

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

BETWEEN:

MARSHALLZEHR GROUP INC.

APPLICANT

-and-

FERNWOOD DEVELOPMENTS (ONTARIO) CORPORATION

RESPONDENT

**RESPONDING MOTION RECORD  
OF JEFF MCKEVER PLUMBING AND CONTRACTING  
(Returnable May 10, 2021)**

Date: May 5, 2021

**PAUL J. DAFFERN LAW FIRM**  
Barristers & Solicitors  
48 High Street  
Barrie, Ontario L4N 1W4

**PAUL J. DAFFERN**  
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paul.daffern@daffernlaw.com

Lawyer for Jeff MeKever  
Plumbing and Contracting

TO: ALL PARTIES ON THE ATTACHED SERVICE LIST

## SERVICE LIST

(current as of February 16, 2021)

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<p><b>BAYSHORE PROPERTY MANAGEMENT INC.</b> 11 Ferris Lane Barrie, ON L4M 5N6</p> <p><b>Laura MacPhee</b> Tel: (705) 722-3700 Ext: 235 Fax: (705) 722-6242 Email: lmacphee@bpmgmt.ca</p> <p><b>Property Manager</b></p>	<p><b>HODISLAW</b> 62 Camelot Square Barrie, ON L4M 0C2</p> <p><b>Sonja Hodis</b> Tel: (705) 737-4403 Fax: (705) 300-2599 Email: sonja@hodislaw.com</p> <p><b>Lawyers for Simcoe Standard Condominium Corporation No. 420</b></p>
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<p><b>DEPARTMENT OF JUSTICE CANADA</b> Ontario Regional Office 120 Adelaide Street West, Suite 400 Toronto, ON M5H 1T1</p> <p><b>Diane Winters and Pat Confalone</b> Tel: (416) 973-3172 Fax: (416) 973-0810 Email: Diane.Winters@justice.gc.ca / Pat.Confalone@justice.gc.ca</p> <p><b>Lawyers for Canada Revenue Agency</b></p>	<p><b>HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE</b> Insolvency Unit 33 King Street West Oshawa, ON L1H 8H5</p> <p>Email: insolvency.unit@ontario.ca</p>
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**CITY OF BARRIE**

c/o Mary Lyn Gervais, Billing Analyst  
Email: [Mary-Lyn.Gervais@barrie.ca](mailto:Mary-Lyn.Gervais@barrie.ca)

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B.	Statutory Declaration dated January 9, 2020

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

B E T W E E N:

MARSHALLZEHR GROUP INC.

APPLICANT

-and-

FERNWOOD DEVELOPMENTS (ONTARIO) CORPORATION

RESPONDENT

**AFFIDAVIT OF Jeff McKeever  
SWORN MAY 5th, 2021**

I, Jeff McKeever, of the City of Barrie, in the County of Simcoe, MAKE OATH AND SAY:

1. I am the sole proprietor of a plumbing firm that I operate from Barrie, Ontario.
2. I was formerly represented by a lawyer named Joshua Valler of the law firm of Barriston LLP.
3. I retained Mr. Valler to commence a Construction Lien Action on my behalf after the owner of the land, Fernwood Developments (Ontario) Corporation failed to pay me for my work on its project.
4. The first day I worked on Fernwood's project was on June 23, 2017. However, I am informed by Rob Duncan that his drywall company had started work on this project as early as March 30, 2016.

5. I am informed that Fernwood granted a mortgage to MarshallZehr Group ("MZ") that apparently was not advanced until December 12, 2016. This information is based upon some disclosures my current lawyer, Mr. Paul J. Daffern received from Jeff Larry, the lawyer for the Receiver of Fernwood in an email dated February 4, 2021. A copy of that email is Exhibit "A" to my Affidavit.
6. I have read that one of the attachments to Exhibit "A" was a Statutory Declaration I signed on January 9, 2020. A copy of that Statutory Declaration is Exhibit "B" to my Affidavit.
7. I understand that Mr. Larry has alleged based upon Exhibit "B" that my Construction Lien, that was registered on February 13, 2020, by Mr. Valler was registered out of time. I disagree with Mr. Larry's allegation in this regard.
8. I was lead to believe by Fernwood that it was working on a refinancing of the construction project and that I would be paid once Fernwood received additional monies to pay the monies owed to various contractors.
9. I agreed to sign a Statutory Declaration indicating the amount I was owed as of January 9, 2020, because this refinancing was supposedly about to take place. I had not completed my work on this project when I signed this Declaration.
10. At the time I signed the Statutory Declaration, I was owed \$170,450.03.
11. After I signed this Statutory Declaration, I continued to do more work on the project for Fernwood. I was specifically asked by Jordan Zukowski to do certain work in some of the units.



