

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

2292912 ONTARIO INC.

Applicant

-and-

2380009 ONTARIO LIMITED

Respondent

APPLICATION UNDER Section 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3
as amended and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended

FACTUM

November 27, 2017

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**FACTUM OF THE RECEIVER
(Advice and Directions Re: Eco Claims)**

PART 1- INTRODUCTION

1. This motion is brought by the Receiver, Collins Barrow Toronto Limited (the “**Receiver**”), receiver of the assets, property and undertaking of 2380009 Ontario Limited (“**238**”) for advice and directions pursuant to s.249 of the *Bankruptcy and Insolvency Act* (R.S.C., 1985, c. B-3) (“**BIA**”) concerning certain claims advanced by Eco Home Energy Services Inc. (“**Eco**”).
2. The Receiver was appointed over the assets, property and undertaking of 238 on February 7, 2017 pursuant to the Order of the Honourable Justice Newbould.

3. The principal asset of 238 consists of an industrial property located at 2370 South Sheridan Way, Mississauga, Ontario (the “**Property**”). The building located on the Property was occupied by a single tenant, BuiltRite Technologies Inc. (“**BuiltRite**”), a related company to 238, pursuant to a lease between BuiltRite and 238 (the “**Lease**”) from February 1, 2014 to August 8, 2017.

4. The Lease was terminated on August 8, 2017 and BuiltRite has now vacated the Property. The Receiver has concluded a sales and marketing process in respect of the Property. This motion is scheduled to be heard at the same time as the Receiver’s motion for approval of the sale of the Property and, if the sale is approved, it is anticipated that the Property will be sold imminently.

5. Eco’s claims relate to certain work performed by Eco in respect of the Property. The relevant work was completed in early 2014. Eco did not register a lien in respect of the Property pursuant to the *Construction Lien Act*, R.S.O. 1990, c. C.30 (the “**CLA**”) or commence any other proceeding to recover the outstanding balance owing in connection with the work performed by Eco at the Property.

6. BuiltRite paid rent throughout the course of its occupation of the Property. During the period from March 1, 2017 to August 31, 2017 (i.e. the period following the appointment of the Receiver in which BuiltRite continued to occupy or have access to the premises), rent was paid to the Receiver by BuiltRite.

7. Eco claims a trust interest under the CLA in any payments made to the Receiver by BuiltRite. If Eco’s trust claims are accepted, these claims will reduce realizations of other creditor(s) of 238 who hold security against the Property.

8. The Receiver seeks advice and directions with respect to the nature and priority of the claims advanced by Eco. The Receiver has prepared this factum for the assistance of the Court in making this determination and has attempted to identify herein what it considers to be the relevant law applicable in the circumstances.

9. Issues addressed in this factum are intended to address the positions taken by Eco in its communications and correspondence with the Receiver and its counsel. The Receiver has expressed its concern to Eco that Eco's trust claims may be statute barred pursuant to the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B ("*Limitations Act*"), having not been asserted until more than three years following completion of the relevant work. The Receiver understands Eco's position to be that Eco's trust claims in relation to funds in the possession of the Receiver are not statute barred and did not arise prior to:

- (a) receipt by the Receiver of rent payments from BuiltRite; and/or
- (b) the issuance of a certificate of substantial performance (which has to date not occurred) in respect of the work performed by Eco.

PART 2 - FACTS

Work Performed by Eco and Related Documents

10. Based upon the information provided by Eco and 238, Eco was engaged by 238 in or around November 29, 2013 for the purpose of supplying and installing HVAC units on the building located at the Property. The Receiver has been provided by Eco with a copy of a

contract for services dated November 29, 2013 (the “**Contract**”) respecting the work to be performed by Eco at the Property. The Contract indicates a total cost, including applicable taxes, of \$43,392.00 for the work to be performed by Eco.

Contract, Fourth Report of the Receiver, paragraph 79 and Appendix K

11. Eco has also provided the Receiver with a copy of terms and conditions (the “**Terms and Conditions**”) printed on the back of the Contract. The Terms and Conditions contain, *inter alia*, the following provisions:

- (a) *“Eco Energy Home Services Inc. remains the owner of all the articles herein referred to until payment in full is received. In case of failure to make the payment when due or either of repossessing the said articles or claiming the entire balance due in case of repossession, Eco Energy Home Services Inc. shall have the right to retain all or part of any payments made prior to repossession on the basis of quantum merit (sic) and shall more over (sic) have the right to dispose of the articles repossessed without any accounting.”*
- (b) *“An server (sic) charge of 2% per Month (24% Annually) will be charge (sic) on overdue amount”.*

Terms and Conditions, Fourth Report of the Receiver Appendix L

12. Counsel to Eco has advised that the work contemplated by the Invoice was completed in January of 2014. The Contract appears to have been signed on behalf of 238 on January 21, 2014. The Receiver has not been provided with evidence which establishes whether the Contract

was signed by 238 before, or after, the work was performed. The specific date of completion of the relevant work is not addressed in the Affidavit materials filed on behalf of Eco.

Fourth Report of the Receiver, paragraph 82

13. The Receiver is not aware of any dispute between 238 and Eco as to the nature of the work to be performed by Eco, that the work was in fact performed or the total amount payable pursuant to the Contract.

Fourth Report of the Receiver, paragraph 83

Eco Registrations

14. On December 18, 2014, Eco registered a security interest against 238 under the PPSA as registration 20141218 1623 9382 0000.

PPSA Registry Search Except, Fourth Report of the Receiver, Appendix M

15. On February 22, 2017, Eco registered a Notice of Security Interest on title to the Property as Instrument Number PR3083146.

