

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

IN THE MATTER OF THE *COMPANIES' CREDITORS  
ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR  
ARRANGEMENT OF THE HARD-ROCK PAVING COMPANY LIMITED  
AND THE COMPANIES LISTED ON SCHEDULE "A"  
(collectively the "Applicants")

**RESPONDING MOTION RECORD OF  
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 AND  
LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 837  
(Motion Returnable July 21, 2008)**

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**Solicitors for The Miller Group**

**SCHEDULE 'A'**

DIAMOND STONEBRIDGE CONTRACTING INC.

HARD-ROCK HIGHWAY MAINTENANCE INC.

HARD-ROCK CONSTRUCTION INC.

942355 ONTARIO LIMITED

942356 ONTARIO LIMITED

**I N D E X**

<b>TAB</b>		<b>PAGE NOS.</b>
1	Affidavit of Demetrios Yiokaris sworn July 18, 2008	1 – 5
A.	Exhibit A – Notice of Motion, returnable July 9, 2008	6-10
B.	Exhibit B – Affidavit of David Semley sworn July 8, 2008	11 – 33
C.	Exhibit C – Order of Justice Wilton-Siegel, dated July 9, 2008	34 – 41
D.	Exhibit D – Letter from Stephen Wahl, dated July 18, 2008	43 – 44
E.	Exhibit E – Email from Martin Rabinovitch, dated July 18, 2008 at 11:28 a.m.	45 – 46
F.	Exhibit F – Independent Hand Agreement.	47 – 78
G.	Exhibit G – Email from Martin Rabinovitch, dated July 18, 2008 at 3:46 p.m.	79 – 80
H.	Exhibit H – Email from Andrew Hatnay, dated July 18, 2008	82 – 83

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(collectively the "Applicants")

**AFFIDAVIT OF DEMETRIOS YIOKARIS  
(sworn July 18, 2008)**

**I, DEMETRIOS YIOKARIS**, of the City of Toronto, in the Province of Ontario MAKE  
OATH AND SAY:

1. I am an associate with Koskie Minsky LLP, counsel for Labourers International Union of North America, Local 837 and the International Union of Operating Engineers, Local 793 (the "Unions"). Unless stated otherwise, I have personal knowledge of the facts herein deposed and which I believe are true.
2. On or about July 8, 2008, the Applicants brought a motion returnable the next day on July 9, 2008, seeking the court's approval of a proposed transaction for the sale of "the property, assets and undertaking of the Applicants and the issuance of a vesting order connected with same;" (the "Agreement of Purchase and Sale" and the "Vesting Order") amongst other relief including an extension of the court's *Companies' Creditors Arrangement Act* stay (the "Stay"). Attached hereto as **Exhibit "A"** is a true copy of the Applicant's Notice of Motion.
3. In support of the Motion, the Applicants relied upon the sworn affidavit of David Semley, dated July 8, 2008 (the "Semley Affidavit"). At paragraph 2 ii) of the Semley Affidavit, Mr. Semley swore that the Agreement of Purchase of Sale was with Miller Paving Limited and

Waterford Sand and Gravel Limited. Attached hereto as **Exhibit B** is a true copy of the Semley Affidavit without exhibits.

4. Further along in the Semley Affidavit, Mr. Semley describes the sale process at some length. Under the subheading "Sale Process", Mr. Semley swears that the Agreement of Purchase and Sale will likely result in sustained employment of a majority of the employments and that Miller and Waterford respectively will be in the position of successor employer, which will result in each being bound by current collective agreements.

69. In addition, the Miller/Waterford Offer is a going concern offer which carries with it benefits beyond the immediate financial benefits to the secured creditors, In particular, the Miller, Waterford Offer will likely result in sustained employment of a majority of the employees.

70. I believe that the Miller/Waterford Offer will place each of Miller and Waterford respectively in the position of successor employer, which I understand will therefore result in each being bound by the current collective agreements with the Unions, which is likely in the best interest of the employee stakeholders.

71. It is also more likely that there will be less interruption to local suppliers and other entities who do ongoing business with the Applicants if a going-concern offer is accepted.

72. I also believe that the Miller/Waterford Offer, which is a going concern offer, presents the best opportunity with respect to the ongoing collection of receivables.

5. At all material times, and for almost three months, the Unions have been supportive of the Stay and generally of the position of the Applicants. At all material times, the Unions were led to believe that the Applicants and/or the successors who purchased their assets who continue the business as an ongoing concern and be bound by the collective agreements as sworn to by Mr. Semley in his July 8, 2008 affidavit.

6. On July 9, 2008, the court approved the sale. Attached hereto as **Exhibit C** is a true copy of the July 9, 2008 order.

7. On or about July 16, 2008, the Applicants served their motion material, returnable July 21, 2008, for various relief including the issuance of two Vesting Orders and an extension of the stay. Specifically, the motion seeks a Vesting order in “favour of each of Waterford Sand & Gravel Limited and Miller Paving Limited or its Assignee respectively.”

8. The attached Vesting Orders are in favour of Waterford Sand and Gravel Limited and “2178550 Ontario Ltd. which name was changed to Brennan Paving Limited by Articles of Amendment filed on July 14, 2008.” (see pages 5 and 52 of the Applicant’s July 16, 2008 Motion Record).

9. On July 18, 2008, Stephen Wahl of Koskie Minsky LLP, counsel for the Unions wrote to counsel for Miller Paving Limited and Waterford confirming that “our Union clients assert that Miller and/or Waterford are successor employers pursuant to section 69 and/or a single employer for the purposes of labour relations with Hard-Rock pursuant to 1(4) of the *Labour Relations Act, 1995* as amended and bound under the operative Collective Agreements”. Mr. Wahl further specifically referred to the Semley Affidavit and requested the information relating to the identity of the members of the Unions who are to be continuously employed at each location. Attached hereto as **Exhibit D** is a true copy of Mr. Wahl’s July 18, 2008 facsimile.

10. In reply, counsel for Brennan, Mr. Martin Rabinovitch wrote advising that it is unlikely that they will be able to answer Mr. Wahl’s letter today. However, he confirmed that it is “Brennan Paving Limited” that is buying the assets, not “Miller Paving Limited” and that “*Brennan is buying some of the assets of Hard Rock, but not on a going concern basis.*” [emphasis added] Attached hereto as **Exhibit E** is a true copy of Mr. Rabinovitch’s email dated July 18, 2008.

11. The Unions have Collective Agreements with another Miller entity, Brennan Paving & Construction Ltd. which is distinct from Brennan Paving Limited. Attached hereto as **Exhibit F** a copy of the Collective Agreement between the International Union of Operating Engineers, Local 793 and Brennan Paving & Construction Ltd. I am advised by Andrew Hatnay and do so verily believe that a similar agreement is in place between the Labourers International Union of North America, Local 837 and Brennan Paving & Construction Ltd.

12. It appears to the Unions that Miller is assigning the assets to an entity that does not have a Collective Agreement with the Unions.

13. A few hours later, Mr. Rabinovitch sent another email, attached hereto as **Exhibit G** advising that the “purchase agreement between Hard Rock and Brennan specifically excludes ongoing projects.”

14. In reply, Mr. Andrew Hatnay of Koskie Minsky LLP, asked for an assurance that any assets or construction projects of Hard obtained will vest in a company bound by a collective agreement with the Unions. He confirmed that at no time were the Unions told anything other than that the sale of the Applicants’ assets would be on a going concern and would continue the employment of the Union members. A true copy of this email is attached hereto as **Exhibit H**. Specifically, Mr. Hatnay wrote:

We understand that it is "Brennan Paving Limited" that is buying the assets of Hard Rock. That appears to us to be a distinct entity from "Brennan Paving & Construction Ltd.", the company with which our clients have collective agreements.

We have supported the CCAA application of Hard Rock, including its sale of assets, on the basis that the company would either re-structure or be sold as a going concern and continue the employment of the Union members. At no time have we heard otherwise.

We need an assurance as soon as possible that any assets or construction projects of Hard Rock obtained by the Miller group will vest in a Miller company bound by a collective agreement with our clients.

We look forward to hearing from you.

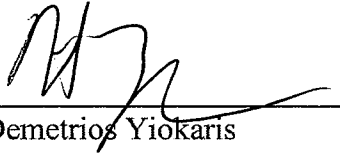
15. The Unions have serious concerns as it believes the Brennan entity acquiring the assets is not bound by collective agreement and the purchasers have not provided any confirmation that the Union employees will continue to be employed.

16. I swear this affidavit for no improper purpose.

SWORN BEFORE ME at the City of  
Toronto, on July 18, 2008.

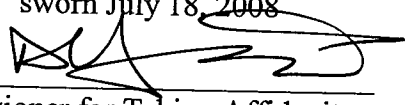


\_\_\_\_\_  
ANDREW HATOUALI,  
Commissioner for Taking Affidavits, etc.



