Court File No. CV-17-11760-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

BUSINESS DEVELOPMENT BANK OF CANADA

Applicant

– and –

ASTORIA ORGANIC MATTERS LTD. and ASTORIA ORGANIC MATTERS CANADA LP

Respondents

FACTUM OF FITZGIBBON CONSTRUCTION LIMITED
(returnable August 24, 2017)

Lawyers for the Construction Lien Claimant, Fitzgibbon Construction Ltd.

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PART I: OVERVIEW

1. The Receiver has brought a motion for *inter alia* an Order approving the form of Approval and Vesting Order attached at TAB 3 of its Motion Record. In effect, the Receiver has brought a motion for summary judgment on the issue of whether three (3) construction liens registered against the freehold interest of the subject property without proper notice to the construction lien claimants.

2. The Receiver has denied any and all requests for an adjournment made on behalf of Fitzgibbon to permit examinations, complete disclosure etc.

3. The construction lien claimants, whose claims together exceed $1,000,000.00, were not consulted on the sales transaction. They oppose the relief sought by the Receiver in the form of a summary dismissal of their construction lien claims as against the freehold interest for which the Debtor has no right, title or interest and/or authority to vest such assets and/or encumbrances in the Purchaser.

PART II: THE ISSUES

Preliminary Issue

4. The preliminary issue to be determined is whether the Court should permit an adjournment of the motion for the relief sought in the form of a vesting Order discharging the Construction Lien Claims as against the freehold interest in the Premises?

Substantive Issues

5. In the event the Court is not inclined to grant an adjournment, the substantive issue raised by Fitzgibbon on this motion is as follows:

   Should the Court grant the Approval and Vesting Order in the form attached at TAB 3 to the Motion Record, which includes a vesting off of the Construction Liens as against the freehold interest? In other words, should the Court grant the Receiver's request for summary dismissal of the Construction Lien Claims as against the freehold estate.

PART III: THE FACTS

6. Pursuant to the Order of the Honourable Justice Hainey dated April 13, 2017, BDO Canada Limited was appointed as receiver (in such capacities, the **"Receiver"**), without security, of all of the assets, undertakings and property of each Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP (**"Astoria"**).

7. Three (3) trade suppliers (collectively, the **"Construction Lien Claimants"**, comprising of Fitzgibbon Construction Limited (**"Fitzgibbon"**), Ken Tulloch Construction Ltd (**"Ken Tulloch"**) and Van Soelen Landscaping (**"Van Soelen"**) have registered construction liens against Astoria's leasehold interest (collectively the "**Construction Liens**") in the premises municipally known as 704 Phillipston Road, Belleville, ON (the **"Premises"**). The Construction Lien Claimants have also registered their Construction Liens against the freehold interest of 1684567 Ontario Inc. (the **"Landlord"**) of the Premises.

8. On August 16, 2017 at 3:57pm the Receiver served a motion record in respect of a motion returnable August 24, 2017 wherein the Receiver was seeking an Order, *inter alia*:

   a. approving the Asset Purchase Agreement dated July 27, 2017, as amended, entered into between the Receiver and SusGlobal Energy Belleville Ltd. (the **"Purchaser"**);

   b. authorizing the Receiver to complete the sale transaction as contemplated under the Asset Purchase Agreement; and

   c. approving the form of Approval and Vesting Order attached at TAB 3 of its Motion Record.

9. Upon review of the vesting order sought by the Receiver, it was apparent same would expunge and discharge the Construction Liens against the freehold interest of the Premises. On August 18, 2017, counsel for Fitzgibbon raised objections to the proposed vesting order and sought a "carve out" of the Construction Liens as against the freehold interest alone from the vesting order on the basis that:

   a. Astoria and the Receiver do **not** have a legal interest in the freehold interest of the Premises; and

   b. the Landlord is an "owner" under the *Construction Lien*.

10. Counsel for the Receiver advised it would consider the objections of Fitzgibbon on the issue of the vesting Order and advise. On August 18, 2017 at 3:37PM counsel for the Receiver advised no "carve-out" of the Construction Liens as against the freehold interest would be provided. Counsel for Fitzgibbon responded to same seeking an adjournment to permit examinations of David Moore, the officer and director of the Landlord and/or Al Hamilton, President and CEO of Astoria. Additionally, a request was made for the position of the Receiver on the issue of discharging a lien against the freehold interest, especially in light of the fact that neither Astoria nor the Receiver have any interest in same.

