

**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**

SEVENTH REPORT OF THE TRUSTEE

January 13, 2016

INTRODUCTION AND PURPOSE OF THE SEVENTH REPORT

1. Pursuant to the Order of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated January 22, 2015 (the “**Appointment Order**”), Collins Barrow Toronto Limited was appointed *Construction Lien Act* (Ontario) trustee (the “**Trustee**”) with respect to certain lands and premises owned by 144 Park Ltd. (“**144 Park**”) and 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**”).
2. The purpose of this Seventh Report of the Trustee (the “**Seventh Report**”) is to report to the Court in accordance with paragraph 1 of the Priority Resolution Process Order (as defined below).

TERMS OF REFERENCE

3. In preparing this Seventh Report and making the comments herein, the Trustee has relied upon unaudited financial information, the books and records of 144 Park, discussions with management and employees of 144 Park and other companies within the MADY group of companies, and information received from third-party sources (collectively, the “**Information**”). Certain of the information contained in this Seventh Report may refer to, or is based on, the Information. As the Information has been provided by 144 Park, or other parties, the Trustee has relied on the Information and, to the extent possible, reviewed the Information for reasonableness. However, the Trustee has not audited or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Generally Accepted Assurance

Standards pursuant to the CPA Canada Handbook and, accordingly, the Trustee expresses no opinion or other form of assurance in respect of the Information.

Background

4. As has been previously reported to the Court, the Property was acquired by 144 Park in September 2011 for the purpose of developing and constructing a 19 story residential condominium project containing 148 residential units and 1 guest unit (the “**144 Park Project**”).
5. As of the date of the Trustee’s appointment, 144 Park had entered into agreements of purchase and sale (“**Sale Agreements**”) with purchasers for the sale of 129 residential units and parking and storage units to be allocated by 144 Park to the purchasers.
6. One of the sale transactions was an agreement of purchase and sale with a lien claimant, Brody Wall System Ltd., dated December 5, 2014, which was terminated by the Trustee on May 4, 2015 in accordance with the Order of the Honourable Mr. Justice McEwen dated April 29, 2015.
7. As a result, there were 128 units that were the subject of Sale Agreements with 144 Park, and twenty (20) unsold units.
8. Pursuant to the Order of Justice Newbould dated August 5, 2015, the Trustee was authorized to engage Mint Realty Inc. Brokerage (“**Mint Realty**”) to market any or all of the 20 unsold units.
9. Pursuant to the Order of the Honourable Madam Justice Mesbur dated December 3, 2015, the Trustee was authorized to engage Mint Realty to market any units where the Sale

Agreements had been terminated by the Trustee due to purchaser defaults or on consent of the parties.

Claims Process and Priority Resolution Process

10. Pursuant to the Order (re Construction Lien Claims Process) of the Honourable Mr. Justice Wilton-Siegel dated April 23, 2015, the Trustee is to implement and administer a construction lien claims process.
11. Pursuant to the Order (Priority Resolution Process) of Justice Mesbur dated January 11, 2016 (the “**Priority Resolution Process Order**”), the Court approved a process to determine the claims of the construction lien claimants and Laurentian Bank of Canada to funds being held by the Trustee. A copy of the Priority Resolution Process Order is attached hereto as **Appendix “A”**.
12. Pursuant to paragraph 1(ii) of the Priority Resolution Process Order, the Trustee is require to serve a report that:
 - (a) provides a statement of receipts and disbursement as at the date of the report that includes, among other things, the amount of proceeds held by the Trustee; and
 - (b) an estimate of the realizable net sale proceeds from the sale and closing of the remaining unsold residential condominium units, parking units and locker units.
13. In accordance with Priority Resolution Process Order, attached hereto as **Appendix “B”** is a copy of the Trustee’s statement of receipts and disbursements for the period from January 22, 2015 to January 11, 2016 (the “**R&D Statement**”).