\_\_\_\_\_  
Demetrios Yiokaris

This is Exhibit A  
to the Affidavit of Demetrios Yiokaris,  
sworn July 18, 2008

A handwritten signature in black ink, appearing to be 'D. Yiokaris', written over a horizontal line.

Commissioner for Taking Affidavits, etc.

6

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(collectively, the "Applicants")

**NOTICE OF MOTION  
(returnable July 9, 2008)**

**THE APPLICANTS** (collectively, "The Hard-Rock Group" or the "Applicants") will make a motion to a Judge of the Commercial List on Wednesday, July 9, 2008, at 10:00 a.m. or as soon after that time as the motion can be heard at 330 University Avenue, 8<sup>th</sup> Floor, Toronto, Ontario.

**THE MOTION IS FOR AN ORDER:**

- (a) abridging the time for service of this Notice of Motion and Motion Record, if necessary, and declaring that the motion is properly returnable on July 9, 2008;

- (b) extending the stay of proceedings originally granted by the Order of Justice Spence dated May 12, 2008, and subsequently extended through to and including October 10, 2008;
- (c) approving a proposed transaction for the sale of the property, assets and undertaking of the Applicants and the issuance of a vesting order connected with same;
- (d) authorizing the Applicants to enter into an interim management agreement with the purchasers of the business pending closing of the proposed transaction;
- (e) approving the conduct of the BDO Dunwoody Limited in its capacity as monitor of the Applicants (the "Monitor") as described in the Monitor's Third Report dated July 7, 2008;
- (f) such further and other relief as the nature of this motion may require and this Honourable Court permit.

**THE GROUNDS FOR THE MOTION ARE:**

- (g) the Applicants and the Monitor have completed a process for the sale and marketing of the Assets.

- (h) the Offer recommended by the Monitor and accepted by the Applicants is the best offer received in that sale process
- (i) it is urgent that the Applicants complete a sale of the assets so that the assets may be sold on a going concern basis, which results in a higher recovery to the benefit of the stakeholders.
- (j) the offer has the support of Caterpillar Financial Services Limited, the largest secured creditor of the Applicants, notwithstanding CAT stands to suffer a significant shortfall as a result of the completion of the proposed transaction.
- (k) the Applicants require a stay extension in order to complete the proposed transaction and to be able to collect and distribute those remaining assets, being principally receivables, which will remain assets of the Applicants following the completion of the transaction contemplated herein.
- (l) those other grounds set out in the Affidavit of David Semley sworn July 7, 2008.
- (m) Such further and other grounds as counsel may advise and this Honourable Court permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

	<b>DATE</b>	<b>DESCRIPTION</b>
1.	July 8, 2008	Affidavit of David Semley together with exhibits attached thereto.
2.	May 12, 2008	Amended and Restated Initial Order of Justice Spence.
3.	June 12, 2008	Order of Justice Wilton-Siegel.
4.		Such other material as counsel may advise and this Honourable Court may permit.

Date: July 8, 2008

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Solicitors for the applicants

**SCHEDULE "A"**

DIAMOND STONEBRIDGE CONTRACTING INC.

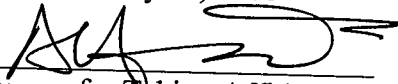
HARD-ROCK HIGHWAY MAINTENANCE INC.

HARD-ROCK CONSTRUCTION INC.

942355 ONTARIO LIMITED

942356 ONTARIO LIMITED

This is Exhibit B  
to the Affidavit of Demetrios Yiokaris,  
sworn July 18, 2008

A handwritten signature in black ink, appearing to be 'A. Yiokaris', written over a horizontal line.

Commissioner for Taking Affidavits, etc.

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AND THE COMPANIES LISTED ON SCHEDULE "A"  
(collectively, the "Applicants")

**AFFIDAVIT OF DAVID R. SEMLEY  
(sworn July 8, 2008)**

**I, DAVID R. SEMLEY**, of the City of Port Colborne, in the Province of Ontario, **MAKE OATH AND SAY AS FOLLOWS:**

1. I am the Chairman, director and principal shareholder of Hard-Rock Paving Company Limited and as such have knowledge hereinafter deposed to. Where I do not have personal knowledge of the background matters discussed in this Affidavit, I have informed myself by review of the relevant background documents, and the source of my knowledge is set out herein.
2. This Affidavit is submitted in support of an application by Hard-Rock Paving Company Limited ("**Hard-Rock**") and the affiliated

12  
7.

companies listed on Schedule "A" to the Initial Order (collectively, the "Applicants") for:

- (i) an Order extending the stay of proceedings (the "Stay") granted under the *Companies Creditors' Arrangement Act* (the "CCAA") pursuant to the Initial Order of Justice Spence dated May 2<sup>nd</sup>, 2008 as amended and restated on May 12<sup>th</sup>, 2008 (collectively, the "Initial Order") to October 10<sup>th</sup>, 2008,
- (ii) an Order authorizing the Applicants to enter into separate Agreements of Purchase and Sale with Miller Paving Limited ("Miller") and Waterford Sand and Gravel Limited ("Waterford") (collectively, the "Miller/Waterford Offer") and, if necessary, authorizing the Applicants to enter into an interim management agreement with Miller, and
- (iii) for certain other ancillary relief further described herein.

3. As further described below, following the granting of the Initial Order, the Applicants have, under the review of BDO Dunwoody Limited in its capacity as Monitor, (the "Monitor"), and in consultation with KPMG Inc. ("KPMG"), various GE finance entities (collectively, "GE") and Caterpillar Financial Services Limited ("CAT"), operated during this first two (2) months of their CCAA proceeding within the anticipated cash flow projections.

4. The Applicants remain one of the larger private sector employers in the City of Port Colborne.
5. The Applicants, in concert with the Monitor, have now completed a formal sale process, in respect of which the deadline for submitting offers was June 27<sup>th</sup>, 2008.
6. The sale process has generated several offers, one of which is, in the view of the Applicants and the Monitor, clearly superior to the other offers received as further described herein. I also believe that the sale process has clearly demonstrated the value of the assets of the Applicants.
7. I have reviewed the Third Report of the Monitor dated July 7<sup>th</sup>, 2008 (the "**Monitor's Report**") and note that the Monitor also recommends the granting of a Stay extension and also recommends the approval of the Miller/Waterford Offer.
8. The Applicants have entered into a protocol with its bonding company to facilitate dealing with the collection and distribution of funds in respect of bonded projects. As a result of this and other measures, the Applicants have been able to continue to offer employments to a significant portion of its workforce.
9. The Applicants are acting in good faith and with due diligence in this process.

- 10. The granting the requested Stay extension is necessary in order to allow the Applicants the opportunity to complete the transaction contemplated by the Miller/Waterford Offer, and to ensure a smooth transition of the business to them. I am not aware of any party who would be prejudiced by the granting of the extension of the Stay sought herein, provided that the completion of the transaction selected by the sale process is also approved by this Court.
- 11. If the Miller/Waterford Offer is not approved by the Court immediately, the Applicants will likely have to cease operating, as there are insufficient funds to finance the obligations of the Applicants on a go forward basis for much time beyond July 10, 2008.

*Background*

- 12. Hard Rock began operations in 1956. The Applicants now collectively compose one of the largest road building, heavy construction and construction material companies operating in the Niagara Peninsula. The Applicants' head offices are located in Port Colborne, Ontario. Each of the Applicants are Ontario companies.
- 13. In addition to typical construction projects, the Applicants are also engaged in recycling operations and winter maintenance projects. The Applicants routinely bid on and receive contracts for large

government tendered construction and paving contracts for streets, roads and bridges throughout southern Ontario.

14. The development of infrastructure construction projects in Ontario is a growth industry and the Applicants, with their government contacts and history of doing government projects, are well situated, but for their immediate crisis, to participate in this growth industry. The Applicants government contacts have indicated that there will be significant work available in the future. In general, it is my understanding that our competitors are extremely busy because of the high amount of work available.
15. The Applicants are principally a family owned and operated business. The Applicants collectively employ as many as 300 unionized employees over the course of the calendar year. In addition, at any given time the projects being performed by the Applicants result in the engagement or employment of a further 100 people throughout southern Ontario by other construction sub-contractors.
16. All operating personnel of the Applicants are unionized and are represented by the Labourers International Union and The International Union of Operating Engineers (collectively, the "Unions").
17. The Applicants business also involves the mining, refining and sale of construction aggregate used in road construction. To this end the

Applicants own a quarry in Wainfleet, Ontario composed of 258 acres of quarry lands. The Applicants also maintain an operations office and an asphalt processing plant at the quarry location.