11. On August 19, 2017, counsel for the Respondent in an email to counsel for Fitzgibbon confirmed its client would not consent to an adjournment. Counsel then advised the Receiver would, in effect, move for summary judgment on the issue of whether the Landlord constitutes an "owner" for the purposes of the *Construction Lien Act* on the motion returnable August 24, 2017 contrary to the requirements for notice and service of materials on a motion for summary judgment outlined in the *Consolidated Practice Direction Concerning the Commercial List* and the *Rules of Civil Procedure*.

Supplementary McCabe Affidavit, Ex. "C".

12. On August 21, 2017 at 7:22PM, counsel for the Receiver served the Second Supplement (the **"Second Supplement of Receiver"**) to the First Report of the Receiver that it intends to rely upon in support of its argument that the Construction Liens as against the freehold interest of the Premises ought to be discharged. Soon thereafter, counsel for the Receiver served a Factum and Book of Authorities.

13. Contained in the Second Supplement at section 2.2 are statements made by the Receiver to the effect that, based on discussion with the Landlord and Al Hamilton, it has been confirmed by the Receiver that the Landlord had no interest in the business of Astoria, the Landlord was not a partner of Astoria etc.

14. On August 21, 2017 at 8:15PM, Al Hamilton sent an email communication to counsel for the Receiver (cc: service list) stating he did not agree with the statements made under section 2.2 of the Second Supplement.

Affidavit of Colleen McCabe sworn August 22, 2017, Ex. "A".

15. On August 22, 2017 at 4:23PM, counsel for the Receiver sent a Third Supplement to the First Report of the Receiver (the **"Third Supplement of Receiver"**) that it intends to rely upon in support of its argument that the Construction Liens as against the freehold interest of the Premises ought to be discharged. With same, Mr. Hamilton in an email to the Receiver and its counsel makes reference to a joint venture existing between the Landlord and Astoria.

16. While the Landlord has stated to the Receiver it had no interest in Astoria, nor was it a business partner of Astoria, it has not defended the construction lien action commenced by Fitzgibbon wherein it is alleged the Landlord is an owner for the purposes of the *Construction Lien Act*. The Landlord has been noted in default in the construction lien litigation and thus, has been deemed to admit the allegation that it is an owner under the *Construction Lien Act*.

PART IV: LAW AND ARGUMENT

Preliminary Issue

17. The Receiver has converted a motion for a vesting of the claims as against the property of Astoria (i.e. the leasehold interest) into a motion for summary judgment on the issue of whether the Landlord is an owner for the purposes of the *Construction Lien Act*. In doing so, the Receiver has failed to comply with the rules governing summary judgment motions as outlined in the *Consolidated Practice Direction Concerning the Commercial List* and the *Rules of Civil Procedure*.

18. It was not until August 18, 2017 that the Receiver advised as to its intention to seek a discharge of the Construction Lien Claims as against the freehold interest in the Premises as part of its motion returnable August 24, 2017 on the basis the Landlord is not an "owner" for the purposes of the *Construction Lien Act*. This specific relief was not sought and/or addressed in the Motion Record served on the parties August 16, 2017 as there was no dispute that Astoria had no right, title, benefit and/or interest in the freehold estate to vest-off to the Purchaser. Astoria has no right and/or ability to vest absolutely in the Purchaser, free and clear of and from any and all security interests, including construction liens, as against the freehold interest of the Premises.

Supplementary McCabe Affidavit, Ex. "A".

19. The Receiver was appointed pursuant to the Order of the Honourable Justice Hainey dated April 13, 2017. It knew, or ought to have known, at this time that the Construction Lien Claims included claims as against the freehold interest in the Premises. If the position of the Receiver was that the lien claims were invalid, it ought to have moved to discharge said claims upon providing proper notice to the Construction Lien Claimants prior to entering into the sales transaction with the Purchaser to allow for a hearing of the matter based on a full factual record.