*AFFIDAVIT OF JEFF MCKEVER*

12. By February 13, 2020, the value of the labour and materials my firm had supplied had increased to \$173,489.63.
13. I therefore claim that my last day of supply of services and materials was on February 13, 2020, and my claim for lien was registered that day.
14. In any event, my lien was preserved on February 13, 2020, 35 days after I signed the Statutory Declaration and my construction lien was preserved within the 45 days I had from January 9, 2020, to preserve my lien.
15. My action to perfect my lien was commenced on May 12, 2020, which was 89 days after my last day of the supply of services and materials.
16. I therefore claim that my construction lien was preserved and perfected within the time required by the *Construction Lien Act*.
17. I therefore believe that my lien is a valid construction lien for \$173,489.03 inclusive of H.S.T.
18. It is my understanding that Justice Hainey made an Order in this action Toronto Court File No. CV-20-635523-00CL on February 12, 2020, for an Order appointing a Receiver. This Order provides that no proceedings against the debtor or the property shall be commenced or continued except with the written consent of the Receiver or with leave of the Court and any and all proceedings currently underway against the debtor and/or the property are stayed.

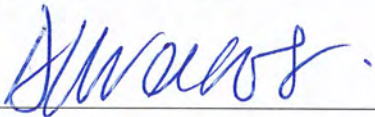
19. I understand that the Receiver, RSM and its counsel, Jeff Larry of Paliare Roland Rosenberg and Rothstein LLP have taken the position that I am not entitled to claim any monies with respect to this project because my former lawyer failed to add the mortgagee, MarshallZehr as a Defendant to my action and because he did not claim priority for my construction lien over the mortgage. I disagree with Mr. Larry's position in this regard.
20. First, if it was necessary for my lawyer to add MZ as a Defendant and claim priority over its mortgage, then I seek leave of this Honourable Court to amend my Statement of Claim.
21. My current lawyer Mr. Paul J. Daffern informs me and I believe he was served by Mr. Larry's firm on Friday, April 30, 2021, at 5:00 p.m. with a Motion Record seeking Court approval of the sale of Fernwood's lands to MZ. This motion was short served by counsel for the Receiver. I therefore request an adjournment of this motion until my lawyer may prepare and serve additional motion materials.
22. I also seek an adjournment so that Mr. Daffern can place Mr. Valler and Barriston on notice of a potential negligence claim and to allow LAWPRO to appoint counsel to represent Mr. Valler and Barriston so that they may bring a motion to amend my Statement of Claim and if necessary, try to make a repair.

23. Further, I take the position that RSM and Mr. Larry have demonstrated a clear bias in favour of MZ and that they have failed to deal with me in an even handed and reasonable manner. I am therefore opposed to any further fees or disbursements being paid out to RSM and its lawyer.
24. I further dispute the accuracy of the opinion letter of Jeff Larry given in this proceeding and set out at Appendix/Tab D, pages 118-125 of RSM's Motion Record returnable on May 10, 2021.
25. It is noteworthy that in Mr. Larry's opinion letter he does not mention what amount was allegedly advanced by MZ to Fernwood in December, 2013. At the time, it is alleged that the original mortgage advance was made. Nor does he provide any indication of what the value of the land was at the time that the mortgage was originally registered.
26. I believe that the value of the land at the time of the registration of the original mortgage is one important factor in determining whether the MZ mortgage has priority over my construction lien. I therefore submit that Mr. Larry's failure to provide information about the amount allegedly advanced in 2013 and the value of the land at the time of registration is a material omission that assists MZ and which fails to assist in determining the priorities between myself as a lien claimant and MZ as a mortgagee.
27. I ask for an Order that the sale of the land to MZ not be approved unless the full amount of my lien claim plus 25% of that amount as security for my costs in my lien action are paid into Court to the credit of my action. This amount is  $(\$173,489.63 \times .25 = \$43,372.41)$   $(\$173,489.63 + \$43,372.41 = \$216,862.04)$ .