18. The quarry operates under a Ministry of Natural Resources quarry license granted to the Applicants.
19. The assets of the Applicants are principally the following:
  - (i) Its good name in the context of bidding for highly sought after government contracts and other construction work,
  - (ii) its skilled and experienced work force,
  - (iii) extensive owned machinery,
  - (iv) multiple additional significant pieces of equipment under lease in respect of which there is equity,
  - (v) accounts receivable,
  - (vi) the MTO claims receivables,
  - (vii) the quarry lands and business,
  - (viii) other real estate, such as the head office location, also owned by the Applicants, and
  - (ix) committed contracts extending to fiscal 2011.

*Activities Since June 9<sup>th</sup>, 2008*

- 20. Attached hereto as **Exhibit "A"** to this my Affidavit is a list of jobs and contracts currently in progress. This Exhibit will only be provided to the Court and the Applicants will seek to have it otherwise sealed because of its confidential nature. The listing reports the job/contract, the job/contract value, the billings against the job/contract as of June 28<sup>th</sup>, 2008, the billings to occur during the balance of the fiscal year, and the Applicants' comments on the status of the job/contract.
- 21. As set out therein, the Applicants are engaged in substantial work, including both old work and new work.
- 22. The Applicants have bid for and been awarded certain new jobs in the past month. I believe that, despite our strong reputation for doing good work, the uncertainty about the Applicants' immediate future is impacting on our ability to secure these bids
- 23. The receivables which have been generated during this process or which arose prior to the process commencing but have not yet been collected, represent a substantial asset of the Applicants. As at the end of June, the total amount of receivables billed and to be collected is in the amount of approximately \$7,400,000.00, excluding those claims owed to the Applicants by the Ministry of Transportation of Ontario (the "MTO").

*CAT Equipment*

24. As required by the Initial Order, the Applicants have met their weekly obligation to advise CAT of the existence and location of the equipment owned by the Applicants, which is subject to the security of CAT. It is my understanding that CAT has been satisfied with this information from the Applicants.

*Cash Flow and DIP Status*

25. The Applicants received further DIP funding in the amount of \$1,000,000.00 from Caterpillar in accordance with the Order of Justice Wilton-Siegel dated June 12<sup>th</sup>, 2008. Various DIP proceeds have been applied in accordance with the cash flow and other terms and arrangements as set out in the DIP term sheet. The available DIP funds have all been drawn.
26. Pursuant to the Initial Order, the Applicants have arranged with the Monitor a process to allow for the daily monitoring of cash receipts and disbursements.
27. A comparison of the Applicants' actual cash flow for the period ending June 28, 2008, as compared to the amount budgeted on the initial cash flow for the same period, is attached as **Exhibit "B"**.
28. The actual vs. projected analysis illustrates that the Applicants were in a positive cash position as of June 28<sup>th</sup>, 2008 in the amount of the

Applicants are reporting a positive cash position as of June 28, 2008 in the amount of \$ 5,463.

29. With respect to cash receipts for the week ended June 28th, non trust impressed cash receipts were \$ 12,874 less than projected. However there was approximately \$ 163,000 that the Applicants were entitled to reimburse itself from trust funds collected to make payments in respect of labour and materials previously financed by the Applicants, which funds resolved the potential shortfall which would otherwise have been suffered by the Applicants.
30. Professional fees have proven throughout this process to be much higher than expected. The Applicants have not been able to make payments to cover professional fees accrued over the month of June. An increase in the Administrative Charge under the Order would be appropriate to ensure the professionals are paid for the work which has been done to date, which work has clearly benefited all the stakeholders. Had the professionals been paid on a weekly basis the full amount of their fees out of cash flow, as was contemplated by the Initial Order, the Applicants would not have been able to make payroll or their other obligations.
31. I point out that the sale process, as discussed below, completed under the supervision of these professionals since the beginning of June has resulted in the submission of a going concern offer which is 25%

26

higher than the offer originally submitted by the recommended party on June 4<sup>th</sup>.

32. In addition, the daily assistance of the Monitor has been important in allowing the Applicants to meet their reporting requirements to Cat, to operate within the bonding protocol, and to maintain their business as a going concern. All of this has, in my view, greatly enhanced the recovery possibilities for the stakeholders in this process.
33. Based on outstanding accounts to date, I recommend that the Administrative Charge be increased from \$125,000 to \$500,000 in order to cover outstanding accounts of the Monitor, KPMG, the Monitor's counsel and counsel to the Company. I have been provided with this sum by the Monitor, who has also recommended this in its report.

*MTO Claims*

34. As described in my earlier Affidavits filed in this process, in the years prior to the CCAA filing, the Applicants bid for and were awarded certain projects with the MTO in which the ultimate cost of the performance of the projects was in excess of the amount bid due to changes in the work and improper direction from the MTO.
35. As previously described, the most significant among these projects was a project for the construction of the Henley bridge. Ultimately,

the Henley bridge project had a cost that was approximately \$7,000,000.00 or 30% higher than the anticipated bid cost.

36. The Applicants filed a claim with MTO for payment of the Henley bridge claim in the amount of \$7,253,167.00 in April 2008.
37. The usual time frame for having a claim of this nature resolved by the MTO is one to three years. However, as described in the Initial Affidavit, MTO has been accelerating this process as a result of the dire straits in which the Applicants find themselves.
38. On the week of June 15<sup>th</sup>, 2008 we were advised that the Henley Bridge claim had been rejected by the lower level review board. This rejection was anticipated as the Applicants felt it was unlikely that the lower level would make a decision of this size.
39. At this time, we are advised that the materials are being reviewed at the Assistant Deputy Minister (“ADM”) level which is the level at which a decision will finally be made.
40. I remain in communication directly with the MTO to impress on the seriousness of this issue.
41. In addition to the Henley claim, the Applicants have several other claims pending at the MTO, and one other owner, which in the aggregate amount to a further \$2,000,000.

22

42. The Applicants believe that as much as 85% of the amount claimed by the Applicants in respect of these MTO claims will not be encumbered by construction trust claims, as these projects were completed with borrowed funds which were used to pay the trades despite the fact that payment to the Applicants was deferred to the claims process.
43. We have spoken to the ADM who has indicated his understanding of the gravity of the issues. An update is expected this coming week. The ADM also confirmed that a recommendation for settlement had been made on Napanee but he would not commit to the amount.

*Staffing*

44. As of June 28th, 2008 the Applicants had 29 salaried staff employed of which 11 filled administration roles and operational duties. Hourly staff as of June 28th, 2008 amounted to 100 people. Staff is being assigned on an as needed basis. Currently there is no shortage of staff to execute expected work volumes.

*Sale Process*

45. In accordance with the Initial Order, the Applicants have been working with the Monitor to secure offers to purchase the Applicant's property, assets and undertaking.

23

- 46. Pursuant to the Initial Order, the sale process was conducted by the Applicants and the Monitor, in consultation with and as approved by CAT and GE.
- 47. The initial sale process discussed in my earlier affidavits required offers to be submitted by June 4, 2008. Those offers were discussed in the materials previously filed with this Court, some of which materials were sealed.
- 48. Following the granting of the Order of June 12, 2008, I contacted certain of those parties who had submitted offers by the original June 4<sup>th</sup>, 2008 deadline to seek the improvement of their offers.
- 49. The list of parties that I contacted was determined, in consultation with the Monitor, GE and CAT, to be the most promising parties who had expressed an interest by June 4<sup>th</sup>, 2008.
- 50. The Applicants and the Monitor met with and negotiated with these parties on several occasions.
- 51. These parties were advised that the sale process was to be revised so that offers were required to be submitted by June 27<sup>th</sup>, 2008. It was expected that this additional time period would provide the opportunity for parties to conduct further due diligence and to be able to submit offers with few or no conditions.

29

52. We also prepared a form of Agreement of Purchase and Sale and a form of Receivables Collection Agreement, which was provided to the parties the week of June 23<sup>rd</sup>, 2008 to further advise them of the terms and conditions that the Applicant and the Monitor would be expecting in any transaction.
53. The results of the sale process and further analysis thereof is contained in a confidential supplemental section of my Affidavit, which section is to be sealed and will be provided only to the Court, the Monitor, GE and CAT at this time. I understand the Monitor has also prepared confidential summary to be appended to its report.
54. As set out in the analysis contained therein, it is clear to the Applicants that the best available offer is Miller/Waterford Offer.
55. The only material condition in the Miller/Waterford Offer is a financing condition with respect to the Waterford component of the offer. I am advised that this condition will have been waived or satisfied as early as today, and in any event by July 9, 2008.
56. There are also certain further conditions with respect to agreements to be reached among Miller and Waterford. I am advised that these conditions will have been waived or satisfied as early as today, and in any event by July 9, 2008.