20. There was ample time for the Receiver to bring a summary judgment motion pursuant to the rules outlined for same under the *Commercial List Practice Directions*. The parties could then have exchanged all motion materials on an agreed schedule, completed the necessary examinations and fulfilment of undertakings arising from same etc. so that a full factual record on the issue of whether the Landlord is an owner under the *Construction Lien Act* could be developed. This procedure was and remains necessary to allow that the parties to crystallize the issue and evidence relating to same.

21. The Receiver now takes the position the matter is urgent and thus it is appropriate to deny the reasonable request of Fitzgibbon for an adjournment and move simply to summarily dismiss the claims of the Construction Lien Claimants as against the freehold interest in the premises in the absence of a complete factual record. The urgency expressed by the Receiver is of its own making and ought not to be considered a factor so as to prejudice the right of Fitzgibbon and the remaining Construction Lien Claimants to have an opportunity to respond fully to the substantial relief sought by the Receiver at this late stage.

Necessity of Adjournment to Permit Examinations, Full Disclosure Etc.

22. The Second and Third Supplement of the Receiver do not answer the question as to whether the Landlord is an owner for the purposes of the *Construction Lien Act*. To the contrary, the Second and Third Supplement of the Receiver highlight the necessity of examinations pursuant to Rule 39.03 of the *Rules of Civil Procedure* of David Moore and Al Hamilton and complete disclosure from the Landlord and Astoria for the following non-exhaustive list of reasons:

    a. the sworn evidence of Gregory DeMille, President of Fitzgibbon, is that David Moore represented to him that he was a partner in Astoria in the summer of 2015.

    Affidavit of Gregory DeMille sworn August 21, 2017 ("DeMille Affidavit").

    b. The Environmental Compliance Approvals (**"ECA"**) was issued to both the Landlord and Astoria as owners/operators of the Waste Disposal Site.

    DeMille Affidavit, Ex. E – H.

    c. The ECA for Air and Noise (ECA No. 0565-9WXGBY) for which the Landlord and Astoria jointly applied identifies that the Landlord and Astoria were companies operating as ***Astoria Organic Matters Canada LP***, the very entity for which Fitzgibbon issued invoices to. This is a critical piece of evidence showing the Landlord and Astoria were representing themselves as partners operating under the name "Astoria Organic Matters Canada LP." From this point on, there was a non-arm's length relationship between the Landlord and Astoria. Disclosure of and questioning on the application submitted jointly by the Landlord and Astoria is required.

    DeMille Affidavit, Ex. F at p 3 para 8.

    d. Al Hamilton refuted the statements outlined in the Receiver's Second Supplement concerning the Landlord's relationship to Astoria and/or the project.

    Second Supplement of Receiver.
    Third Supplement of Receiver.

e. The unsworn evidence of David Moore and Al Hamilton is hearsay and thus should be accorded little, if any, weight especially in light of the fact that Fitzgibbon and the remaining Construction Lien Claimants have been denied an opportunity to examine these individuals under oath.

f. The hearsay evidence attached as Appendix C of the Third Supplement of the Receiver (email correspondence of Al Hamilton dated August 22, 2017) makes clear that Al Hamilton takes the position there was some form of joint venture with the Landlord (the particulars of which must be elicited), that David Moore refused to amend the ECAs to remove him as owner/operator etc.

g. The Lease Agreement has not been disclosed by Astoria and/or the Receiver despite requests for same from Fitzgibbon, and same has been referred to by Al Hamilton as containing evidence of a joint venture between Astoria and the Landlord for which the Construction Lien Claimants have a right to examine and consider.

Third Supplement of Receiver.

h. The engineering designs have not been disclosed. The engineer designs apparently demonstrate a joint venture between the Landlord and Astoria.

Third Supplement of Receiver.

23. While Fitzgibbon does not dispute that the reports of the Receiver are recognized by the common law as being admissible evidence in a proceeding, the hearsay evidence contained therein (i.e. statements of David Moore and Al Hamilton) are inadmissible. At a minimum, any self-serving statements of David Moore and/or Al Hamilton ought not to be relied upon for the truth of their contents. The issue of whether the Landlord is an "owner" for the purposes of the *Construction Lien Act* is a contentious issue. Affidavits of David Moore and Al Hamilton are reasonably expected to permit cross-examination. As Justice Farley stated in *Bell Canada International Inc., Re,* [2003] O.J. No. 4738 at para 10:

> it is desirable to have an affidavit from someone in the moving party's camp if the matter is reasonably expected to be contentious. If a matter turns contentious, it may be necessary to provide such an affidavit before the hearing with sufficient time to cross examine on it if necessary or to adjourn the hearing to allow for same...