14. As set out in the R&D Statement, the Trustee is currently holding approximately \$5,607,858, of which approximately \$4.2 million (the “**Reserve**”) is being held in a separate account for the benefit of the parties that are to be determined to have priority to the Reserve.
15. The sale transactions that have closed to date and the Trustee’s estimate of the realizable net sale proceeds from the sale and closing of the remaining unsold residential condominium units, parking units and locker units, are set out in detail below.¹

Sold Units

16. As noted above, there were 128 units that were subject to Sale Agreements that the Trustee was authorized to take steps to close pursuant to the Appointment Order (the “**Sold Units**”).
17. As of the date of this Seventh Report, the Trustee has closed the sale of 117 of the 128 Sold Units.
18. As set out in the R&D Statement, the sale of the 117 Sold Units generated gross sale proceeds of approximately \$34,636,920. After taking into account HST (totaling approximately \$2,990,405) and property taxes (totaling approximately \$557,643) collected and to be remitted with respect to the sale transactions, the net sale proceeds generated by the sale of the 117 Sold Units is approximately \$31,088,872.

¹ All references to estimated realizable net sales proceeds in this Seventh Report are prior to costs of administration, including, among others, repairs and maintenance, maintenance fees payable to WSCC 591, professional fees, utilities, operating costs and insurance.

19. There is one Sold Unit, unit 1310, which is scheduled to close on January 15, 2016. The Trustee estimates that the net sale proceeds from the closing of this sale transaction will be approximately \$311,000.
20. There is another Sold Unit, unit 1802, where the Trustee is in the process of completing required construction of the unit that 144 Park agreed to complete prior to closing, to the point where the purchaser has agreed to close the transaction and finish the remaining construction on his own. A closing date is in the process of being finalized. The Trustee estimates that the net sale proceeds from the closing of this sale transaction will be approximately \$306,000 if the sale transaction closes in accordance with the terms of the Sale Agreement.
21. As a result, the Trustee estimates that the net sale proceeds to be realized from the sale of 119 of the 128 Sold Units is approximately \$31.7 million.

Estimated Net Sale Proceeds re Remaining Units

22. As noted above, 128 of the 148 residential units were subject to Sale Agreements. The Trustee has closed the sale of 117 of the 128 Sold Units, and the Trustee anticipates being in a position to close two additional Sold Units, units 1310 and 1802, in January 2016.
23. With respect to the remaining nine (9) Sold Units:
 - (a) the Trustee continues to be in discussions with the purchaser of unit 105/TH5 regarding completing the sale transaction; and
 - (b) there are eight (8) units where (i) the Trustee has terminated the Sale Agreements due to purchaser defaults (units 610 and 1009); (ii) the Trustee has terminated the

Sale Agreements with the consent of the purchasers (units 609, 1102, 1801 and 1902); and (iii) the purchaser has commenced an application seeking to terminate the sale transactions (units 1407 and 1408).

24. In addition to the 9 Sold Units referred to above, there were the 20 units that remained unsold as at the date of the Trustee's appointment.² The 20 unsold units and the 9 Sold Units are collectively referred to as the "Remaining Units".
25. The Trustee has discussed the potentially realizable net sale proceeds that could be generated for the Remaining Units with Mint Realty, who the Trustee has engaged to market and sell the Remaining Units. Based on Mint Realty's expertise in the Kitchener-Waterloo condominium market and the advice it has provided to the Trustee, and based on similar units that have already sold in the building, the Trustee estimates that the net sale proceeds that may be realized with respect to the sale of the 29 Remaining Units is approximately \$10.6 million.
26. As a result, the Trustee estimates that the net sale proceeds to be received by the Trustee with respect to the sale of all 148 residential units in the 144 Park Project is approximately \$42.3 million.

² Units 102/TH2, 106/TH6, 107/TH7, 502, 503, 702, 706, 710, 809, 810, 1110, 1203, 1306, 1503, 1506, 1607, 1707, 1807/PH7, 1903/GPH3 and 1904/GPH4.

All of which is respectfully submitted to this Court as of this 13th day of January, 2016.