- 57. The Miller/Waterford Offer represents the highest and best available offer for the assets. The Applicants recommend that the Miller/Waterford Offer be the offer approved by the Court, and that the Applicants be authorized to proceed with that transaction.
- 58. The Applicants have been advised that CAT supports the acceptance of the Miller/Waterford Offer, provided there is an immediate closing and no further DIP is required.
- 59. I am advised by my counsel, that they are advised by GE's counsel that GE does not accept the Miller/Waterford Offer.
- 60. GE has been advised of all of the offers received in the sale process. To my knowledge, GE is not proposing that any of the other offers received in the sale process are superior to the Miller/Waterford Offer.
- 61. GE's counsel has indicated to my counsel that GE may yet make an offer to acquire the assets of the Applicants or to make some other form of proposal concerning the sale process.
- 62. I remain committed to seeing the best possible recovery for the largest group of stakeholders in this process and therefore do not want to foreclose the possibility of GE providing a better offer. However, given that the Miller/Waterford offer is clearly the best offer received, and given that the Miller/Waterford offer would otherwise have

expired on July 7, 2008, and given the fact that it is necessary that there be some finality in this process, I felt the Applicants were compelled to accept the Miller/Waterford offer and to see the approval of same from the Court. I am also not certain that GE would be allowed by the Courts to make an offer at this time.

- 63. Accordingly, I executed the Miller/Waterford offer on behalf of the Applicants on July 7, 2008. The Applicants' obligation to complete the transaction contemplated therein is subject to Court approval and requires that a vesting order be issued in favour of Miller and Waterford in respect of the assets subject to their respective offers.
- 64. I note that the assets of the Applicants have now been marketed in this CCAA on two occasions to a wide group of parties.
- 65. I also note that, as previously reported in other affidavits filed in this process, the Applicants had been, commencing in the Fall of 2007, engaged in negotiations in an attempt to sell its assets and property, in order to stave off the necessity of an insolvency filing.
- 66. Therefore these assets have been subject to some scrutiny for almost a year. I think it is clear, therefore, that there has been sufficient time for the market to determine the value of the assets.
- 67. I see no benefit in continuing the sale process or seeking further additional offers.

- 68. I see no reason to expect that a receivership or bankruptcy would result in a better recovery being derived from these assets.
- 69. In addition, the Miller/Waterford Offer is a going concern offer which carries with it benefits beyond the immediate financial benefits to the secured creditors. In particular, the Miller/Waterford Offer will likely result in sustained employment of a majority of the employees.
- 70. I believe that the Miller/Waterford Offer will place each of Miller and Waterford respectively in the position of successor employer, which I understand will therefore result in each being bound by the current collective agreements with the Unions, which is likely in the best interest of the employee stakeholders
- 71. It is also more likely that there will be less interruption to local suppliers and other entities who do ongoing business with the Applicants if a going-concern offer is accepted.
- 72. I also believe that the Miller/Waterford Offer, which is a going concern offer, presents the best opportunity with respect to the ongoing collection of receivables.
- 73. A large portion of the Applicants' receivables relate to ongoing work which has been commenced within the last six (6) to ten (10) weeks. I am strongly of the view that if the contracts to which these

receivables relate are not completed, that the collection of these receivables will be difficult.

74. Given my understanding that Miller intends to assume essentially all of the ongoing contracts and continue this work, and given that I understand that much of the management and employment team and business enterprise of the Applicants will likely be preserved by the Miller acquisition, I feel it is very likely that the acceptance of the Miller/Waterford Offer will result in a high percentage of these receivables will be collected, to the benefit of the stakeholders.
75. Under the Miller/Waterford Offer, the accounts receivables, including the MTO claims, are included in the definition of excluded assets, so that they therefore remain assets of the Applicants.
76. As a component of the Miller/Waterford Offer, Miller has agreed to collect these receivables, other than the MTO claims, for a fee of 15%. Therefore, under the Miller/Waterford Offer, Miller has a financial interest in seeing these receivables be collected.
77. We estimate that this will result in at least a further \$2,300,000.00, net of trust claims, being available to the secured creditors, which might otherwise not be available in the liquidation or break up style offer. GE, who holds a first position on the receivables of the Applicants, would benefit the most from this.

- 78. It is available to the Applicants and the Monitor to collect the MTO claims themselves once the transaction is complete.
- 79. At this time it is anticipated that, if the Miller/Waterford Offer is approved by this Court on July 9, 2008, that the transaction will be closed quickly.
- 80. However, in the event the closing needs to be extended, the Applicants shall seek to enter into an Interim Management Agreement on terms satisfactory to Miller, Waterford CAT, GE and the Monitor, under which Miller shall agree that, pending closing, Miller and Waterford shall pay the operating costs of the Applicants, including payroll, in exchange for having sole right to the receivables generated during that period, to ensure the businesses going concern value is preserved during the period from approval to closing.
- 81. I understand that Miller's counsel has advised my counsel, that Miller is likely willing to enter into such an agreement, on reasonable terms to be discussed. Waterford has similarly advised me directly.

*Unions*

- 82. The Applicants have been in regular communication with the Unions. I believe the Unions will be supportive of the Miller/Waterford offer.

28.

83. The Union members continue to act in good faith and to act diligently in connection with the Applicants, which is appreciated by the Applicants.

*Urgency*

84. The Applicants will likely be unable to meet their obligations as they fall due after Friday July 11, 2008 in the absence of further DIP funding or the completion of the proposed transaction. As noted above, the Applicants cash flow is so tight that have already effectively ceased paying their professionals. The management of the Applicants are considering whether or not they can, in good faith, continue the employment of its work force beyond the end of this week without greater certainty of how they will be paid going forward.

85. If work were to cease at this point, it would have dire consequences to the Applicants ability to continue to be a going concern.

86. In addition, the Applicants' current work load is such that they need to operate continuously from this point forward in order to ensure that the current jobs are completed on time and on budget.

87. The uncertainty surrounding the fate of the Applicants makes it extremely difficult for new work to be secured, or for management to

20

be able to focus on anything other than daily survival and reporting issues.

88. The Applicants have not pursued further DIP financing at this time. Cat has indicated they will not be willing to provide further DIP at this time. GE has indicated that they might be willing to provide certain financing, but the details and amounts have not been made clear.
89. Therefore, I am of the view that it is extremely urgent that the relief being sought by the Applicants be granted immediately.

*Conclusion*

90. It is my view that the Applicants require an extension of the Stay in order to complete the transaction contemplated by the Miller/Waterford Offer and in order for the Applicants to have continued protection from its creditors while the MTO claims and receivables are collected and distributed.
91. I believe that the sale process has produced the best available offer and that the Court should immediately approve the Miller/Waterford Offer so as to ensure continuity of employment and benefit to the maximum number of stakeholders in this process.

92. I make this affidavit in support of the relief described herein and for no other or improper purpose.

SWORN before me at Port Colborne, in )  
the Province of Ontario, this 8<sup>th</sup> day of )  
July, 2008. )  
)  
)  
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)  
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)

A Commissioner, etc.

*Sherrle June Fulbrook*

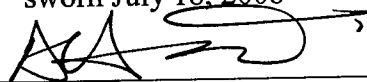
#1362392

*David R. Semley*  
**DAVID R. SEMLEY**

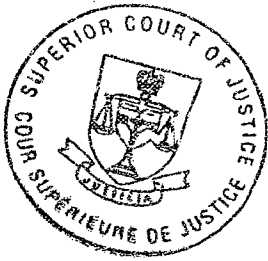
Sherrle June Fulbrook, a Commissioner,  
etc., Regional Municipality of Niagara, for  
Hard-Rock Paving Company Limited and its  
subsidiaries, associates and affiliates.  
Expires November 17, 2008

**EXHIBIT "A" - LIST OF JOBS AND CONTRACTS**  
**SUBJECT TO SEALING ORDER**

This is Exhibit C  
to the Affidavit of Demetrios Yiokaris,  
sworn July 18, 2008

A handwritten signature in black ink, appearing to be 'AA' followed by a stylized flourish.

\_\_\_\_\_  
Commissioner for Taking Affidavits, etc.



**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

THE HONOURABLE ) WEDNESDAY, THE 9<sup>th</sup> DAY  
 )  
JUSTICE WILTON-SIEGEL ) OF JULY, 2008

IN THE MATTER OF THE *COMPANIES' CREDITORS  
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR  
ARRANGEMENT OF THE HARD ROCK PAVING COMPANY LIMITED  
AND THE COMPANIES LISTED ON SCHEDULE "A"  
(collectively, the "Applicants")

**ORDER**

**THIS MOTION**, made by the Applicants for an order approving the sale transaction (the "Transactions") contemplated by an agreement of purchase and sale (the "Miller Sale Agreement") between the Applicants and 2178550 Ontario Ltd. and by an agreement of purchase and sale (the "Waterford Sale Agreement") between the Applicants and Waterford Sand & Gravel Limited (collectively, the "Purchasers"), was heard this day at 330 University Avenue, Toronto, Ontario.