24. In light of the substantial relief sought by the Receiver in the form of a vesting Order wherein the Receiver is seeking to vest assets and encumbrances for which Astoria has no entitlement and the contentious factual/legal dispute in play, adjourning the motion to permit complete disclosure, examinations on affidavits of David Moore and Al Hamilton, fulfilment of undertakings arising from same etc. accords with both the reasonable expectations of the Court and common sense.

Substantive Issue

25. If the court is not prepared to grant an adjournment, Fitzgibbon submits the evidence before the Court demonstrates that the Landlord is an "owner" for the purposes of the *Construction Lien Act* and thus the lien as against the freehold interest in the premises ought not to be vested-off. At a minimum, Fitzgibbon submits there is a genuine issue for trial.

26. Prior to addressing the issue on whether the Landlord is an "owner" for the purposes of the *Construction Lien Act*, it is prudent to identify the scope of the condition for an Approval and Vesting order outlined in the Asset Purchase Agreement. Fitzgibbon submits the condition does not require BDO to move to discharge the Construction Lien Claims as against the freehold interest of the Premises.

Scope of Approval and Vesting Order Condition Under Agreement of Purchase and Sale

27. The Asset Purchase Agreement defines "Approval and Vesting Order" as:

> **"Approval and Vesting Order"** means an order of the Court substantially in the form attached hereto as **Exhibit A**: (I) approving the sale of the Purchased Assets by the Receiver to the Purchaser pursuant to the terms of this Agreement, and (ii) providing for the vesting of the right, title, benefit and interest of Astoria in and to the Purchased Assets in and to the Purchaser, free and clear of all liens, other than Permitted Encumbrances.

First Report of the Receiver dated August 16, 2017 ("First Report of Receiver"), Appendix H, p. 2.

28. "Purchased Assets" are defined as set out in Section 2.01 of the Asset Purchase Agreement which reads as follows:

> Upon and subject to the terms and conditions hereof, the Receiver will sell to the Purchaser and the Purchaser will purchase from the Receiver, as of and with effect from the Time of Closing, all of the right, title, benefit and interest of Astoria in and to the following assets (collectively, the "Purchased Assets"):
>
> a. the Land Lease;
>
> b. the MOECC ECA, to the extent transferable;
>
> c. the outstanding accounts receivable at the Time of Closing;
>
> d. all structures, erections, improvements, appurtenances and fixtures situate on or forming part of the Lands, other than the fixed machinery and fixed equipment referred to in Section 2.01(e) and other than the Equipment;

e. all fixed machinery and fixed equipment situate on or forming part of the Lands, other than the Equipment;

f. all Inventories;

g. subject to Sections 2.08 and 2.09(3), and to the extent not otherwise included in this Section 2.01, the Assigned Contracts;

h. all Intellectual Property owned by Astoria that was used in connected with the Purchased Assets;

i. all pre-paid expenses and deposits relating to the Purchased Assets (other than deposits paid to suppliers, Governmental Authorities or customers of Astoria) including all pre-paid Taxes, local improvement rates and charges, water rates and other operating costs, all pre-paid purchases of gas, oil and hydro, and all pre-paid lease payments;

j. any and all customer lists;

k. the Books and Records; and

l. the Equipment,

but excluding, for greater certainty, in each and every case the Excluded Assets (as hereinafter defined).

First Report of Receiver, Appendix H, s. 2.01.

29. The Purchased Assets do not include any right, title or interest in the freehold interest of the Premises. Neither the Receiver or Purchaser have any privity of contract for same. It is Fitzgibbon's position that a "carve-out" of the liens attaching to the freehold interest of the Premises from the Approval and Vesting Order is not only appropriate under the circumstances, but accords with the Asset Purchase Agreement.