Notice of Security Interest, Fourth Report of the Receiver, Appendix N

Eco Outstanding Balance

16. On February 28, 2017, the Receiver contacted Eco to inquire as to the nature of the security interest claimed by Eco. A representative of Eco confirmed that its registrations (as

above) relate to Eco's installation of the HVAC units at the Property. On March 1, 2017, Eco delivered a series of documents to the Receiver relating to same, including a copy of an invoice dated as of February 28, 2017, which indicates a total outstanding balance of \$75,996.35 in connection with the Contract, inclusive of interest and taxes.

Invoice, Fourth Report of the Receiver, paragraph 80 and Appendix L

17. Counsel for Eco has since confirmed that the Invoice did not account for certain payments made to Eco pursuant to the Contract and that the correct current outstanding principal balance owing is only \$12,560.20. Eco claims interest and costs in addition to the principal balance outstanding.

Fourth Report of the Receiver, paragraph 87

Eco Trust Claim

18. The Receiver understands Eco's position to be that any rent paid to the Receiver in respect of the Property, or any proceeds of sale realized in respect of the Property, are funds held in trust for Eco pursuant to s.7(3) of the CLA. Eco asserts that its trust claim extends to the outstanding balance owing on the Contract, interest on the outstanding balance in accordance with the Terms and Conditions at 24% per annum from January 2014 to present, plus indemnity for legal costs incurred by Eco in connection with the enforcement of its claim.

Fourth Report of the Receiver, paragraph 88

19. Counsel for Eco has quantified its claims for principal, interest and related legal fees, as of November 21, 2017, as being in the following amounts:

- (a) Principal = \$12,560.20
- (b) Interest = \$11,644.85
- (c) Legal Fees = \$16,375.70

Fourth Report of the Receiver, paragraph 89

Rent Paid to 238

20. Between February 1, 2014 and the appointment of the Receiver on February 7, 2017, BuiltRite made rent payments totalling \$666,000. These payments were directed to 238's senior secured creditor, 2292912 Ontario Inc. ("229"), and applied against 238's outstanding indebtedness to 229.

Fourth Report of the Receiver, paragraph 90

21. Since the appointment of the Receiver, the total amount of \$108,000 plus HST of \$14,040 has been paid to the Receiver by BuiltRite on account of payments due under the terms of the Lease (the "**Post-Receivership BuiltRite Payments**").

Fourth Report of the Receiver, paragraph 91

22. Eco claims a trust interest in the Post-Receivership BuiltRite Payments in the amount of its total claims as referenced above, plus such additional fees to be incurred up to and including the determination of same.

Fourth Report of the Receiver, paragraph 82 and Appendix L**Position of the Receiver**

23. The Receiver has been unable to locate any authority which decisively supports Eco's position that its alleged trust claims can now be maintained against funds received by the Receiver in the form of rent or other proceeds in respect of the Property. In particular, the Receiver is concerned that:

- (a) the operation of the *Limitations Act* may bar Eco from asserting CLA trust claims against the owner, 238, in respect of work completed more than three years prior to the assertion of such claims; and
- (b) if Eco's trust claims are statute-barred as against the owner, Eco may similarly be prevented from asserting such claims over rent or sale proceeds in relation to the Property that are in the possession of the Receiver.

24. Acceptance of the trust claims advanced by Eco would effectively grant Eco priority over the claims of other creditors with validly registered security and will reduce funds available for distribution to such parties.

25. The Receiver is of the view that it is appropriate to seek advice and directions from the court in respect of Eco's claims and to afford any interested parties the opportunity to participate in the determination of the issues relating to same. At this time, the terms of the sale of the Property have not been disclosed, pending its completion, and the sale price is not public information. As a result, the identity of the potentially affected party is similarly unknown.

PART 3- ISSUES AND LAW

26. The Receiver submits that the following issues are relevant to the determination of the nature and priority of Eco's claims:

- (a) The relevant provisions of the CLA;
- (b) The nature of CLA trusts;
- (c) Limitations and CLA Trusts;
- (d) The Relevance of the Issuance of a Certificate of Substantial Performance;
- (e) The Relevance of the Appointment of the Receiver;
- (f) The content of a CLA trust;

A. The Relevant Provisions of the CLA

27. Please see Schedule B.

B. The Nature of CLA Trusts

28. The purpose and intent of the CLA is to protect persons supplying services and materials to an improvement to real property and to prevent unjust enrichment of those higher up in the construction pyramid.¹ To that end, Part II of the CLA creates a comprehensive trust scheme to ensure that construction funds flow intact from the owner down to the lowest tier subcontractor.²

¹ For example, in *Sunview Doors Ltd. v. Academy Doors & Windows Ltd.*, 2010 ONCA 198, 2010 CarswellOnt 1450 at para. 23, the Court held that construction trusts are intended to "protect beneficiaries from insolvent or unscrupulous owners or contractors, to give contractors security for work done by them, and to impress with a trust all funds received on account of work done at the project."

² *Stuart Olson Dominion Construction Ltd. v. Structural Heavy Steel*, 2015 SCC 43, at paras. 32 and 40.

29. The structure of this statutory trust essentially holds that the funds received from a financier or owner will pass down from one level to the next, with the condition that they shall not be misappropriated or converted into the trustee's own use or any use inconsistent with the trust. The CLA trust provisions are "privity-based" whereby monies received by each payor are held in trust for their respective payees.³

30. In this case, the Receiver understands that Eco's position is that any rent paid in respect of the Property or proceeds of sale of the Property are funds held in trust for Eco. Both sources of funds can constitute an owner's trust under the CLA.⁴

31. The owner's trust is at the top of the pyramid. Section 7(1) of the CLA specifically imposes a trust upon funds received by an owner that are to be used in the financing of the improvement.⁵ Sections 7(2) and 7(3) create additional trust obligations for the owner that applies when funds are in the hands of the owner at the time of a certification by a payment certifier or certification of substantial performance, or funds received by the owner at any time thereafter.⁶ Section 9(1) further imposes a trust on funds received from the proceeds of the owner's interest in the subject premises, in the event it is sold.⁷

C. Limitations and CLA Trusts

C(i) – General Application of Limitations Act

³ *Construction Builders and Mechanics' Liens in Canada* (7th Edition; looseleaf), Bristow, Glaholt, Reynolds & Wise, at page 9-2 and 9-3.