COLLINS BARROW TORONTO LIMITED,
in its capacity as Court-appointed Trustee of
the Property and not in its personal capacity

Per: 

Name: Bryan A. Tannenbaum, FCPA, FCA, FCIRP
Title: President

I have the authority to bind the corporation

APPENDIX “A”

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

THE HONOURABLE *MADAM*)

MONDAY, THE 11th DAY

)

JUSTICE *MESBUR*)

OF JANUARY, 2016



**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**

**ORDER
(Priority Resolution Process)**

THIS MOTION made by Collins Barrow Toronto Limited, in its capacity as Court-appointed trustee over the lands and premises known municipally as 142, 144 and 148 Park Street and 21 Allen Street West, Waterloo, Ontario pursuant to section 68(1) of the *Construction*

Lien Act, R.S.O. 1990, c. C.30, as amended (the "**Trustee**"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON HEARING the submissions of counsel for the Trustee and on being advised that no opposition to the terms of this Order have been received from any Lien Claimants (as defined below),

PRIORITY RESOLUTION PROCESS

1. **THIS COURT ORDERS** that the priority of the claims of the construction lien claimants (the "**Lien Claimants**") and Laurentian Bank of Canada (the "**Bank**") to the funds being held by the Trustee pursuant to the Order of Justice Newbould dated August 5, 2015 (the "**Reserve**") shall be determined pursuant to the following procedure and timetable:

(a) On or before January 13, 2016:

(i) the Bank shall serve an affidavit (the "**Bank Affidavit**") from a representative of the Bank (the "**Bank Representative**") addressing, among others, the following:

(A) whether the Bank advanced any funds to 144 Park Ltd. or its designee ("**144 Park**") after the Bank had received a written notice of lien,

(B) purpose or purposes of the advances made by the Bank to 144 Park on October 8 and 24, 2014, including statutory declarations (if

any), correspondence and other documentation in the Bank's possession, power or control in respect of such advances, and

(C) the total amount of 144 Park's indebtedness owing to the Bank as at the date of the Bank Affidavit; and

(ii) the Trustee shall serve a report (a "**Report on Proceeds**") that, among other things, will include the following information:

(A) a statement of receipts and disbursements as at the date of the Report on Proceeds that includes, among other things, the amount of proceeds held by the Trustee, and

(B) an estimate of the realizable net sale proceeds from the sale and closing of the remaining unsold residential condominium units, parking units and locker units.

(b) Any lien claimant claiming entitlement to part of the Reserve by asserting priority over the Bank's mortgage (a "**Disputing Lien Claimant**") for an amount in excess of the basic ten per cent (10%) holdback (the "**Basic Holdback**") shall, on or before January 29, 2016 (the "**Bar Date**"), serve a responding affidavit describing with sufficient particularity and supporting documentation, the factual and legal basis upon which the lien claimant asserts such priority over the Bank's mortgage (the "**Responding Affidavit**");

(c) The Bank, the Disputing Lien Claimants and the Trustee will attempt to consensually resolve the Disputing Lien Claimants' claim for priority over the

Bank's mortgage for an amount in excess of the Basic Holdback, failing which, the priority dispute shall be determined by a judge presiding over the Commercial List according to the following timetable:

- (i) if necessary, cross-examinations on the Bank Affidavit and Responding Affidavits shall be completed on or before February 5, 2016;
- (ii) the Bank shall serve its factum on or before February 11, 2016;
- (iii) the Disputing Lien Claimants shall serve facta on or before February 18, 2016 at 2:00 pm;
- (iv) all motion materials, including facta, shall be filed with the Court by February 19, 2016; and
- (v) the hearing shall be heard on February 22, 2016.

2. **THIS COURT ORDERS** that if a Lien Claimant does not deliver a Responding Affidavit on or before the Bar Date, it shall be forever barred from asserting a claim to the Reserve in priority to the Bank's mortgage in these proceedings or any other proceedings for an amount in excess of the Basic Holdback in respect of such Lien Claimant's construction lien.

CROSS EXAMINATION OF BANK REPRESENTATIVE

3. **THIS COURT ORDERS** that any cross-examination of the Bank Representative shall be subject to the following procedure:

- (a) each Disputing Lien Claimant wishing to cross-examine the Bank Representative shall serve a Notice of Examination by email on the Bank's counsel, with a copy to the Trustee and its counsel, on or before the Bar Date;
- (b) if two (2) or more Disputing Lien Claimants serve a Notice of Examination, the Disputing Lien Claimants shall appoint one (1) representative counsel (the "**Examining Counsel**") to conduct the cross-examination on behalf of all of the Disputing Lien Claimants. The Disputing Lien Claimants who served a Notice of Examination shall advise the Bank and Trustee of the Examining Counsel selected as soon as practical after selection. For greater certainty, all counsel for Disputing Lien Claimants are entitled to attend the cross-examination;
- (c) the cross-examination of the Bank Representative shall be held in Toronto on a date to be agreed upon by the Bank, Trustee and Examining Counsel, but shall be held by no later than February 3, 2016; and
- (d) if no Disputing Lien Claimant serves a Notice of Examination on or before the Bar Date, no Disputing Lien Claimant shall be entitled to cross-examine the Bank Representative.