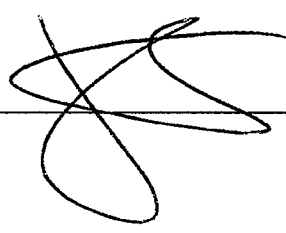
**ON READING** the Motion Record of the Applicants, the Affidavit of David R. Semley sworn July 8, 2008, the Monitor's Third Report dated July 7, 2008 (the "Report"), the Affidavit of Carlo Fagnoli sworn July 8, 2008, and on hearing the submissions of counsel for the Applicants, counsel for the BDO Dunwoody

Limited (the "Monitor"), counsel for Caterpillar Financial Services Limited, counsel for GE Capital Canada ("GE"), counsel for the Labourers International Union Local 837 and The International Union of Operating Engineers Local 793, counsel for Miller Paving Limited, counsel for Waterford Sand & Gravel Limited and counsel for the Guarantee Company of North America, no one else appearing,

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged so that this Motion is properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS** that the Stay Period, as originally defined in the Amended and Restated Order of Justice Spence dated May 12, 2008 (the "Initial Order"), is hereby extended to July 23, 2008.
3. **THIS COURT ORDERS AND DECLARES** that the Transactions are hereby approved, and that the Miller Sale Agreement and the Waterford Sale Agreement are each commercially reasonable and collectively in the best interests of the Applicants and its stakeholders (the "Miller Sale Agreement" and the "Waterford Sale Agreement" are sometimes referred to hereafter collectively as, the "Sale Agreements"). The execution of the Sale Agreements by the Applicants is hereby authorized and approved, and the Applicants are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transactions and for the conveyance of the purchased assets subject to the Sale Agreements to the respective Purchasers in accordance with their respective Sale Agreements.
4. **THIS COURT ORDERS** that subject to paragraph 5 of this Order the conduct of the Monitor as described in the Report be and the same is hereby approved.

5. **THIS COURT ORDERS** that the amount of the Administrative Charge, as described and defined in the Initial Order, is hereby increased to \$500,000 provided that there shall be a standstill with respect to the payment of the fees of the Monitor and its counsel accrued up to July 4, 2008, pending a hearing of a motion to be brought by CFSL or a motion by the Monitor.

#1364268 | 4064915



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**Joanne Nicoara**  
Registrar, Superior Court of Justice

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

**JUL 10 2008**

PER/PAR: JSN

**SCHEDULE "A"**

DIAMOND STONEBRIDGE CONTRACTING INC.

HARD-ROCK HIGHWAY MAINTENANCE INC.

HARD-ROCK CONSTRUCTION INC.

942355 ONTARIO LIMITED

942356 ONTARIO LIMITED

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED  
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE HARD ROCK PAVING  
COMPANY LIMITED AND THE COMPANIES LISTED ON SCHEDULE "A"

Applicants  
Court File No. 08-CL-7503

<p><b>ONTARIO</b> <b>SUPERIOR COURT OF JUSTICE</b> <b>COMMERCIAL LIST</b></p> <p>Proceeding commenced at TORONTO</p> <p><b>ORDER</b></p> <p><b>MINDEN GROSS LLP</b> Barristers and Solicitors 145 King Street West, Suite 2200 Toronto ON M5H 4G2</p> <p><b>Raymond M. Slattery</b> (LSUC #20479L) 416-369-4149 416-864-9223 fax <a href="mailto:rslattery@mindengross.com">rslattery@mindengross.com</a></p> <p><b>David T. Ullmann</b> (LSUC #42357I) 416-369-4148 416-864-9223 fax <a href="mailto:dullmann@mindengross.com">dullmann@mindengross.com</a></p> <p>Solicitors for the Applicants</p>	
---	--

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

IN THE MATTER OF THE *COMPANIES' CREDITORS  
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR  
ARRANGEMENT OF THE HARD ROCK PAVING COMPANY LIMITED  
AND THE COMPANIES LISTED ON SCHEDULE "A"  
(collectively, the "Applicants")

**MOTION RECORD OF THE APPLICANTS**  
(returnable July 9, 2008)

**MINDEN GROSS LLP**  
Barristers & Solicitors  
145 King Street West  
Suite 2200  
Toronto ON M5H 4G2

**Raymond M. Slattery** (LSUC #20479L)  
416-369-4149  
416-864-9223 fax  
[rslattery@mindengross.com](mailto:rslattery@mindengross.com)

**David T. Ullmann** (LSUC #423571)  
416-369-4148  
416-864-9223 fax  
[dullmann@mindengross.com](mailto:dullmann@mindengross.com)

Solicitors for the applicants

**TO: THE SERVICE LIST ATTACHED**

**SCHEDULE "A"**

DIAMOND STONEBRIDGE CONTRACTING INC.

HARD-ROCK HIGHWAY MAINTENANCE INC.

HARD-ROCK CONSTRUCTION INC.

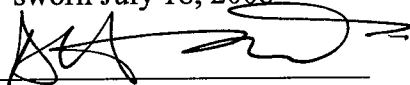
942355 ONTARIO LIMITED

942356 ONTARIO LIMITED

**INDEX**

<b>TAB</b>	<b>DATE</b>		<b>PAGE NO.</b>
1	July 8, 2008	Notice of Motion, returnable July 9, 2008	1 - 5
2	July 8, 2008	Affidavit of David R. Semley	6 - 27
A	June 28, 2008	<b>Exhibit "A"</b> - List of Jobs and Contracts (subject to sealing order)	28
B	June 28, 2008	<b>Exhibit "B"</b> - Cash Flow Comparison	29 - 30
3	May 12, 2008	Amended and Restated Initial Order of Justice Spence	31 - 50
4	June 12, 2008	Order of Justice Wilton-Siegel	51 - 75

This is Exhibit D  
to the Affidavit of Demetrios Yiokaris,  
sworn July 18, 2008



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Commissioner for Taking Affidavits, etc.

July 18, 2008

**Stephen Wahl**  
Direct Dial: 416-595-2060  
Direct Fax: 416-204-2820  
swahl@kmlaw.ca

*By Email*

Lazier Hickey LLP  
25 Main Street West  
15<sup>th</sup> Floor  
Hamilton, Ontario  
L8P 1H1

**Attention: Gerald B. Aggus**

Lang Michener LLP  
Brookfield Place  
181 Bay Street  
Suite 2500  
Toronto, Ontario  
M5J 2T7

**Attention: David Hager and Martin D. Rabinovitch**

Dear Sirs:

**Re: Labourers' International Union of North America, Local 837  
International Union of Operating Engineers, Local 793  
Re: Hard-Rock Paving CCAA Application  
Our File No. 08-0645**

As you are aware, we are Counsel to the Labourers International Union of North America, Local 837 ("LIUNA Local 837") and the International Union of Operating Engineers, Local 793 ("IUOE Local 793") in connection with the above-captioned matter.

Hard-Rock Paving Company Limited ("Hard-Rock Paving") and/or Hard-Rock Construction Inc. (collectively referred to as "Hard-Rock") are bound by Collective Agreements with each of our Union clients.

Both Miller Paving Limited ("Miller Paving") and Waterford ("Waterford") under the CCAA proceedings are to purchase assets of Hard-Rock Paving Company Limited and/or Hard-Rock Construction Inc. including but not limited to particular ongoing projects and/or pit and quarry

locations. In respect of these assets, our Union clients assert that Miller and/or Waterford are successor employers pursuant to section 69 and/or a single employer for the purposes of labour relations with Hard-Rock pursuant to 1(4), of the *Labour Relations Act, 1995* as amended and bound under the operative Collective Agreements.

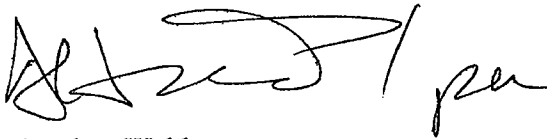
In the Affidavit of David Semley filed with the court on the sale approval motion, it is clear that a key element in the approval of the purchases by Miller Paving and/or Waterford of the specific assets of Hard-Rock has been the assurance that there is to be a continuation of the projects and pit and quarry locations as a going concern including the continued employment of the members of Labourers Local 837 and IUOE Local 793 at such operations.

Accordingly, we require immediate notice of the specific projects and pit and quarry locations to be acquired by Miller Paving and/or Waterford from Hard-Rock as well as full and complete information relating to the identity of the members of LIUNA Local 837 and IUOE Local 793 who are to be continuously employed at each location. *We require this information by close of business today please.*

We look forward to your co-operation in this matter.