⁴ See for example, *Structural Contracting Ltd. v. Westcola Holdings Inc.*, 2000 CarswellOnt 2018.

⁵ *Construction Lien Act*, Sections 7(1).

⁶ *Construction Lien Act*, Sections 7(2) and 7(3).

⁷ *Construction Lien Act*, Sections 9(1).

32. Had Eco's trust claim been asserted within two years of the completion of the work, the Receiver is not aware of any reason why Eco would not have had a valid trust claim to funds received by the owner in relation to (at least) the principal balance outstanding on the Contract.

33. However, trust claims under the CLA are subject to the two year limitation period prescribed by the *Limitations Act*.⁸

34. Section 4 of the *Limitations Act*, provides that "a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered". A "claim" is defined under the *Limitations Act* as "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission"⁹.

35. Pursuant to section 5 of the *Limitations Act*, a claim will be considered to have been discovered on the earlier of:

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1)¹⁰.

⁸ *Construction Builders and Mechanics' Liens in Canada*, 7th Edition, Bristow, Glaholt, Reynolds & Wise, at page 9-63.

⁹ *Limitations Act*, Sections 1 and 4.

¹⁰ *Limitations Act*, Section 5.

C(ii) – Discoverability and CLA Trusts

36. Section 5(2) establishes a presumption that an entity with a claim shall be presumed to have known of its claim on the day the act or omission on which the claim is based took place, “unless the contrary is proved”. In order to defeat the presumption that a claim is discovered when the relevant damage occurs, it is not enough for a plaintiff to show that it did not know of its claim, but to prove that it could not reasonably have known of that claim. The plaintiff must show that it exercised reasonable diligence in attempting to discover the facts that it now advances in support of its claim.¹¹

37. The discoverability of claims under the *Limitations Act* has been specifically considered in the context of trusts under the CLA. One of the leading cases is the Superior Court decision of *Cast-Con Group Inc. v. Alterra (Spencer Creek) Ltd.*¹² In that case, the plaintiff commenced a lien action in early 2004 and sought to pursue a breach of trust claim under Sections 7, 8 and 9 of the CLA in mid-2006, being more than two years after it commenced its lien action.

38. To attempt to avoid the two year limitation period, the plaintiff relied on the discoverability principle under Section 5 of the *Limitations Act*, arguing that its cause of action in breach of trust did not arise until it received a full accounting of funds received by the defendants in relation to the project, which it sought and obtained in early 2007. The Court rejected this argument, and determined that the trust claims of the Plaintiff were statute-barred. With respect to the question of discoverability, the Court found that reasonable diligence on the part of the contractor could have resulted in claims for breach of trust “soon after the contract price was not

¹¹ *Findlay v. Holmes*, [1998] O.J. No. 2796 (C.A.) at para. 28.

¹² *Cast-Con Group Inc. v. Alterra (Spencer Creek) Ltd.*, [2008] O.J. No. 842 (Ont. Sup. Ct.)

paid upon completion of the work”.¹³ In other words, that there were essentially no material facts that could not have been discovered with the exercise of reasonable diligence once the claim for breach of contract for the unpaid work had arisen.

39. In *Construction Builders' and Mechanic's Lien in Canada*, the authors commented on the findings in *Cast-Con* and stated that a breach of trust is discovered soon after the amounts are not paid under the contract and, consequently, the limitation period runs concurrently with that of a claim for breach of contract.¹⁴

40. The principle in *Cast-Con* was followed in *Aldine Construction Ltd. v. Brucegate Holdings Inc.*, where the court held that breach of trust claims arise from the failure to pay the contract price for work performed.¹⁵

41. The most recent consideration of *Cast-Con* was in 2017, where Master Short followed the decision, determined the Court was bound by it, and held that “*the trust claim clock runs from when the default entitling a party to lien a project, is discovered.*”¹⁶

42. While the authorities set out above, and others¹⁷, suggest that a claim for breach of a CLA trust arises for the purpose of the *Limitations Act* upon a default or failure to pay amounts owed under a contract, there are other decisions of the Court which suggest that there is not a clear trigger for when a cause of action in breach of trust arises and, instead, that the issue requires a contextual analysis.

¹³ *Cast-Con Group Inc. v. Alterra (Spencer Creek) Ltd.*, [2008] O.J. No. 842 (Ont. Sup. Ct.), at paras. 15 to 17

¹⁴ *Construction Builders and Mechanics' Liens in Canada*, 7th Edition, Bristow, Glaholt, Reynolds & Wise, page 9-64

¹⁵ *Aldine Construction Ltd. v. Brucegate Holdings Inc.*, [2010] O.J. No. 2214 (Ont. Master) at para. 18

¹⁶ *Campoli Electric Ltd. v. Georgian Clairlea Inc.*, [2017] O.J. No. 2980 at paras. 148 to 159

¹⁷ See also, *Carmen Drywall Ltd. v. BCC Interiors Inc.*, 2013 O.J. No. 3245 (Ont. Sup. Ct) at paras 28 to 29 and *Lacroix (c.o.b. S& L Mechanical Plumbing and Heating) v. Lexus Mechanical Inc.*, [2016] O.J. No. 3165