Landlord is an Owner for the Purposes of the Construction Lien Act

Deemed Admission of Landlord

30. First and foremost, it is important to identify that the Landlord has been noted in default in the construction lien litigation commenced by Fitzgibbon (Court File No. CV-17-0022-00) and thus, has been deemed to admit the truth of the allegation that he is an owner for the purposes of the *Construction Lien Act*. The Landlord has not moved to set aside the noting in default.

DeMille Affidavit at para 9.

31. It is anticipated the Receiver will submit that the action as against the Landlord was stayed pursuant to the Appointment Order. This overlooks both the negotiation of the Appointment Order between counsel and, more importantly, the clear wording of the Order. The pertinent sections read as follows:

NO PROCEEDING AGAINST THE DEBTOR OR THE PROPERTY

9. THIS COURT ORDERS that no Proceeding against or in respect of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

10. THIS COURT ORDERS that all rights and remedies against the Debtors, the Receiver or affecting the Property, are hereby stayed except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (I) empower the Receiver or the Debtors to carry on any business which the Debtors is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to the health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, (iv) prevent the registration of a claim for lien, or (v) prevent the registration and perfection of the claim for lien of Ken Tulloch Construction Ltd., but for greater certainty, no further steps or proceeding shall be taken in the context of any such claim.

Appointment Order at paras 9 – 10.

32. "Debtor" and "Property" are defined in the Appointment Order as follows:

"Debtor" – Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP

Appointment Order at preamble.

"Property" – all of the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtors, including all proceeds thereof

Appointment Order at paragraph 2.

33. The term "Property" in the Appointment Order does not encompass any right, title or interest in the freehold estate. The term "Debtor", of course, does not include the Landlord. The stay does not apply to the action as against the Landlord for which the only issue to be determined by the Court is whether the Landlord is an "owner" for the purposes of the *Construction Lien Act*. The determination of this matter has nothing to do with the Property and/or the Debtor as defined in the Appointment Order. It was acknowledged by counsel for BDC during negotiations of the Appointment Order that the stay would not impair the right of Fitzgibbon to proceed with the action as against the Landlord.

34. If the Landlord disputes the allegation deemed to be admitted, he is entitled to move to set aside the noting in default in the construction lien litigation. He has not done so. Under the circumstances, this Court ought not to consider the issue as to whether the Landlord constitutes an owner under the *Construction Lien Act* as this issue of liability, absent an Order setting aside the noting in default within the construction lien litigation, will lead to duplicitous proceedings and/or inconsistent findings. As it stands, Fitzgibbon has proven its claim as against the Landlord. Under the circumstances, if this Court discharges the lien as against the freehold interest of Fitzgibbon it will eliminate Fitzgibbon's remedy and/or right to recover damages in the construction lien litigation.

35. Based on the fact the Landlord has been noted in default in the construction lien litigation, alone, this Court ought to dismiss relief sought by the Receiver. At a minimum, the motion of the Receiver ought to be adjourned to allow for a motion to set aside the noting in default of the Landlord, presuming the Landlord chooses to move for such a remedy.

Totality of Circumstances

36. In its Third Supplement, the Receiver takes the position that statements obtained by David Moore and Al Hamilton make it clear that the Landlord is not an owner for the purposes of the *Construction Lien Act*. The Receiver goes further to state that:

> if the Landlord had made a request to the Lien Claimants for the improvements that gave rise to their liens, then the Receiver presumes that the Lien Claimants would have evidence of such a request, and not need to conduct examinations in an attempt to uncover such evidence.
>
> **Third Report of the Receiver at para 3.0.2.**

37. This statement of the Receiver is problematic for a number of reasons not the least of which is that it ignores the law concerning the test of an "owner" under the *Construction Lien Act*. As will be outlined below, various actions by a landlord that do not individually satisfy parts of the "owner" test, when taken together, may be sufficient to render the landlord an owner. In *Parkland Plumbing & Heating Ltd. v Minaki Lodge Resort 2002 Inc. ("Parkland Plumbing")*, the Ontario Court of Appeal held that the absence of a direct dealing between the landlord and supplier and/or contractor is only one factor to consider. A request for work to be done may be inferred from the totality of the circumstances.

***Parkland Plumbing* at para 67.**

38. Contrary to the case law on the "owner" issue, the Receiver wants to focus solely on the fact that a Section 19 notice was not delivered by Fitzgibbon and hearsay of David Moore and/or Al Hamilton in support of its position that the Landlord is not an "owner" for the purposes of the *Construction Lien Act*.