DISTRIBUTIONS OF RESERVE

4. **THIS COURT ORDERS** that, following the Bar Date and subject to paragraph 5, below, the Trustee is authorized and directed to distribute the Reserve to the Bank up to the amount of the Bank's secured mortgage indebtedness without further order of this Court.

5. **THIS COURT ORDERS** that, notwithstanding paragraph 4 above, the Trustee may not distribute any funds from the Reserve to the Bank without retaining an amount equivalent to the priority amount claimed by the Disputing Lien Claimants.



ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JAN 11 2016


**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**

Court File No. CV15-10843-00CL

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

Proceedings commenced at Toronto

ORDER

CHATTONS LLP
5000 Yonge Street, 10th Floor
Toronto, ON M2N 7E9

Harvey Chaiton (LSUC #21592F)
Tel: (416) 218-1129
Fax: (416) 218-1849
E-mail: harvey@chaitons.com

Sam Rappos (LSUC #51399S)
Tel: (416) 218-1137
Fax: (416) 218-1837
E-mail: samr@chaitons.com

Lawyers for the Trustee

APPENDIX “B”

**In the Matter of the Construction Lien Proceeding of 144 Park
Trustee's Statement of Receipts and Disbursements
For the Period January 22, 2015 to January 11, 2016**

Receipts	11-Jan-16	Notes
Closing proceeds from sale of units	31,088,872	1
HST collected	2,990,405	1
Occupancy fees paid by residents	930,831	2
DIP funds received	500,000	3
Property taxes collected from closing of units	557,643	1
Hydro utilities recovery	59,023	
HST refunds	183,616	
Transfers from Harris Sheaffer accounts	8,564	4
Bank interest	11,783	
Sale of access fobs and other miscellaneous receipts	1,615	
Total Receipts	36,332,351	
Disbursements		
Operating expenses (property manager, security, snow removal and landscaping, property cleaner, garbage disposal)	79,258	
Payment of DIP Facility fee	25,000	3
Repayment of DIP funds	517,062	3
Insurance premiums	26,703	
Payment of fees and bond premium to Westmount Guarantee	40,480	5
Insurance deductible	50,000	6
Trustee's fees		
- pre-appointment consulting fees	36,737	
- post-appointment fees	485,710	
Legal counsel fees	471,743	7
Utilities	168,180	
Common area maintenance fees paid to WSCC 591	364,170	8
Amounts paid on behalf of WSCC 591 (insurance, utilities)	45,761	8
Repairs and maintenance	392,057	
Wages	191,628	9
Third party consultants (engineer, surveyor, planner, architect)	140,181	10
HST/PST paid	276,372	
HST remitted to Canada Revenue Agency	2,625,114	
Property taxes paid	507,277	
Advertising - Unsold Units	26,475	
Registration fees paid to the City and Region of Waterloo	3,375	
Courier	584	
Other	2,442	
Total disbursements	6,476,307	
Excess of receipts over disbursements before distributions to mortgagees and lien claimants	29,856,044	
Distribution to mortgagees and lien claimants		
Laurentian Bank of Canada	23,010,000	11
Lien claim holdback paid	1,238,186	11
Excess of receipts over disbursements	5,607,858	11

**In the Matter of the Construction Lien Proceeding of 144 Park
Trustee's Statement of Receipts and Disbursements
For the Period January 22, 2015 to January 11, 2016**

Notes:

1. As at January 11, 2016, the Trustee has closed the sales of 117 units. Total proceeds received from 117 closings total \$34,636,920, which includes \$2,990,405 of HST and \$557,643 of property taxes collected.