43. In *Employment Professionals Canada Inc. v. Steel Design and Fabricators (SDF) Ltd.* a motions judge considered *Cast-Con* and other authorities and declined to hold that they stand for the invariable principle that a claim for breach of trust under section 13 of the *CLA* must run concurrently with a claim for breach of a construction contract. Rather, the motion's judge held that the cases merely applied the discoverability principle to the facts of the particular case. On a motion for leave to appeal, the Divisional Court upheld the motion judge's findings and determined that the motions judge did not conclude that a breach of trust claim *does not* run concurrently with the breach of contract, but rather that the question of when a claim for breach of trust is discovered turns on the facts of the case.¹⁸ *Employment Professionals Canada Inc.* was, however, decided in the context of a motion for summary judgment and did not provide specific guidance as to which factors can give rise to discoverability.

C(iii) – The Instant Case

44. Aside from registering a security interest under the PPSA in December, 2014 (nearly a year following completion of the work), the Receiver is unaware of any steps taken by Eco to investigate or pursue a claim. The Receiver is not aware of Eco commencing a claim in contract or a lien claim. The Receiver is not aware of Eco delivering any requests for information to the owner pursuant to Section 39 of the *CLA*, or otherwise. The Receiver is not clear as to upon what basis the conclusion that Eco has discharged its onus to prove that it exercised reasonable

¹⁸ *Employment Professionals Canada Inc. v. Steel Design and Fabricators (SDF) Ltd.* (Ont. Sup. Ct.) [2016] O.J. No. 5164 (Ont. Div. Ct) at paras. 17, 27 to 28.

diligence in attempting to discover the facts that it now advances in support of its claim could be reached.

45. The Receiver's view is that it is likely that Eco's trust claim was discovered, for the purposes of the application of the *Limitations Act*, in or shortly after January 2014, and that the relevant limitation period within which such claims could have been asserted against the owner, 238, expired well before the Receiver's appointment in February 2017.

D. The Relevance of the Issuance of a Certificate of Substantial Performance

46. The concept of substantial performance under the CLA is inextricably linked to the statutory requirement to maintain holdback. The CLA contemplates that an owner and other persons involved in the building of a project are required to maintain a holdback until the project is "substantially performed" and for a specific number of days thereafter. The holdback is for the benefit of persons holding liens as it provides security for their completion of the contract.¹⁹

47. The object of the substantial performance concept is therefore to expedite the release of the holdback and acts a trigger mechanism for various deadlines under the CLA regarding claims against the holdback.²⁰

48. For example, the holdback is to be maintained until all liens that may be claimed against the holdback have expired (or have otherwise been satisfied or discharged).²¹ In relation to

¹⁹ Thomas Heintzman and Immanuel Goldsmith, *Heintzman and Goldsmith on Canadian Building Contracts*, 5th Edition (Ontario, Carswell) (Loose-leaf updated 2017, release 4), vol 1 at page 16-51.

²⁰ Duncan W. Glaholt & David Keeshan, *The 2017 Annotated Ontario Construction Lien Act*, (Toronto: Thomson Reuters), at 258.

contractors, a lien expires 45 days following the publication of the certificate of substantial performance (or the date the contract is completed or abandoned).²² The CLA also contemplates that no certificate of substantial performance may be issued and provides that, in such circumstances, the lien expires 45 days following the earlier of the date the contract is completed or abandoned.²³

49. “Substantial performance” may be determined in two ways:

- (a) by the publication of a certificate of substantial performance when the contract has been determined to have been “substantially performed”; or
- (b) by completion of the contract occurring as a matter of fact.²⁴

50. The test for both substantial performance and completion is set out in Section 2 of the CLA. Section 2(1) requires two events to occur for substantial performance, namely: (i) the improvement to be made under the contract or a substantial part thereof is ready for use or is being used for the purposes intended; and (ii) when the improvement to be made under that contract is capable of completion or, where there is a known defect, correction, at a cost of not more than 3 per cent of the first \$500,000 of the contract price (and lower percentages for amounts in excess of \$500,000).²⁵

²¹ *Construction Lien Act*, Section 22(1).

²² *Construction Lien Act*, Section 31(2)(a).

²³ *Construction Lien Act*, Section 31(2)(b).

²⁴ Thomas Heintzman and Immanuel Goldsmith, *Heintzman and Goldsmith on Canadian Building Contracts*, 5th Edition (Ontario, Carswell) (Loose-leaf updated 2017, release 4), vol 1, page 16-53

²⁵ *Construction Lien Act*, Section 2.

51. The CLA further “deems” a contract to be completed when price of completion, correction of a known defect or last supply is not more than the lesser of: (i) 1 per cent of the contract price; and (ii) \$1,000.²⁶

52. As the date for the release of the holdback is specified as being the earlier of 45 days following substantial performance or completion as set out above, the certificate of substantial performance achieves no benefit in accelerating the release of the holdback once the contract is already deemed to be complete under Section 2(3) of the CLA.

53. The CLA sets a mechanism for a contractor to apply to seek a determination that the contract has been substantially performed as a means of ensuring timely release of the holdback. In particular, Section 32 of the CLA provides that on an application of the contractor, the “payment certifier” is to determine whether the contract has been substantially performed in accordance with section 2 of the CLA by issuing a certificate of substantial performance. Where there is no payment certifier, the owner and contractor are to make the determination jointly and are both to sign the certificate. The contractor is obliged to publish a copy of the certificate in a construction trade newspaper.