Yours truly,

**KOSKIE MINSKY LLP**



Stephen Wahl

SW:es

c: LIUNA Local 837  
Attention: Mr. Michael Popovich

IUOE Local 793  
Attention: Mr. Jeff Smith

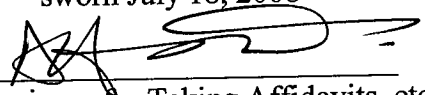
Harrison Pensa  
Attention: Mr. Timothy C. Hogan

Minden Gross LLP  
Attention: Mr. Raymond M. Slattery

Koskie Minsky LLP  
Attention: Mr. Andrew Hatnay  
Attention: Mr. Jeffrey Long  
Attention: Mr. Demetrios Yiokaris

44a

This is Exhibit E  
to the Affidavit of Demetrios Yiokaris,  
sworn July 18, 2008

A handwritten signature in black ink, appearing to be 'M. S.', written over a horizontal line.

Commissioner for Taking Affidavits, etc.

**Demetrios Yiokaris**

---

**From:** Martin Rabinovitch [MRabinovitch@langmichener.ca]  
**Sent:** July 18, 2008 11:28 AM  
**To:** Judi Muir; aggusg@lazierhickey.com; dahager@langmichener.ca  
**Cc:** Andrew J. Hatnay; Jeffrey J. Long; Demetrios Yiokaris; rslattery@mindengross.com; mpicone@laborers837.on.ca; delinquencycontrol@iuoelocal793.org; thogan@harrisonpensa.com  
**Subject:** RE: Labourers' International Union of North America, Local 837 and Hard Rock

I do not believe that we will be able to answer your question today.

However please be advised that it is not "Miller Paving Limited" that is buying the assets but "Brennan Paving Limited".

Martin D. Rabinovitch  
 416.307.4115 (direct telephone)  
 416.307.4468 (direct facsimile)  
 mrabinovitch@langmichener.ca

-----Original Message-----

**From:** Judi Muir [mailto:jmuir@kmlaw.ca]  
**Sent:** July 18, 2008 11:11 AM  
**To:** aggusg@lazierhickey.com; dahager@langmichener.ca; Martin Rabinovitch  
**Cc:** Andrew J. Hatnay; Jeffrey J. Long; Demetrios Yiokaris; rslattery@mindengross.com; mpicone@laborers837.on.ca; delinquencycontrol@iuoelocal793.org; thogan@harrisonpensa.com  
**Subject:** Labourers' International Union of North America, Local 837 and Hard Rock

Enclosed please find correspondence for your review and response.

Yours truly,

Judi Muir  
 Legal Assistant/Law Clerk to Andrew Hatnay  
 Koskie Minsky LLP  
 20 Queen Street West  
 Suite 900  
 Toronto, Ontario  
 M5H 3R3  
 Tele: 416-595-2706  
 Fax: 416-977-3316  
 jmuir@kmlaw.ca

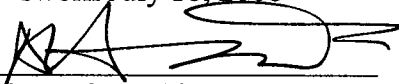
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Lang Michener LLP  
 Lawyers - Patent & Trade Mark Agents  
 Brookfield Place, 181 Bay Street, Suite 2500  
 Toronto, Ontario, Canada M5J 2T7  
 Telephone (416) 360-8600 Fax (416) 365-1719  
 Visit us on the web at [www.langmichener.ca](http://www.langmichener.ca)

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This is Exhibit F  
to the Affidavit of Demetrios Yiokaris,  
sworn July 18, 2008

A handwritten signature in black ink, appearing to be 'K. A. S.', written over a horizontal line.

Commissioner for Taking Affidavits, etc.

INDEPENDENT HAND AGREEMENT

BETWEEN: BRENNAN PAVING & CONSTRUCTION LTD.  
P.O. Box 3459  
Markham Industrial Park  
Markham, ON L3R 6G7  
Tel. (905) 475-1440 Fax. (905) 475-3852

hereinafter called the "Employer"

- and -

INTERNATIONAL UNION OF OPERATING ENGINEERS,  
LOCAL 793

hereinafter called the "Union"

WHEREAS the Union and the Employer are desirous of establishing a form of standard collective agreement with respect to employees of Employers engaged in the construction industry and equipment rental within the Province of Ontario, to provide uniform interpretation, application and administration of the relationship established.

IT IS EXPRESSLY AGREED AND DECLARED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

Article 1 - Recognition

1.1 The Employer agrees to recognize the Union as the exclusive Collective Bargaining Agent for all of its employees within the Geographical Scope of this Agreement and the classifications contained in the schedules of wage rates hereinafter set out, save and except foremen, clerical employees, office staff, full time shop employees and security guards.

Article 2 - Union Security

2.1 The Employer agrees that all present employees, covered by this Agreement, shall as a condition of employment, after fifteen (15) days from the signing of this Agreement, become and remain members in good standing of the Union.

2.2 All employees hired on or after the signing of this Agreement shall as a condition of employment, become and remain Union members within fifteen (15) calendar days of the date of employment.

2.3 The Employer and the Union agree that employees to be hired for work under Schedule "A", "B", "C", "D" and "E" shall be hired through the Union Office. It is further agreed that the Employer may recall employees who have worked for the company and may have been laid off within the previous twelve month period and must inform the Union of such re-hiring. It is understood and agreed that all employees shall have Clearance Cards before commencing work or as otherwise agreed to between the Employer and the Union. A telephone clearance by the Employer is acceptable within forty-eight (48) hours of the employee commencing work.

## Article 2 – continued

- i) Any employee who is in receipt of a retirement pension from I.U.O.E. Local 793 Pension Plan shall not be entitled to recall.
- ii) In the event of lay-off of employees covered by this Agreement, the Employer shall abide by the following procedure, providing the remaining employees are capable of performing the work.
  - a) First laid-off shall be applicants for membership in the Union.
  - b) Second laid-off shall be members of the Union from out-of-province working on permits or travel cards.
  - c) Third laid-off shall be members of the Union who are in receipt of a retirement pension from the I.U.O.E. Local 793 Pension Plan.
  - d) Last laid-off shall be all other members of the Union.

2.4 All employees in the employ of the Employer shall, when working in a position within the bargaining unit described in Article 1 hereof, be required as a condition of employment, to sign an authorization for dues check-off and assessments, and any such authorization shall be in duplicate and shall be

signed by the employee concerned and duly witnessed. The Employer agrees to recognize such check-off authorization and to deduct whatever sum may be authorized for Union dues and assessments from the first pay due each calendar month and to remit same not later than the fifteenth (15th) day of the same month to the Financial Secretary of the Union. The Employer shall, when remitting such dues and assessments, name the employees from whose pay such deductions have been made and their Social Insurance Numbers, also the names of any employees who have left the employ of the Employer since the last payment, and the names of employees who have been hired by the Employer, together with their addresses and the jobs on which they are working.

The Employer agrees to deduct from each employee in the bargaining unit, working dues at the rate of two percent (2%) of the total monetary package each hour earned by each employee, which includes the hourly rate, vacation pay, health plan and pension plan contributions. Such deductions shall be forwarded along with the remittances required under Article 12 and supporting information shall be as required by the Trustees on the Reporting Forms. Such deductions shall be immediately paid to the Union by the administrator of the plans.

- 2.5 The Employer agrees to engage only those sub-contractors and equipment rentals (except equipment dealers) who are in contractual relations with the Union to perform work set out in the classifications of this Agreement or as otherwise agreed to by the parties. For all of the classifications listed in this Agreement, the Employer must assign the work to the Operating Engineers.
- 2.6 Any equipment currently being operated by members of this Local which might be or will be operated by remote control or semi-automatic will continue to be operated by members of Local 793 where qualified.
- 2.7 Effective January 1, 2002 the Employer shall deduct ten cents (0.10¢) per hour for each hour earned by each employee covered by this Agreement for Advancement Dues. The amount deducted shall be remitted together with other monthly contributions and deductions in the manner set out in this Collective Agreement.

Article 3 - Management Rights

3.1 The Union agrees that it is the exclusive function of the Employer:

a) To conduct its business in all respects in accordance with its commitments and responsibilities, including the right to manage the jobs, locate, extend, curtail or cease operations, to determine the number of men required at any or all locations, to determine the kinds and location of machines, tools and equipment to be used and the schedules of production, to judge the qualifications of the employees and to maintain order, discipline and efficiency.

b) To hire, discharge, classify, transfer, promote, demote, lay-off, suspend or otherwise discipline employees, provided that a claim by an employee that he has been discharged, suspended, disciplined or disciplinarily demoted without reasonable cause shall be subject to the provisions of the grievance procedure.

c) To make, alter from time to time and enforce reasonable rules of conduct and procedure to be observed by employees. It is agreed that these functions shall not be exercised in a manner inconsistent with the express provisions of this Agreement.

Article 4 - Grievance Procedure

4.1 There shall be an earnest effort on the part of both parties to this Agreement, to settle promptly through the procedure set out herein, any complaints, grievances, or disputes arising from the interpretation, application or administration of this Agreement.

4.2 All grievances to be dealt with under Step Two below shall be in writing, on a form supplied by the Union and signed by the employee having such grievance.