28. I further ask for leave of this Honourable Court to lift the stay related to my construction lien action so that I may proceed with my action in Barrie, Ontario.
29. I further ask this Honourable Court for an Order for payment of my costs of participating in this action and for my costs of this motion.
30. I am opposed to RSM holding any monies in trust with respect to my lien claims because I believe that RSM has demonstrated a bias in favour of MZ and has failed to make reasonable enquiries about mortgage advances and other issues related to whether MZ is entitled to priority over my construction lien. I further submit that the payment of monies into Court will result in interest being paid by the Accountant until there is a final disposition of my lien claim.

I have made this Affidavit in response to the motion made by RSM for Court approval of the sale of the premises that are subject to my claim for lien and for no improper purpose.

**SWORN BEFORE ME** at the  
City of Barrie, in the County of Simcoe,  
this 5 day of May, 2021



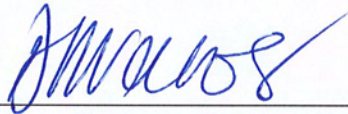
Commissioner for Taking Affidavits  
(or as may be)

Diana Dawn Viveiros, a Commissioner,  
etc., Province of Ontario, for Paul J.  
Daffern Law Firm, Barrister and Solicitor.  
Expires June 3, 2022



Jeff McKeever

This is **Exhibit "A"** referred to in the Affidavit of  
**Jeff McKeever** sworn before me this 5th day of  
May, 2021.



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*A Commissioner for Taking Affidavits, etc.*  
Diana Dawn Viveiros, a Commissioner,  
etc., Province of Ontario, for Paul J.  
Daffern Law Firm, Barrister and Solicitor.  
Expires June 3, 2022

## Jane Barager

---

**From:** Jeff.Larry@paliareroland.com  
**Sent:** Thursday, February 04, 2021 11:45 AM  
**To:** Paul Daffern  
**Cc:** Jane Barager; Dawn Viveiros  
**Subject:** RE: Fernwood Developments (Ontario ) Corporation  
**Attachments:** Jeff McKeever Plumbing.pdf; Doc2.docx; 2016-12-15 Georgian Meadows MZGI 72 Trust Advance Statement.pdf; 2017-05-24 Advance Statement Excel.pdf; 2017-07-11 Final Advance Statement.pdf; 2017-08-10 Final Advance Statement.pdf; 2017-12-20 Final Advance Statement .xls.pdf; 2018-02-16 Final Advance Statement Excel.pdf; 2018-08-31 GMSH Final Advance Statement (signed).pdf

Paul,

Thank you for your email.

My December 15, 2020 was circulated to counsel for the lien claimants including yourself, below. I am not sure why it did not come to your attention.

In any case, and to be clear, the Receiver has not yet determined the validity, quantum or priority of any of the liens claims. Rather, the Receiver has only attempted to determine the maximum amount of each lien claimant's possible priority claim so that the lien claimant will be properly protected for any priority dispute that may result in future. Ultimately, however, if there is a dispute about the priority, that will have to be addressed by the court.

As you know, MarshallZehr Group Inc.'s mortgage was granted in 2013. Attached are trust advance statements for the mortgage, as well as a summary of the advances. You will note that the statements show no advances were made on the mortgage following the registration of either of your client's liens.

Under Section 78 (without acknowledging or determining priorities in this case), a lien can have priority over a mortgage or building mortgage to the extent of any holdbacks required to be retained by the owner under Part IV of the Construction Act. The Owner's holdback obligations under Part IV of the Construction Act are limited to 10% of the price of the services or materials supplied under the applicable contract. A lien can also have priority over advances made under a mortgage following registration of a lien, however, the records provided to the Receiver shows this did not occur.

To the extent your client is suggesting that it is entitled to participate in the holdback on other contracts, we are not aware of such authority. If you have any authority to the contrary or a basis as to why your client's priority claim would exceed the holdback obligations in these circumstances, we would be pleased to consider it.

As requested, the Receiver's calculation of the maximum potential priority amount for each of your clients is as follows:

### Duncan Drywall

We understand from your client's claim for lien and information supplied by your client that:

1. Duncan Drywall entered into a direct contract with the Owner, Fernwood Developments (Ontario) Corporation for the supply of drywall and related work (the "Contract") for the project known as the "School House Barrie"
2. The contract was for a price of \$240,000 plus HST
3. Duncan Drywall's claim for lien is the amount of \$178,195 plus HST (which does not include a claim for demobilization costs) and was registered on March 5, 2020

4. Duncan Drywall asserts that its services under its lien were undertaken between April 17, 2017 and January 30, 2020
5. Paragraph 13 of Duncan Drywall's statement of claim states that "The Plaintiff therefore claims priority pursuant to the Construction Lien Act over MarshallZehr Group Inc.'s mortgage ..."