54. Section 32(7) provides that: “where there is a failure or refusal to certify substantial performance of the contract within a reasonable time, any person may apply to the court, and the court, upon being satisfied that the contract is substantially performed, and upon such terms as to costs or otherwise as it considers fit, may declare that the contract has been substantially performed, and the declaration has the same force and effect as a certificate of substantial performance of the contract.”

²⁶ *Construction Lien Act*, Section 2(3).

55. Although Section 32 applies to any contract regardless of its size, commentary has criticised its applicability to small contracts as being not mandatory, not practical and misleading.²⁷

56. Under the general scheme, the certificate of substantial performance generally functions to facilitate access to holdback funds. The issuance of a certificate of substantial performance also permits the contractor to access remedies under s.7(3) of the CLA. However, the Receiver was not able to locate jurisprudence or commentary that expressly dealt with the issue of whether issuing a certification of substantial performance after substantial performance has occurred can function to extend the limitation period, or constitute a trigger for the commencement of a limitation period, under Subsection 7(3) of the CLA.

57. The Receiver interprets the legislation surrounding the issuance of a certificate of substantial performance as a means by which a contractor may accelerate or enforce a right to release of statutory holdback, and not as a requirement to be met by an owner which, if not complied with, suspends or tolls the rights of a contractor to assert lien or trust claims.

58. Although in *Royal Bank v. Penex Metropolis Ltd.*, the Court held that there is nothing limiting the time for a motion to declare a contract substantially complete (i.e. a party cannot attempt to defeat an otherwise valid trust claim under Subsection 7(3) simply because a certificate of substantial performance has not been issued), the Court did not deal with the *Limitations Act* or when the subject claim was discovered. Rather, the plaintiffs in *Penex* sought certificates of substantial performance and pursued trust claims within two years from the date of completion of their work.

²⁷ William G.J. Swybrous, Q.C., "Is Certification and Publication of Substantial Performance Under the Ontario Construction Lien Act Required on All Contracts Between the Owner and the Contractor?", *Construction Law Reports (Articles)*, 1984, 5 CONSTR LR-ART 173.

59. The Receiver is of the view that, to the extent that Eco's position is that its trust claims only arise upon the issuance of a certificate of substantial performance:

- (a) The Receiver can locate no jurisprudence which suggests that the ordinary CLA trust claim limitations period would not run, or would remain perpetually in abeyance, in circumstances where no certificate of substantial completion has been issued;
- (b) The Receiver is more inclined to interpret the statute as intending that while the issuance of a certificate of substantial performance facilitates access to remedies under s.7(3) of the CLA, it is incumbent upon the contractor to avail himself of the procedure under s.37(2) of the CLA within the relevant limitation period for the trust claim itself. Were the contrary true, inaction on the part of a contractor could effectively preserve the limitation period indefinitely.

E. The Relevance of the Appointment of the Receiver

60. While the Court has confirmed that the expiry of a limitations period does not extinguish the debt itself, though it may limit the creditor's ability to commence a proceeding "to remedy an injury, loss or damage that occurred as a result of an act or omission"²⁸, it is not clear that this principle assists Eco in these circumstances.

61. In Justice Newbould's decision in *Temple (Re)*, the question before the court was whether a statute-barred debt could sustain a bankruptcy application. In *Temple (Re)*, the Court indicated that an application for a bankruptcy order was not a proceeding "to remedy an injury, loss or

²⁸ In *Matter of the Bankruptcy of Temple of the City of Toronto in the Province of Ontario* [Indexed as: *Temple (Re)*] 109 O.R. (3d) 374.

damage that occurred as a result of an act or omission”²⁹, the *Limitations Act* did not apply and that unlike certain procedural rights, debts are not extinguished by virtue of the passing of a limitations period.

62. The implications of the *Temple (Re)* decision do not appear to the Receiver to lead to the conclusions that:

- (a) rent, or other proceeds, received by an owner are subject to a CLA trust even if no trust claim was asserted within the relevant limitations period; and
- (b) that the Receiver is obliged, in circumstances where the creditor could not commence a proceeding for relief under the trust provisions of the CLA against the owner, to account for an otherwise meritorious - but statute-barred - trust claim when distributing funds in the Receiver’s possession.

63. As confirmed by Justice Cameron in *Royal Bank of Canada v. Penex Metropolis Ltd.*³⁰, the Receiver receives funds otherwise payable to 238 in trust for 238 and such funds remain the property of 238 while in the Receiver’s possession. This being the case, the Receiver questions whether its appointment should have any significance at all for the purposes of a limitations analysis. As the Receiver is but in possession of the property of the owner, it is not clear to the Receiver that Eco is able to advance claims to such property if those claims could no longer be advanced against the owner.

64. Furthermore, the Receiver is concerned that if either:

²⁹ *Temple (Re)*, (2012) 109 O.R. (3d) 374 at para 14

³⁰ *Royal Bank of Canada v. Penex Metropolis Ltd.*, [2010] O.J. No. 362.

- (a) the issuance by the Receiver of a certificate of substantial performance (or an order declaring substantial performance); or
- (b) the receipt by the Receiver of proceeds from the lease or sale of the Property,

triggers the commencement of a relevant limitations period with respect to funds in the possession of the Receiver, that such funds could be subject any number of historical claims by contractors, regardless of when the work was performed or whether such contractors ever took steps to assert or preserve their rights previously.