4.3 Written grievances, to be valid shall set out the nature of the grievance, the Article or Articles of the agreement alleged to have been violated and the nature of the remedy sought and shall not be subject to change at later steps except by mutual agreement in writing with the Employer, or in the case of remedy, by an Arbitration Board.

4.4 In determining the time which is allowed in the various steps Saturday, Sunday and Statutory Holidays shall be excluded and any time limits may be extended by mutual agreement in writing. Including Article 5.

4.5 If advantage of the provisions of Article 4 and 5 hereof is not taken within the time limits specified therein or as extended in writing as set out above, the grievance shall be deemed to have been abandoned and may not be re-opened.

4.6 The Employer shall designate and name the official to whom a written grievance is submitted as Step #2.

4.7 It is understood and agreed that an employee does not have a grievance until he has discussed the matter with his foreman or other supervisory personnel acting in this capacity and given him an opportunity of dealing with the complaint. His decision shall be made known to said employee within forty-eight (48) hours. Grievances properly arising under this Agreement shall be adjusted and settled as follows:

#### Article 4 – continued

STEP 1 - Within ten (10) days after the circumstances giving rise to the grievance occurred or originated, the aggrieved employee, with or without a Union Representative, shall present his grievance orally or in writing to the Official of the Employer named by the Employer to handle grievances at this step. If a settlement satisfactory to the Union and employee concerned is not reached within five (5) full working days, a grievance may be presented as indicated in Step 2 at any time within five (5) full working days thereafter.

STEP 2 - (a) At this step the grievance may be processed as an individual, joint or Union grievance and shall be presented in writing by a Union Steward or Representative to the Company Official assigned to handle written grievances.

(b) The Employer or the Union may process a written grievance at this step concerning any matters related to this Agreement including the Union's right to present an employee grievance in total.

#### Article 5 - Arbitration

- 5.1 The parties to this Agreement agree that any grievance concerning the interpretation or alleged violation of this Agreement which has been properly carried through all of the steps of the grievance procedure outlined in Article 4 which has not been settled will, within fourteen (14) days of receiving an answer following the procedure outlined in Step 2, then be referred to a Board of Arbitration at the request of either of the parties hereto.
- 5.2 The Board of Arbitration will be composed of one person appointed by the Employer, one person appointed by the Union and a third person to act as Chairman chosen by the other two members of the Board.
- 5.3 Within five (5) working days of the request by either party for a Board each party shall notify the other in writing of the name of its appointee.
- 5.4 Should the person chosen by the Employer to act on the Board and the person chosen by the Union fail to agree on a third member as Chairman within five (5) days of the notification mentioned above, the Minister of Labour of the Province of Ontario will be asked to appoint a Chairman.
- 5.5 The decisions of the Board of Arbitration or a majority of such Board constituted in the above manner shall be binding on the parties to this Agreement.
- 5.6 The Board of Arbitration shall not have any power to alter or change any of the provisions of this Agreement or to substitute any new provisions, for any existing provisions, nor to give any decisions inconsistent with the terms and provisions of this Agreement.
- 5.7 Each of the parties to this Agreement will bear the expenses of the Arbitrator appointed by it and the parties will jointly bear the expense of the Chairman.

#### Article 6 - Union Representation

- 6.1 The Employer shall not refuse permission to any representative of the Union upon request to enter the Employer's premises or job site in the administration of this Agreement, provided that it does not interfere with the work.

Article 6 continued

- 6.2 The Employer agrees to recognize such reasonable number of stewards as may from time to time be appointed by the Union, but shall not be obliged to recognize such stewards until they have been informed in writing of the names of all stewards as they were appointed.
- 6.3 The Union Steward will be the last man on the job within his classification provided he is capable of doing the work. No discrimination shall be shown against the Steward for carrying out his duties, which he shall perform the same way as any other employee and shall be allowed a reasonable amount of time during working hours to perform the work of the Union but shall not abuse that privilege.

Article 7 - No Strike, No Lockout

- 7.1 During the term of this Agreement the Union agrees that there shall be no strike and the Employer agrees that there shall be no lockout.
- 7.2 The words "strike" and "lockout" in this Agreement shall mean "strike" and "lockout" as defined in the Ontario Labour Relations Act.
- 7.3 The Union agrees it will not involve the Employer in any dispute, which may arise between the Union and any other company and the employees of such other company. The Union further agrees it will not condone a work stoppage or observe any picket line placed on a job site for jurisdictional purposes.
- 7.4 It shall not be a violation of this Agreement for an employee to refuse to cross a picket line that has been established in accordance with the Labour Relations Act.

Article 8 - Geographical Area

- 8.1 This Agreement shall be effective in Board Areas 5 and 26 as described by the Ontario Labour Relations Board plus the Town of Grimsby, the Regional Municipality of Haldimand-Norfolk and the Regional Municipality of Niagara.

Article 9 - Safety, Sanitation and Shelter

- 9.1 In co-operation with the Employer's overall program of accident control and prevention, the job steward or an employee shall report to the foreman for Immediate Investigation any alleged unsafe conditions, unsafe acts or violations for correction if required.
- 9.2 Employees shall be provided with adequate protection from falling material and other hazards on the job, in accordance with the appropriate Safety Acts. Adequately heated enclosures or cabs for men operating equipment shall be provided where reasonably required.
- 9.3 Every employee shall, as a condition of employment, be required to wear an approved safety helmet and the Employer agrees that such helmets may be purchased from him at cost. When the Employer makes mandatory the wearing of a specific helmet it will be released on a charge-out basis.
- 9.4 Every employee shall wear suitable protective footwear. Other personal protective equipment required under abnormal conditions or during inclement weather will be supplied by the Employer. The Union recognizes the right of the Employer to economically supervise the distribution of clothing provided and will co-operate with the Employer to prevent wasteful practices.

Article 9 continued

- 9.5 The Employer, the employees and the Union agree to abide by the provisions of the appropriate safety act.
- 9.6 The Employer agrees to supply ice water and proper sanitary facilities, which shall be maintained in a clean and sanitary condition by the employees and the Employer.
- 9.7 Suitable and adequately heated shelter for men to eat their lunch shall be provided by the Employer, with table and seating space, which shall be maintained in a clean and sanitary condition by the employees and the Employer.
- 9.8 Hazardous Waste - The parties agree to be represented on a committee regarding the handling of hazardous waste with the I.C.I. and Metropolitan Roads and Sewers.

**Article 10 - Productivity**

- 10.1 The Union and the Employer recognize the mutual value of improving by all proper and reasonable means the productivity of the individual workman and both will undertake individually and jointly to promote such increased productivity.

**Article 11 - Payment of Wages**

- 11.1 a) Wages shall be paid each week by cheque or electronic deposit no later than Thursday by 5:00 p.m.  
 b) Accompanying each payment of wages shall be a retainable statement identifying both the Employer and the employee, showing the pay period, total hours marked "regular" and "overtime", the hourly rate, the total earnings, the amount of vacation pay, the amount and purpose of each deduction, and the net earnings.
- 11.2 In the case of lay off, all employees shall be paid up to date on the job site where practical; otherwise, cheque's and E.I. Record of Employment Certificate shall be forwarded by registered mail to his last known address within forty-eight (48) hours of the lay off. Notification to, or attempted notification of lay-off, to an employee on a Saturday, Sunday or Holiday shall not be considered proper notice unless the employee is working on such days.
- 11.3 When laid off, employees shall be allowed sufficient time with pay to clear up their personal and Company property on the job site.
- 11.4 When employees who are laid off are not paid up to date on the job site and should the Employer fail to send such wages and/or employment records as stated above, the Employer shall pay eight (8) hours pay at the regular hourly rate for each additional regular working day the employee is required to wait for his pay and records after giving notice to the Employer and giving him four (4) hours to correct such default.

**Article 12 - Health and Pension Plans**

- 12.1 a) Effective September 1, 2007 Employers shall contribute in total: \$9.01 per hour to the International Union of Operating Engineers, Local 793 Members Life and Health Benefit Trust of Ontario (the "Health Plan") and to the International Union of Operating Engineers, Local 793 Members Pension Benefit Trust of Ontario (the "Pension Plan") for each hour earned by each employee in his employ.

Article 12 – continued

Effective January 1, 2008, the total Employer contributions of \$9.26.

Effective September 1, 2008, the total Employer contributions of \$9.76 per hour earned.

Effective September 1, 2009, the total Employer contributions of \$10.26 per hour earned.

Effective September 1, 2010, the total Employer contributions of \$10.76 per hour earned.

It is agreed that Employers shall make a single monthly payment to an independent administrator appointed by the Trustees of the Health Plan and the Pension Plan for contributions owing to the two plans. The administrator shall be responsible for ensuring that the contributions are allocated and made on behalf of each Employer and employee to the Health Plan and the Pension Plan, as set out in Appendix "A" of this Agreement.