In this case, given that your client's contract price is \$240,000 plus HST, the Owner's holdback obligations would be no more than \$24,000 plus HST.

Finally, as you also know, before a lien claimant can make a claim for priority, it must first establish the validity of the lien itself. The Receiver's records show that Duncan Drywall's invoices were 90 days outstanding as of October 31, 2019 in the amount of \$178,195 (its lien amount). In other words, it appears from the Receiver's records that Duncan Drywall's services under the lien were supplied prior to October 31, 2019. If that is correct, the lien may not have been registered within the deadlines required under the Construction Act.

Jeff McKeever Plumbing (JMP)

We understand from your client's claim for lien and information supplied by your client that:

1. JMP entered into a direct contract with the Owner, Fernwood Developments (Ontario) Corporation (the "Contract") for the Project
2. The Contract was for a price of \$211,989.63 plus HST. JMP asserts it completed the Contract
3. JMP's claim for lien is the amount of \$173,489.63 plus HST and was registered on Feb 13, 2020
4. JMP asserts that its services under its lien were undertaken between June 23, 2017 and Feb 13, 2020
5. JMP's statement of claim does not include a priority claim over the mortgage

In this case, given that your client's contract price is \$211,989.63 plus HST, the Owner's holdback obligations would be no more than \$21,198.96 plus HST. We note that the letter from JMP's previous counsel dated July 24, 2020 expressly confirmed that JMP's priority claim over the mortgage was in the amount of \$21,198.96.

Finally, we point out that the validity of JMP's lien itself appears to be in question. JMP's original Statutory Declaration (attached) was dated on December 9, 2019 and showed the entire amount of the lien (\$172,450) owing on that date. The date of the Statutory Declaration was then struck out and changed to Jan 9, 2020. The lien was registered Feb 13, 2020. Our information is that, in fact, JMP's work was indeed completed well before December 2019 such that its lien may well be out of time.

**From:** Paul Daffern <paul.daffern@daffernlaw.com>

**Sent:** January 26, 2021 3:25 PM

**To:** Jeff Larry <Jeff.Larry@paliareroland.com>

**Cc:** Jane Barager <jane.barager@daffernlaw.com>; Dawn Viveiros <dawn.viveiros@daffernlaw.com>

**Subject:** RE: Fernwood Developments (Ontario ) Corporation

Jeff

Today is the first time I have seen your email dated December 15, 2020.

It appears that you are suggesting that my client Duncan Drywall is entitled to priority to a maximum of \$24,000.00 but that RSM is not prepared to admit that the priority is that amount yet.

It also appears that you are claiming that Jeff McKeever is entitled to a maximum priority of \$21,198.96 but again RSM is not prepared to admit that this is the amount of priority Mr. McKeever is entitled to.

I disagree with your conclusions and its my opinion that my clients are entitled to priority for the full amounts of their claims for lien including their legal costs.

I am interested in how you calculated the amount of the Priority Claims of my clients.

Please provide a detailed written explanation for your calculations.

Please also explain why the Receiver is not prepared to admit that any amount of my client's claims have priority.

Please also be advised That I concerned about why it has taken the Receiver so long to get to the point where you are suggesting that the lien claimants are entitled to a small percentage of the total amount of their Construction Liens.

Please specifically provide the details of every mortgage advance made by the mortgagee together with back up documentation to prove the dates of the advances.

Please also provide me with the details of the Construction Lien Trust Funds that the Mortgagee maintained out of the mortgage advances.

Time is of the essence to my clients.

Please advise me when I may expect to receive the requested information.

Yours very truly,

*Paul J. Daffern*

Paul J. Daffern Law Firm

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Fax: 705-725-8764

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**From:** [Jeff.Larry@paliareroland.com](mailto:Jeff.Larry@paliareroland.com) <[Jeff.Larry@paliareroland.com](mailto:Jeff.Larry@paliareroland.com)>

**Sent:** January 26, 2021 12:24 PM

**To:** Paul Daffern <[paul.daffern@daffernlaw.com](mailto:paul.daffern@daffernlaw.com)>

**Subject:** FW: Fernwood Developments (Ontario ) Corporation

Paul



May I please hear from you. I have heard from all other counsel and the Receiver intends to go to court shortly and wants confirmation on these numbers

**From:** Jeff Larry

**Sent:** December 15, 2020 9:12 AM

**To:** paul.daffern@daffernlaw.com; mmccluskey@millerthomson.com; 'kdoggett@millerthomson.com' <kdoggett@millerthomson.com>; jsmith@rzcldlaw.com

**Subject:** Fernwood Developments (Ontario ) Corporation

Counsel:

As I believe you know, I am independent counsel to RSM Canada Limited, the receiver of Fernwood Developments (Ontario) Corporation.