65. If this is correct, Receivers appointed over real property could potentially be vulnerable to breach of trust claims in relation to historical unpaid contracts should they distribute proceeds realized from real property without performing investigations as to whether any such claims exist. The problematic implications of this are manifest:

- (a) If claims for interest form part of the trust claim, accumulated interest on even small claims could prove to be significant over long periods of time. At 24% per annum over 20 years, as an example, Eco's trust claim on the original \$12,560 would approach \$1,000,000;
- (b) In many cases, particularly in cases of long ownership, performing the investigations necessary to determine any potential historical trust claims would be both difficult and costly;
- (c) Give the relative priority/status of trust claims, it would seem necessary to conduct a claims process in respect of historical trust claims under circumstances which would not ordinarily warrant such a process (i.e. where realizations are

insufficient to discharge obligations owed to senior secured creditors). Such process would delay and erode realization by secured creditors, even if no such claims existed;

- (d) It would be virtually impossible for a Receiver to ensure that all historical claims had been captured; and
- (e) Creditors holding security against real property will have significant disincentive to enforce their rights by a Receiver due to an increased risk that unknown statute-barred claims against the property could be revived.

F. The Content of the Trust

66. Should the Court determine that Eco has established a valid claim for a trust interest in funds in the possession of the Receiver, there remains the question of whether the trust claim extends to all, or only part, of the total amounts claimed by Eco. In other words, if it is established that Eco has a valid trust claim for the unpaid principal portion of the Contract, does it follow that Eco is also able to claim a trust in respect of its claims for interest and legal costs, as well? Approximately 70% of Eco's total claim (as of November 21, 2017) is comprised of interest and legal costs³¹.

67. Subsection 7(3) imposes a trust fund on "*an amount that is equal to the unpaid price of the substantially performed portion of the contract*" and Subsection 7(4) prohibits an appropriation or conversion of any part of a fund until the contractor is paid all amounts "*related to the improvement owed to the contractor by the owner*".

³¹ Specifically, the claim is comprised as follows: principal = \$12,560.20, interest = \$11,644.85 and legal Fees = \$16,375.70.

68. The terms “price”, “contract” and “improvement” are defined without reference to interest or legal costs. The Receiver is of the view that a natural reading of the definitions of the terms “price” and “improvement”, in particular, lends itself to the interpretation that these terms relate to costs associated with the improvement itself – i.e. the price for materials and services/labour - supplied to the lands and not to other payment obligations that may arise from contract, such as interest, indemnity claims, liquidated damages, penalties or legal costs.

69. The Receiver has been unable to locate commentary or case law where the court has directly considered and ruled upon this issue in similar circumstances. In a 2016 decision of *Deep Foundations Contractors Inc. v. Gottardo*, Justice Bloom considered the issue of whether interest and costs were claimable pursuant to a trust claim under Section 8 of the CLA, and held that the “law on whether interest and costs are covered by the CLA is unsettled”. However, *Deep Foundations* was a decision made in the context of a Rule 21 motion, and the determination of the court that the issue was not plain and obvious did not require the court’s to definitively rule on the issue.³²

70. *Deep Foundations* cites one authority, *Forest City Fire Protection Ltd. v. 1099516 Ontario Inc. (General Refrigeration Canada)*³³, which appears to award interest and costs, but did not expressly consider the issue. Justice Bloom further noticed that the contract in *Forest City* provided for interest and costs, unlike the contract under consideration in *Deep Foundations*, which provided for interest only.

³² *Deep Foundations Contractors Inc. v. Gottardo*, [2016] O.J. No. 5187 at para. 18.

³³ *Forest City Fire Protection Ltd. v. 1099516 Ontario Inc. (General Refrigeration Canada)*, [2015] O.J. No. 2219.

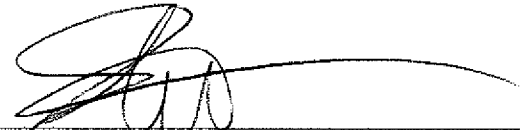
71. In the instant case, the Terms and Conditions associated with the Contract provide for interest at a rate of 24% per annum. Neither the Terms and Conditions nor Contract reference recovery of legal costs.

PART IV – RELIEF REQUESTED

72. The Receiver respectfully requests that this Honourable Court provide advice and directions on the following questions:

- (a) Are proceeds received by the Receiver in respect of the Property impressed with a CLA trust in favour of Eco?
- (b) If the answer to (a) above is yes, what is the quantum of funds held in trust? and
- (c) What is the nature and priority of any part of Eco's claim that is not found to be a valid trust claim?

ALL OF WHICH IS RESPECTFULLY IS RESPECTFULLY SUBMITTED this 28th day of November, 2017.



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Lawyers for Collins barrow Toronto Limited, in its
capacity as Receiver of 2380009 Ontario Limited

SCHEDULE "A"