39. The sworn Affidavit evidence of Greg DeMille provides that David Moore advised he was a partner in Astoria. Mr. Moore asserted that he was in charge of the "MOE Permits", or more specifically, the ECAs required for the design and construction of the Waste Disposal Site. The ECAs and other facts corroborate the evidence of Mr. DeMille:

a. All of the ECAs were issued to both the Landlord and Astoria in their roles as owners and operators of the Waste Disposal Site.

DeMille Affidavit, Ex. E – H.

b. ECA No. 0031-7UTRSS issued (and later amended November 2016) makes it clear that the Landlord is an owner of the project:

i. Clause 3 of the ECA provides:

> Except as otherwise provided by this ECA, the Site shall be designed, developed, built, operated and maintained in accordance with the application for this ECA dated February 19, 2014, and signed by David N. Moore, President, 1684567 Ontario Inc. and the supporting documentation listed in the attached Schedule "A"

DeMille Affidavit, Ex. E at s.3.

c. The site was to be designed, developed, built and operated in accordance with the parameters set by the Landlord.

d. The ECA for Air and Noise (ECA No. 0565-9WXGBY) for which the Landlord and Astoria jointly applied identifies that the Landlord and Astoria were companies operating as ***Astoria Organic Matters Canada LP***, which is the entity for which the Construction Lien Claimants delivered invoices to.

DeMille Affidavit, Ex. F at p.3 para 8.

e. Fitzgibbon commenced work after Mr. DeMille's discussion with David Moore, ECAs were issued identifying the partnership of the Landlord and Astoria, expressions of a partnership in public forums were made and reported on etc.

f. The Landlord at no time took steps to remove himself as an owner and/or operator from the project on the issued ECAs. In fact, the Landlord refused to consent to any such change.

g. The Landlord actively participated in public meetings and identified itself as a partner of Astoria in the development and construction of the Waste Disposal Site.

Third Supplement of the Receiver.

h. The Landlord never took steps to dissociate itself from the project and/or Astoria at any time and/or dispute any public record of his partnership or the expressions of the partnership on Astoria's website.

i. Al Hamilton on behalf of Astoria has refuted the statements that Mr. Moore was not a partner of Astoria.

40. The Landlord refutes the evidence of Mr. DeMille but has failed to even file an Affidavit to make itself available for cross-examination. The Landlord has not defended the construction lien action commenced against it by Fitzgibbon, has been noted in default and thus is deemed to admit the allegations that he is an owner for the purposes of the *Construction Lien Act*. Neither the Receiver, nor the Landlord or any other party has sought to cross-examine Mr. DeMille on his Affidavit. The evidence of Mr. DeMille is admissible for the truth of its contents. It certainly must be given more weight than the hearsay and self-serving evidence of the Landlord.

41. As Justice Fragomeni stated in *Muzzo Brothers Ltd. v Cadillac Fairview Corp. ("Muzzo Brothers")*, 1981 CarswellOnt 529 at para 38:

> In determining whether a person comes with the definition of owner, the substance and not merely the form of the relationship between the parties must be considered. A request to have work performed may be inferred from a consideration of all the circumstances in the absence of direct dealings between the parties.

Muzzo Brothers at para 38.

42. The relationship between the Landlord and Astoria was not arm's length. To the contrary, the Landlord and Astoria were partners and operated under the name of Astoria Organic Matters Canada LP. Fitzgibbon submits that the evidentiary record before the Court supports a finding that the Landlord is an "owner" for the purposes of the *Construction Lien Act*. At the very least, there is a genuine issue requiring trial with respect to the validity of the Construction Lien Claims against the freehold interest of the Premises.

Whether the Landlord is an "Owner" Constitutes a Genuine Issue for Trial

43. Rule 20.04(2)(a) of the *Rules of Civil Procedure* states:

> The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence

***Rules of Civil Procedure,* R.R.O. 1990, Reg. 194 at Rule 20.04(2),**

44. The Supreme Court of Canada in *Hryniak v. Mauldin* held that "a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial."