We have conducted a review each of the lien claims for purposes of determining the potential priority claim of each of the lien claimants. These potential priority amounts are set out in the chart below. **I ask that you please confirm the amount of the potential priority claim on behalf of your respective client.**

To be clear, the Receiver has not made any final determination about the validity or quantum of the liens, nor any priority amount. Rather, at this stage, the Receiver is only trying to determine the aggregate amount of the potential priority claim so that those can funds can be held in connection with any sale of the property.

I look forward to hearing from you and if you have any questions, do not hesitate to contact me.

	<u>Lien Claimant</u>	<u>Quantum of Lien Claims</u>	<u>Potential Priority Claim (10% of value of services provided for each steam. Amount based on total contract value as stated in liens)</u>	<u>Counsel</u>
1.	Duncan Drywall	\$178,195 plus HST	\$24,000	Paul Daffern
2.	Ground Electrical Services	\$106,939.80	\$10,693.98	Michael McCluskey
3.	Jeff McKever Plumbing	\$211,989.63	\$21,198.96	Paul Daffern
4.	Priority Mechanical Services Ltd.	\$231,154.55	\$107,098.77	Keith Doggett
5.	Nezz Electric	\$122,285.30	\$17,924.74	Michael McCluskey
6.	Mack Construction	\$28,740	\$2,874	James Smith

	<b>Total</b>	<b>\$879,304</b>	<b>\$183,790.45</b>	
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**Jeffrey Larry, LL.B, MBA**

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155 Wellington Street West, 35th Floor

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f: 416.646.4301

c: 416.553.2789

e: [jeff.larry@paliareroland.com](mailto:jeff.larry@paliareroland.com)

This is **Exhibit "B"** referred to in the Affidavit of **Jeff McKeever** sworn before me this 5th day of May, 2021.



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*A Commissioner for Taking Affidavits, etc.*

Diana Dawn Viveiros, a Commissioner,  
etc., Province of Ontario, for Paul J.  
Daffern Law Firm, Barrister and Solicitor.  
Expires June 3, 2022

**STATUTORY DECLARATION**

CANADA

PROVINCE OF ONTARIO

) IN THE MATTER OF  
) a Contract between Fernwood  
) Developments (Ontario) Corporation  
) ("Fernwood) and  
)  
) JEFF M<sup>c</sup>KEVER PLUMBING  
) company name (the "Contractor")

I, Jeff McKeever, of Barrie, in the Province of Ontario  
(name) (city)

**DO SOLEMNLY DELARE THAT:**

- 1. I am the Owner (position - Owner, President, General Manager etc )  
of the Contractor operating as Jeff McKeever Plumbing, a  
contractor to Fernwood on the Georgian Meadows construction project  
located in Barrie, Ontario (the "Project").
- 2. As of this date, the amount of \$ 172 450.<sup>03</sup> (outstanding amount)  
is due and owing from Fernwood to the Contractor in respect of the Project.
- 3. I herby certify that all previous amounts invoiced have been paid and that  
there are no monies outstanding.

AND I make this solemn declaration conscientiously believing it to be true, and knowing  
that is of the same force and effect as if made under oath.

DECLARED BEFORE ME  
at the City of Barrie  
in the Regional Municipality  
of Simcoe  
this 9 day of December, 2019  
January, 2020

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Bryony Buchanan  
A Commissioner, etc.

Bryony Buchanan, a Commissioner, etc.,  
Province of Ontario,  
Public Construction Association

MARSHALLZEHR GROUP INC.

-and-

FERNWOOD DEVELOPMENTS (ONTARIO) CORPORATION

APPLICANT

RESPONDENT

Court File No. CV-20-00635523-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT

TORONTO

**AFFIDVIT OF JEFF MCKEVER  
SWORN MAY 5th, 2021**

**PAUL J. DAFFERN LAW FIRM**

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Lawyer for Jeff McKeever Plumbing and Contracting

MARSHALLZEHR GROUP INC.

-and-

FERNWOOD DEVELOPMENTS (ONTARIO) CORPORATION

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**RESPONDING MOTION RECORD**

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