1. *Sunview Doors Ltd. v. Academy Doors & Windows Ltd.*, 2010 ONCA 198, 2010 CarswellOnt 1450 at para. 23
2. *Stuart Olson Dominion Construction Ltd. v. Structal Heavy Steel*, 2015 SCC 43, paras. 32 and 40
3. *Construction Builders and Mechanics' Liens in Canada* (7th Edition; looseleaf), Bristow, Glaholt, Reynolds & Wise, ("Mechanics' Liens"), at pages 9-2, 9-3 and 9-63
4. *Structural Contracting Ltd. v. Westcola Holdings Inc.*, 2000 CarswellOnt 2018.
5. *Findlay v. Holmes*, [1998] O.J. No. 2796 (C.A.), at para. 28
6. *Cast-Con Group Inc. v. Alterra (Spencer Creek) Ltd.*, [2008] O.J. No. 842 (Ont. Sup. Crt.), at paras. 15 to 17
7. Mechanics' Liens, page 9-64
8. *Aldine Construction Ltd. v. Brucegate Holdings Inc.*, [2010] O.J. No. 2214 (Ont. Master), at para. 18
9. *Campoli Electric Ltd. v. Georgian Clairlea Inc.*, [2017] O.J. No. 2980, at paras. 148 to 159
10. *Carmen Drywall Ltd. v. BCC Interiors Inc.*, 2013 O.J. No. 3245 (Ont. Sup. Crt), at paras 28 to 29
11. *Lacroix (c.o.b. S& L Mechanical Plumbing and Heating) v. Lexus Mechanical Inc.*, [2016] O.J. No. 3165
12. *Employment Professionals Canada Inc. v. Steel Design and Fabricators (SDF) Ltd.* (Ont. Sup. Crt.) [2016] O.J. No. 5164 (Ont. Div. Crt), at paras. 17, 27 to 28
13. Thomas Heintzman and Immanuel Goldsmith, Heintzman and Goldsmith on Canadian Building Contracts, 5th Edition (Ontario, Carswell) (Loose-leaf updated 2017, release 4), vol 1 at page 16-51 and 16-53.
14. William G.J. Swybrous, Q.C., "Is Certification and Publication of Substantial Performance Under the Ontario Construction Lien Act Required on All Contracts Between the Owner and the Contractor?", Construction Law Reports (Articles), 1984, 5 CONSTRLR-ART 173.
15. *In Matter of the Bankruptcy of Temple of the City of Toronto in the Province of Ontario* [Indexed as: Temple (Re)] 109 O.R. (3d) 374.
16. *Royal Bank of Canada v. Penex Metropolis Ltd*, [2010] O.J. No. 362.
17. *Deep Foundations Contractors Inc. v. Gottardo*, [2016] O.J. No. 5187 at para. 18.
18. *Forest City Fire Protection Ltd. v. 1099516 Ontario Inc. (General Refrigeration Canada)*, [2015] O.J. No. 2219.

SCHEDULE "B"

Construction Lien Act, RSO 1990, c C.30

Interpretation

Definitions

1. (1) In this Act,

...

"contract" means the contract between the owner and the contractor, and includes any amendment to that contract;

...

"contractor" means a person contracting with or employed directly by the owner or an agent of the owner to supply services or materials to an improvement;

...

"improvement" means, in respect of any land,

(a) any alteration, addition or repair to the land,

(b) any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, or

...

"land" includes any building, structure or works affixed to the land, or an appurtenance to any of them, but does not include the improvement;

...

"owner" means any person, including the Crown, having an interest in a premises at whose request and,

(a) upon whose credit, or

(b) on whose behalf, or

(c) with whose privity or consent, or

(d) for whose direct benefit,

an improvement is made to the premises but does not include a home buyer;

...

“premises” includes,

(a) the improvement,

(b) all materials supplied to the improvement, and

(c) the land occupied by the improvement, or enjoyed therewith, or the land upon or in respect of which the improvement was done or made;

...

“price” means the contract or subcontract price,

(a) agreed upon between the parties, or

(b) where no specific price has been agreed upon between them, the actual value of the services or materials that have been supplied to the improvement under the contract or subcontract;

...

“services or materials” includes both services and materials;

...

Contracts, substantial performance and completion

When contract substantially performed

2. (1) For the purposes of this Act, a contract is substantially performed,

(a) when the improvement to be made under that contract or a substantial part thereof is ready for use or is being used for the purposes intended; and

(b) when the improvement to be made under that contract is capable of completion or, where there is a known defect, correction, at a cost of not more than,

(i) 3 per cent of the first \$500,000 of the contract price,

(ii) 2 per cent of the next \$500,000 of the contract price, and

(iii) 1 per cent of the balance of the contract price. R.S.O. 1990, c. C.30, s. 2 (1).

Idem

(2) For the purposes of this Act, where the improvement or a substantial part thereof is ready for use or is being used for the purposes intended and the remainder of the improvement cannot be

completed expeditiously for reasons beyond the control of the contractor or, where the owner and the contractor agree not to complete the improvement expeditiously, the price of the services or materials remaining to be supplied and required to complete the improvement shall be deducted from the contract price in determining substantial performance. R.S.O. 1990, c. C.30, s. 2 (2).

When contract deemed completed

(3) For the purposes of this Act, a contract shall be deemed to be completed and services or materials shall be deemed to be last supplied to the improvement when the price of completion, correction of a known defect or last supply is not more than the lesser of,

(a) 1 per cent of the contract price; and

(b) \$1,000. R.S.O. 1990, c. C.30, s. 2 (3).

Owner's trust

Amounts received for financing a trust

7. (1) All amounts received by an owner, other than the Crown or a municipality, that are to be used in the financing of the improvement, including any amount that is to be used in the payment of the purchase price of the land and the payment of prior encumbrances, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund for the benefit of the contractor. R.S.O. 1990, c. C.30, s. 7 (1).

Amounts certified as payable

(2) Where amounts become payable under a contract to a contractor by the owner on a certificate of a payment certifier, an amount that is equal to an amount so certified that is in the owner's hands or received by the owner at any time thereafter constitutes a trust fund for the benefit of the contractor. R.S.O. 1990, c. C.30, s. 7 (2).

Where substantial performance certified

(3) Where the substantial performance of a contract has been certified, or has been declared by the court, an amount that is equal to the unpaid price of the substantially performed portion of the contract that is in the owner's hands or is received by the owner at any time thereafter constitutes a trust fund for the benefit of the contractor. R.S.O. 1990, c. C.30, s. 7 (3).

...

Vendor's trust

Amounts received a trust

9. (1) Where the owner's interest in a premises is sold by the owner, an amount equal to,

(a) the value of the consideration received by the owner as a result of the sale,

less,

(b) the reasonable expenses arising from the sale and the amount, if any, paid by the vendor to discharge any existing mortgage indebtedness on the premises,

constitutes a trust fund for the benefit of the contractor. R.S.O. 1990, c. C.30, s. 9 (1)

Obligations as trustee

(2) The former owner is the trustee of the trust created by subsection (1), and shall not appropriate or convert any part of the trust property to the former owner's own use or to any use inconsistent with the trust until the contractor is paid all amounts owed to the contractor that relate to the improvement. R.S.O. 1990, c. C.30, s. 9 (2).

