE**  
(motion returnable April 23, 2015)

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**TO: THE SERVICE LIST**

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**PART I – NATURE OF THE MOTION**

1. This factum is submitted by Collins Barrow Toronto Limited (“**CBTL**”), the Court-appointed trustee of the Property (as defined below) pursuant to section 67(1) of the *Construction Lien Act* (Ontario) (the “**Trustee**”) in support of its motion returnable April 23, 2015. The Trustee will be seeking various relief from the Court at the hearing of the motion. This factum is restricted to the Trustee’s request for authorization to terminate or disclaim the 1503 APS (as defined below).

**PART II – FACTS**

Appointment of the Trustee and the Property

2. Pursuant to the Order of the Honourable Mr. Justice Penny dated January 22, 2015 (the “**Appointment Order**”), CBTL was appointed as Trustee with respect to the lands and premises

known municipally as 142, 144 and 148 Park Street and 21 Allen Street West, Waterloo, Ontario, and legally described in Schedule “A” to the Appointment Order (the “**Property**”).

Motion Record of the Trustee, Tab 2, First Report of the Trustee dated April 17, 2015 (the “**First Report**”), para. 1 and Appendix “A” – Appointment Order

3. The Appointment Order authorized the Trustee to, among other things, act as receiver and manager of the Property.

First Report, para. 2

4. 144 Park Ltd. (“**144**”) is the registered owner of the Property and has developed and constructed a 19-storey residential condominium tower containing 149 total units (the “**144 Park Project**”) on the Property.

First Report, para. 6

5. As of March 30, 2015, 21 lien claimants had registered construction liens against the Property in a total aggregate amount of \$4.33 million.

First Report, para. 46

#### Termination or Disclaimer of 1503 APS

6. Pursuant to an agreement of purchase and sale dated December 5, 2014 (the “**1503 APS**”), Brody Wall System Ltd. (“**Brody**”) agreed to purchase Unit 1503 (“**Unit 1503**”) in the 144 Park Project from 144. The 1503 APS lists a purchase price of \$324,000.

First Report, para. 21, and Appendix “C” – 1503 APS

7. Schedule “X” to the 1503 APS provides that the consideration for the purchase of Unit 1503 is the partial satisfaction the indebtedness of 144 and other MADY Group entities to Brody in the amount of \$324,000. As a result, no cash consideration is contemplated to be paid by Brody to 144 under the 1503 APS.

First Report, para. 22

8. Brody is a construction contractor that performed work on the 144 Park Project and other MADY Group projects. According to the books and records of 144, Brody is owed \$32,532.50. Brody registered a construction lien against the Property on January 21, 2015 in the amount of \$113,327.50.

First Report, para. 23 and Appendix “D” – Brody Construction Lien

9. The 1503 APS was entered into less than sixty (60) days prior to the appointment of the Trustee and at a time when 144 was insolvent.

First Report, para. 24

10. In the Trustee’s view, the sale of Unit 1503 to Brody pursuant to the 1503 APS, if completed, would result in Brody obtaining an unjust preference over other creditors of 144.

First Report, para. 25

### PART III – ISSUE

- (a) Can a Court-appointed lien trustee terminate or disclaim a contract entered into by the debtor prior to the commencement of the lien trustee proceeding?

### PART IV – LAW AND ARGUMENT

11. Pursuant to paragraph 3 of the Appointment Order, the Trustee was authorized and empowered by the Court to act as receiver and manager with respect to the Property.

12. Canadian courts have regularly authorized a receiver to terminate or disclaim contracts entered into by the debtor prior to the commencement of the receivership proceeding.

13. In *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.* (“**bcIMC**”), Justice Burnyeat completed a thorough review of jurisprudence and commentary as to whether a receiver has the power to disclaim contracts entered into by the debtor. Justice Burnyeat concluded, following a review of the decision of the British Columbia Court of Appeal in *New Skeena Forest Products Inc., Re* (“**New Skeena**”), the decision of the Nova Scotia Court of Appeal in *Bayhold Financial Corp. v. Clarkson Co.* (“**Bayhold**”), and the decision of the British Columbia Supreme Court in *Re Pope & Talbot Ltd.*, among others, that:

I have concluded that the Receiver and Manager has the power to disclaim these Contracts...

There are numerous decisions which establish the principle that a Court appointed receiver and manager has the ability to disclaim contracts even though the effect of doing so is that the contract holder will have a claim for damages against the company...

*bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, paras. 53-58

14. In *Royal Bank v. Penex Metropolis Ltd.*, Justice G.R. Strathy (as he then was), concluded that it was established law and practice that a receiver may cease to perform any contracts of the debtor. Justice Strathy cited the *New Skeena* and *Bayhold* decisions in support of this conclusion. Justice Strathy also endorsed the decision of Justice Burnyeat in *bcIMC* by holding that “[a] receiver should be permitted to disclaim an agreement if continuing the agreement would create a significant preference in favour of the contracting party.”

*Royal Bank v. Penex Metropolis Ltd.*, 2009 CarswellOnt 5202 (S.C.J.)  
[“*Pennex*”], paras. 20-27

15. Justice Strathy also concluded that, in deciding whether or not a receiver should be permitted to terminate agreements entered into by the debtor prior to the appointment of the receiver, the court will require the receiver to act for the benefit of all interested parties.

*Pennex*, para. 24

16. The Trustee respectfully submits that, in the circumstances, it would be prejudicial to 144’s stakeholders, including the construction lien claimants, for the Trustee to complete the sale of Unit 1503 to Brody pursuant to the 1503 APS, as it would result in Brody obtaining an unjust preference over other construction lien claimants.

#### **PART V – RELIEF REQUESTED**

17. The Trustee respectfully requests that the Court grant an order authorizing the Trustee to terminate or disclaim the 1503 APS.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED,**



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**Lawyers for the Trustee**

## **SCHEDULE “A”**

### **CASE AUTHORITIES**

1. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897
2. *Royal Bank v. Penex Metropolis Ltd.*, 2009 CarswellOnt 5202 (S.C.J.)
3. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154
4. *Bayhold Financial Corp. v. Clarkson Co.*, 1991 CarswellNS 33 (C.A.)
5. *Pope & Talbot Ltd., Re*, 2008 BCSC 1000



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Court File No. CV15-10843-00CL

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