As at January, 2015, seven transactions have been terminated as a result of either a creditor preference given by 144 Park Ltd., purchaser defaults or transactions mutually terminated by the purchaser and the Trustee.

2. Occupancy fees paid by residents consist of occupancy fees collected by the Trustee for the months of January to June 2015. The Trustee did not cash all occupancy cheques received for June 2015, but on the advice of counsel, sent those cheques that had not been deposited to counsel to be returned to the respective residents. These residents' closing statements of adjustments reflected the June 2015 occupancy fee and all residents' statements of adjustments will reflect fees payable from July 1, 2015 forward to the date of closing, as appropriate. The occupancy fees adjusted for on residents' statements of adjustments are included in closing proceeds from the sale of units.

3. On April 7, 2015, pursuant to the Court-approved term sheet (the "DIP Term Sheet") and authority to borrow funds, the Trustee borrowed \$500,000 (the "DIP Funds") from MarshallZehr Group Inc. ("MZ"). The DIP Funds were repaid by the Trustee to MZ on July 16, 2015, including interest of \$16,812 and an administration fee of \$250. The Trustee also paid to MZ a Facility Fee of \$25,000 in accordance with the DIP Term Sheet.

4. Harris Sheaffer LLP ("HS"), real estate counsel to 144 Park Ltd. and the Trustee, held in its accounts funds paid to HS by 144 Park Ltd. as a retainer for fees. HS has sent the remainder of the retainer funds held by it to the Trustee.

5. Westmount Guarantee Services Inc. ("Westmount Guarantee") acts as agent for the Aviva Insurance Company with respect to a bond securing the obligations of the developer for rectification of in-suite and common area deficiencies that are warranted by Tarion Warranty Corporation. In its capacity as agent, Westmount Guarantee charges annual fees for its services and the invoices paid by the Trustee are for the period August 24, 2014 to August 23, 2015. Westmount Guarantee's recourse for unpaid fees is to charge the bond and obtain payment from the cash collateral supporting the bond, which is held by HS.

6. As set out in previous reports of the Trustee, a flooding incident occurred on March 20, 2015 at the Property. The Trustee's insurance deductible in accordance with its policy was \$50,000. Costs for rectification of the damage to the Property are in excess of \$240,000.

7. Legal counsel's fees include the fees of the Chaitons LLP and Harris Sheaffer LLP.

8. Pursuant to the requirements of the *Condominium Act*, the declarant, upon registration of the Condominium Corporation, is deemed to be the owner of all the units in the Condominium. Monthly invoices to January 31, 2016 have been rendered by First Service Residential (the "Property Manager") for applicable occupancy fees for units not closed and the Trustee has paid all invoices rendered by the Property Manager.

9. The Trustee retained the services of two employees of Mady Development Corporation ("MDC") to assist it with its on-site duties at the Property. One employee left the employ of MDC in or about mid-November 2015 and the second employee has tendered his resignation effective January 22, 2016.

**In the Matter of the Construction Lien Proceeding of 144 Park
Trustee's Statement of Receipts and Disbursements
For the Period January 22, 2015 to January 11, 2016**

10. The Trustee was required to retain the services of certain professionals in order to deal with various issues at the Property to obtain condominium registration.

11. To date, pursuant to authorization by the Court to do so, the Trustee has paid to Laurentian Bank of Canada ("LBC") \$23,010,000.

In accordance with the Order of the Court dated August 5, 2015, the Trustee retained \$5.4 million in an interest bearing account (the "Reserve") for the benefit of lien claimants. Pursuant to an Order of the Court dated October 16, 2015, the Trustee paid from the reserve \$932,949 to lien claimants. Pursuant to an Order of the Court dated December 3, 2015, the Trustee paid from the Reserve a further \$305,237 to lien claimants. the Reserve to lien claimants. As at January 11, 2016, the balance remaining in the Reserve and the Trustee's operating account is \$4,161,743 and \$1,446,115 respectively.

At an average distributable amount of \$265,717 per unit, the Trustee has made distributions to secured lenders totaling the equivalent of approximately 91 units. The Reserve of \$4,161,743 represents a distributable amount equal to approximately 16 units. The Reserve will be distributed after priority to the funds in the Reserve are established.