Payment discharging trust

10. Subject to Part IV (holdbacks), every payment by a trustee to a person the trustee is liable to pay for services or materials supplied to the improvement discharges the trust of the trustee making the payment and the trustee's obligations and liability as trustee to all beneficiaries of the trust to the extent of the payment made by the trustee. R.S.O. 1990, c. C.30, s. 10.

Where trust funds may be reduced

11. (1) Subject to Part IV, a trustee who pays in whole or in part for the supply of services or materials to an improvement out of money that is not subject to a trust under this Part may retain from trust funds an amount equal to that paid by the trustee without being in breach of the trust. R.S.O. 1990, c. C.30, s. 11 (1).

Application of trust funds to discharge loan

(2) Subject to Part IV, where a trustee pays in whole or in part for the supply of services or materials to an improvement out of money that is loaned to the trustee, trust funds may be applied to discharge the loan to the extent that the lender's money was so used by the trustee, and the application of trust money does not constitute a breach of the trust. R.S.O. 1990, c. C.30, s. 11 (2).

Set-off by trustee

12. Subject to Part IV, a trustee may, without being in breach of trust, retain from trust funds an amount that, as between the trustee and the person the trustee is liable to pay under a contract or subcontract related to the improvement, is equal to the balance in the trustee's favour of all outstanding debts, claims or damages, whether or not related to the improvement. R.S.O. 1990, c. C.30, s. 12.

Rules governing certification or declaration of substantial performance

32. (1) The following rules govern the certification and declaration of the substantial performance of a contract:

1. On the application of the contractor, the payment certifier shall determine whether the contract has been substantially performed in accordance with section 2, and, if the payment certifier so determines, shall certify the substantial performance of the contract by signing a certificate in the prescribed form. If there is no payment certifier, the owner and contractor shall make the determination jointly and shall both sign the certificate.
2. The payment certifier or the owner and the contractor jointly, as the case may be, shall set out in the certificate the date on which the contract was substantially performed.
3. The date set out in the certificate as the date on which the contract was substantially performed is deemed for the purpose of this Act to be the date on which that event occurred.
4. Where the payment certifier certifies the substantial performance of a contract the payment certifier shall within seven days of the day the certificate is signed give a copy of the certificate to the owner and to the contractor.
5. The contractor shall publish a copy of the certificate once in a construction trade newspaper.
6. Where the contractor does not publish a copy of the certificate within seven days of receiving a copy of the certificate signed by the payment certifier or, where there is no payment certifier, signed by the owner, any person may publish a copy of the certificate.
7. Where there is a failure or refusal to certify substantial performance of the contract within a reasonable time, any person may apply to the court, and the court, upon being satisfied that the contract is substantially performed, and upon such terms as to costs or otherwise as it considers fit, may declare that the contract has been substantially performed, and the declaration has the same force and effect as a certificate of substantial performance of the contract.
8. Unless the court otherwise orders, the day the declaration is made shall be deemed to be the date the contract was substantially performed.
9. The person who applied to the court shall publish a copy of the declaration of substantial performance once in a construction trade newspaper.
10. For the purposes of this Part, a certificate or declaration of the substantial performance of a contract has no effect until a copy of the certificate or declaration is published. R.S.O. 1990, c. C.30, s. 32 (1).

Contents of certificate

(2) Every certificate or declaration made or given under this section shall include,

- (a) the name and address for service of the owner and of the contractor;
- (b) the name and address of the payment certifier, where there is one;
- (c) a short description of the improvement;
- (d) the date on which the contract was substantially performed;
- (e) where the lien attaches to the premises, a concise description containing a reference to lot and plan or instrument registration number sufficient to identify the premises; and
- (f) the street address, if any, of the premises. R.S.O. 1990, c. C.30, s. 32 (2); 2010, c. 16, Sched. 2, s. 2 (3).

Limitations Act, 2002, SO 2002, c 24, Sch B

Basic limitation period

4 Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. 2002, c. 24, Sched. B, s. 4.

Discovery

5 (1) A claim is discovered on the earlier of,

- (a) the day on which the person with the claim first knew,
 - (i) that the injury, loss or damage had occurred,
 - (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
 - (iii) that the act or omission was that of the person against whom the claim is made, and
 - (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
- (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. 2002, c. 24, Sched. B, s. 5 (2).

SCHEDULE "C"

FORM 6
CERTIFICATE OF SUBSTANTIAL PERFORMANCE OF THE
CONTRACT UNDER SECTION 32 OF THE ACT

Construction Lien Act

(County/District/Regional Municipality/Town/City in which premises are situated)

(street address and city, town, etc., or, if there is no street address, the location of the premises)

This is to certify that the contract for the following improvement:

(short description of the improvement)

to the above premises was substantially performed on _____
(date substantially performed)

Date certificate signed: _____

(payment certifier where there is one)

(owner and contractor, where there is no payment certifier)

Name of owner: _____

Address for service: _____

Name of contractor: _____

Address for service: _____

Name of payment certifier (where applicable): _____

Address: _____

(Use A or B, whichever is appropriate)

A. Identification of premises for preservation of liens:

(where liens attach to premises, reference to lot and plan number or instrument registration number)

B. Office to which claim for lien must be given to preserve lien:

(where liens do not attach to premises)

2292912 ONTARIO INC.
Applicant

-and- 2380009 ONTARIO LIMITED
Respondent

Court File No. CV-16-011354-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

FACTUM

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RCP-E 4C (May 1, 2016)