For Employees Dispatched Under Schedule "E"

b) Effective September 1, 2007 Employers shall contribute in total: \$7.74 per hour to the International Union of Operating Engineers, Local 793 Members Life and Health Benefit Trust of Ontario (the "Health Plan) and to the International Union of Operating Engineers, Local 793 Members Pension Benefit Trust of Ontario (the "Pension Plan") for each hour earned by each employee in his employ.

Effective January 1, 2008, the total Employer contributions of \$7.99 per hour earned.

Effective September 1, 2008, the total Employer contributions of \$8.49 per hour earned.

Effective September 1, 2009, the total Employer contributions of \$8.99 per hour earned.

Effective September 1, 2010, the total Employer contributions of \$9.49 per hour earned.

It is agreed that Employers shall make a single monthly payment to an independent administrator appointed by the Trustees of the Health Plan and the Pension Plan for contributions owing to the two plans. The administrator shall be responsible for ensuring that the contributions are allocated and made on behalf of each Employer and employee to the Health Plan and the Pension Plan, as set out in Appendix "A" of this Agreement.

12.2 a) All contributions shall be submitted by the 15th of the following month in which the hours have been worked and at no time shall the contributions be paid directly to the employee. If payment is over thirty (30) days late, interest at two percent (2%) per month (24% Per Annum) shall be paid from the due date and in addition the delinquent Employer may be required by the Trustees of the funds to deposit with the Trustees a Fifteen Thousand Dollar (\$15,000.00) cash bond.

b) In the event that a grievance alleging that an Employer has failed to remit the proper contributions, deductions or remittances to any Trust Fund or party as required by this Agreement, the parties agree that for the purposes of determining any issue, the following presumption shall apply:

A statement signed by a member of the Union, a Business Representative a Trustee or the Administrator of a Trust Fund, shall be prima facia evidence of the number of hours worked by members of the Union and of a failure to make the appropriate payments as required by this Agreement. This evidence shall establish only a rebuttable presumption and may be challenged by the Employer with proper documentary evidence.

Article 12 – continued

c) If the Ontario Labour Relations Board or a Board of Arbitration to which a grievance alleging failure to make appropriate payments to a Trust Fund or an Administrator as required by this Agreement is litigated and the Board determines that an Employer has violated the Agreement, then the Ontario Labour Relations Board or the Board of Arbitration shall also require the Employer to pay all reasonable costs incurred by the Union in prosecuting the grievance including but not limited to, all legal costs on a solicitor-and-client basis, travel, meal and accommodation costs of all witnesses and Business Representatives, conduct monies, cost incurred in serving a summons, any expenses incurred by the Union pursuant to Section 126(4) or otherwise, for the Board of Arbitration.

d) If the Ontario Labour Relations Board determines that the Employer has not violated the Agreement, then the Ontario Labour Relations Board or the Board of arbitration shall require the Union to pay all costs to the Employer as required to in sub-paragraph (c) above.

Article 13 - Schedules

13.1 The schedules attached hereto are hereby made a part of the Agreement.

Article 14 - General

14.1 Operators required to operate equipment in two-rate classifications during the same shift shall be paid the higher classification rate for the shift.

14.2 Employees required to supply their own tools shall be provided a suitable and safe place to keep said tools.

14.3 It is agreed that all employees of the Employer will be permitted a rest break of ten (10) minutes in each half of their respective shifts.

14.4 It is agreed that no employee covered by this Agreement shall receive a reduction in his rate of wages through the introduction of these schedules.

14.5 Rates for new types of equipment shall be classified and agreed upon by the Union and the Employer as conditions indicate.

14.6 Apprentices - The Parties hereto agree that the use of Apprentices will be permitted. It is the intention of both parties that said Apprentices shall be given the Training and Guidance in the operation of available equipment on site as and when available. The number of apprentices on site to be agreed upon by mutual consent.

The rates to be as follows:

0 - 1,000 Hours - 65%                      1,001 - 2,000 Hours - 75%                      2,001 - 3,000 Hours - 85%

14.7 Training Fund - Effective September 1, 2001, each Employer bound by this Agreement shall contribute the sum of thirty-five (\$0.35) cents per hour for each hour worked by each employee covered by this Agreement to the International Union of Operating Engineers, Local 793 Training Fund.

**Article 15 - Vacation Pay and Statutory Holiday Pay, Schedules "A", "B", "C" And "E"**

- 15.1 Overtime at the rate of double (2) time shall be paid to all employees for all work performed on the following holidays: -

New Year's Day	Dominion Day	Thanksgiving Day
Good Friday	Civic Holiday	Christmas Day
Victoria Day	Labour Day	Boxing Day

It is agreed that all new statutory holidays will be recognized as a holiday hereinunder, if and when it is proclaimed such by the Canadian Federal and/or Provincial Government.

- 15.2 Should any of the above holidays occur on a Saturday or Sunday, such holiday shall be observed on the Monday and/or Tuesday following unless changed by mutual agreement between the Employer and the Union. No work shall be performed on Labour Day except to save life, limb or property.
- 15.3 Vacation and Statutory Holiday credits shall be paid to employees covered by this Collective Agreement at the rate of ten percent (10%) of the gross wages earned. It is understood and agreed that six percent (6%) of the gross wages is to be considered in lieu of Statutory Holiday Pay and four percent (4%) Vacation Pay. It is further understood that Vacation Pay and Statutory Holiday Pay will be paid to employees weekly.
- 15.4 Vacations may be taken at any time within the calendar year (without loss of position) and every effort shall be made to schedule vacations to benefit both the Employer and the employee. Employees shall provide minimum of four weeks written notice for vacation time.

**Article 16 - Reporting Allowance**

- 16.1 An employee who reports for work at the Employer's job site or shop, unless directed not to report the previous day by his company and for whom no work is available due to reasons other than inclement weather, shall receive a minimum of four (4) hours' reporting time and shall remain at other work if requested to do so by the foreman.
- 16.2 An employee who reports for work at the Employer's job site or shop, unless directed not to report and for whom no work is available due to inclement weather, shall receive a minimum of two (2) hours' reporting time provided the employee remains on the job for one hour after his designated starting time, if requested to do so by the foreman.
- 16.3 It is understood that employees receiving reporting allowance under the terms of Clause 16.1 and 16.2 shall also receive travel allowance where applicable.

**Article 17 - Travelling Allowance or Travelling Time**

- 17.1 No travelling expenses shall be paid for work on projects within Board Areas 5 and 26 as described by the Ontario Labour Relations Board.
- 17.2 Travelling expenses for work on projects located outside the area described in paragraph 17.1 of this Article shall be paid either at the rate of forty-eight (48) cents per kilometre each way from the boundary of the area as described in paragraph 17.1 to the project with a minimum of fifty (50) cents per day, or where the Employer supplies transportation, the rate shall be eight (8) cents per kilometre with a minimum of fifty (50) cents per day.

## Article 17 - continued

- 17.3 In regard to out of town allowances, it is understood that if the Employer requires an employee to be out of town overnight, the Employer will provide suitable room and board for the employee up to a maximum of Sixty Four Dollars and Forty Cents (\$64.40) a day or Three Hundred and twenty-two Dollars (\$322.00) a week.
- 17.4 It is understood that when an employee is sent out of town by the Employer in the circumstances contemplated by paragraphs 17.1, 17.2 and 17.3 above, the employee will maintain the rate of wages and hours of work for such employee as provided in the Collective Agreement.

Article 18 - Duration of Agreement

18.1 This Agreement shall become effective September 1, 2007 and shall continue in effect until August 31, 2011 and shall continue automatically thereafter for annual periods of one year each unless either party notifies the other in writing within the period of ninety (90) days immediately prior to the annual expiration date that it desires to amend the Agreement.

Negotiations shall begin within fifteen (15) days following notification for amendment as provided in the preceding paragraph.

If, pursuant to such negotiations, an agreement is not reached on the renewal or amendment of this Agreement, or the making of a new agreement prior to the current expiry date, this Agreement shall continue in full force and effect until a new agreement is signed between the parties, or until conciliation proceedings prescribed under the Ontario Labour Relations Act, have been completed whichever date should first occur.

IN WITNESS WHEREOF each of the parties hereto has caused this Agreement to be signed by its duly authorized representative as of the date and year first above written.

DATED THIS 26<sup>th</sup> DAY OF December, 2007.


SIGNED ON BEHALF OF:

SIGNED ON BEHALF OF:

Brennan Paving & Construction Ltd.

International Union of  
Operating Engineers, Local 793

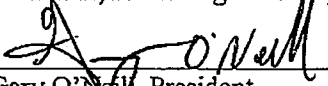
  
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Mike Gallagher, Business Manager

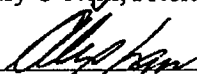
STEPHEN DAMP  
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Rick Kerr, Recording Secretary

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Gary O'Neill, President

MARKHAM INDUSTRIAL PARK  
MARKHAM, ONTARIO  
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Recommended by: Alex Law