***Hryniak v. Mauldin,* 2014 SCC 7 at para. 4, Fitzgibbon Book of Authorities at TAB 4.**

45. Where there are genuine issues for trial and the court concludes that employing the enhanced forensic tools of the summary judgment procedure would not lead to a fair and just determination of the merits, the court should not decide the matter summarily.

***Mitusev v. General Motors Corp.*, 2014 ONSC 2342 (Ont. S.C.J.) at paras 78 – 80, Fitzgibbon Book of Authorities at TAB 5.**

46. There are contentious factual issues in dispute for which there has been non-disclosure of pertinent documents and refusals to submit from the very parties who can elaborate on this contentious factual dispute to examination. For example:

a. Neither the Landlord, the Debtor nor the Receiver have produced the Applications for any of the ECAs, which would have valuable information concerning the representations of the partnership;

b. Despite requests of Fitzgibbon, neither the Debtor nor the Receiver has disclosed the Lease Agreement to the Construction Liem Claimants but rely upon terms contained therein to state the Landlord is not an "owner" for the purposes of the *Construction Lien Act*;

c. the engineering plans and specifications for which the parties could further discern the role of the Landlord in the project and construction of same have not been produced;

d. Al Hamilton submits there was at least some form of joint venture between the Landlord and Astoria and the Receiver has denied the reasonable request of Fitzgibbon to allow for an opportunity to examine Mr. Hamilton on this matter;

e. David Moore admits he represented himself as a partner of Astoria at public meetings, in media posts of Astoria etc. and the Receiver has denied the reasonable request of Fitzgibbon to allow for an opportunity to examine Mr. Moore on this matter etc.

47. In this case the enhanced forensic tools of the summary judgment procedure would not lead to a fair and just determination of the merits and thus, the relief sought by the Receiver in the form of a summary dismissal of the Construction Lien Claims as against the freehold interest ought to be denied.

Summary

48. It would be inequitable to allow the Landlord to avoid its statutory obligation, especially in light of its deemed admission as being an owner for the purposes of the *Construction Lien Act*, on the basis of a summary judgment motion wherein there is no ability to make the necessary findings of fact so as to allow for a just determination of this contentious dispute. A proper trial or summary judgment motion on advance notice with a timetable set for productions, examinations etc. on the issue of whether the Landlord is an "owner" is required.

PART V: RELIEF REQUESTED

49. an Order in the form of a declaration that the Landlord is an "owner" for the purposes of the *Construction Lien Act*;

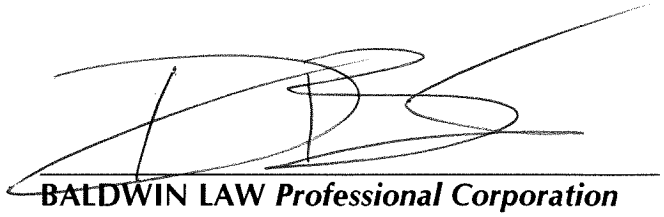
50. in the alternative, an Order dismissing the Receiver's motion for summary judgment on the issue of the whether the Landlord is an "owner" for the purposes of the *Construction Lien Act*;

51. in the further alternative, an Order granting the request of Fitzgibbon for an adjournment of the Receiver's motion for summary judgment with a timetable to be set for examinations, disclosure of documents and a mutually agreeable return date;

52. costs of the motion; and

53. such further and other relief as counsel may advise and this Honourable Court consider.

All of which is respectfully submitted this 23rd day of August, 2017.



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SCHEDULE "A" - List of Statutes and Regulations

1. Construction Lien Act, R.S.O. 1990 c. C.30

2. Consolidated Practice Direction Concerning the Commercial List

3. Rules of Civil Procedure, R.R.O. 1990, Reg. 194

SCHEDULE "B" - List of Authorities

1. *Bell Canada International Inc., Re*, [2003] O.J. No. 4738
2. *Parkland Plumbing & Heating Ltd. v Minaki Lodge Resort 2002 Inc.*, 2009 ONCA 256
3. *Muzzo Brothers Ltd. v Cadillac Fairview Corp.* 1981 CarswellOnt 529
4. *Hryniak v. Mauldin*, 2014 SCC 7
5. *Mitusev v. General Motors Corp.*, 2014 ONSC 2342 (Ont. S.C.J.)