

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N :

DUCA FINANCIAL SERVICES CREDIT LTD.

Applicant

- and -

2203824 ONTARIO INC.

Respondent

**FACTUM
OF THE RECEIVER, MSI SPERGEL INC.**

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FACTUM OF THE RECEIVER, MSI SPERGEL INC.

PART I: OVERVIEW

1. msi Spergel Inc. (“Spergel”), in its capacity as the court appointed receiver (the “Receiver”) of all of the assets, undertakings and properties of 2203284 Ontario Inc. (the “Debtor”), seeks an order authorizing the Receiver to complete the sale of the property known municipally as 98 James Street South, Hamilton, Ontario (the “Property”) and vesting in the purchaser, Hue Developments & Investments Canada Inc., all right, title and interest in the Property, free and clear of any claims and encumbrances (the “Transaction”).

2. The Receiver also seeks an order:

- (a) sealing the Confidential Appendices as set out in the First Report;
- (b) authorizing and approving a distribution by the Receiver to DUCA Financial Services Credit Ltd., from the anticipated sale proceed of the Transaction;
- (c) discharging the Construction Lien and Certificate registered by McCallum Sather Architects Inc.;
- (d) authorizing and approving a Deposit Claims Procedure subject to the completion of the Transaction;

- (e) authorizing and directing the Receiver to make distributions to unit purchasers in respect of their proven deposit claims;
- (f) approving and authorizing the Deposit Payment Protocol which forms part of the Deposit Claims Procedure Order;
- (g) requiring Lawrence Zimmerman aka Larry Zimmerman and Zimmerman Associates to pay \$10,500 to the Receiver with respect to funds received from the Debtor subsequent to the issuance of the Receivership Order;
- (h) requiring Luigi Santaguida to attend an examination before the Receiver; and
- (i) requiring Marylou Santaguida to attend an examination before the Receiver.

PART II: THE FACTS

Overview

3. The Debtor is the registered owner of Property which was to be developed as a condominium project. The sole director, president, and secretary of the Debtor is Luigi Santaguida also known as Louie Santaguida (“Santaguida”).

First Report of the Receiver, May 3, 2018, paras 3, 4, 5 , Motion Record, Tab 2 (the “Report”)

4. DUCA Financial Services Credit Union Ltd., was the operating lender of the Debtor (“DUCA”).

The Report, para 2

5. The Debtor obtained conditional site plan approval from the City of Hamilton to construct a 30 storey residential condominium project consisting of 259 units, known as The Connolly (the “Project”). The construction of the Project has not commenced.

The Report, para 5

6. Sale to unit purchasers of the Project commenced in November 2014 and by the date of the Receivership Order, 195 units were sold pursuant to Agreements of Purchas and Sale (the “Prebuild Agreements”). The deposits with respect to those Prebuild Agreements (the “Deposits”) are held in trust by the law firm Schneider Ruggiero LLP (“SR Law”).

The Report, para 6

7. On June 22, 2017, on application by DUCA, the Court granted an order appointing Spergel as Receiver over the assets, undertakings and properties of the Debtor (the "Receivership Order").

The Report, para 1

8. On the date of the Receivership Order, the Receiver attended at the Property and secured access to the property. The Receiver also obtained liability insurance for the Property and has been undertaking regular site inspections and property maintenance.

The Report, para 12

9. The Receiver attempted to retrieve the books and records of the Debtor but was unsuccessful in obtaining access to the office premises. The Receiver attempted to contact Santaguida via phone and e-mail but Santaguida did not respond. The Receiver also attempted to contact Santaguida, through his lawyer, Lawrence Zimmerman ("Zimmerman"), which also proved unsuccessful.

The Report, para 13

10. The Receiver also contacted SR Law with respect to obtaining access to its records with respect to the Prebuild Agreements. SR Law refused to release any documents until its outstanding accounts were paid.

The Report, para 15

11. As a result of these difficulties, the Receiver obtained the Order of Justice Conway dated July 21, 2017, which, among other things, provided for the following:

- a) That the Tenant, landlord and property manager, provide the Receiver with access to the Office Premises;
- b) That Santaguida, Zimmerman, George Ruggiero and SR Law comply with the Receivership Order and in particular forthwith:
 - i. advise the Receiver of the existence and location of all property and information it has in respect of the Debtor
 - ii. provide full access to property within their possession, power or control; and

- iii. permit the Receiver to remove property or, at its option and where possible, to make copies thereof.
- c) George Ruggiero and SR Law were also ordered to forthwith provide detailed information in electronic form on the deposits held by SR Law in respect of the condominium project.
- d) Santaguida, Zimmerman and SR Law were each order to pay costs to the Receiver in the sum of \$1,000 within 30 days.

The Report, para 16-17

Santerra and Marylou

12. On July 25, 2017, the Debtor's bookkeeper contacted the Receiver and provided certain accounting information consisting of Quick books, bank reconciliations and financial statements. No supporting documentation for any of the financial transactions was provided.

The Report, para 20

13. A review of the Debtor's financial information revealed that immediately upon receipt of the mortgage funds from DUCA on July 8, 2015 in the amount of \$5,000,000, the Debtor transferred \$2,581,543.11 to Santerra Asset Management and Development Inc. ("Santerra"). Marylou Santaguida, is the sole officer and director of Santerra ("Marylou"). Marylou is the spouse of Santaguida.

The Report, para 24

14. On September 30, 2015, the Debtor issued a cheque in the amount of \$1,130,000.00 to Santerra. Several other transactions evidence advances made by the Debtor to Santerra for a total of \$3,457,025.19.

The Report, para 24

15. Marylou has also registered fourth and fifth position mortgages against the Property in the amount of \$1,500,000.00 and \$701,583.00 respectively. Neither of these mortgage liabilities were reflected in the financial records provided by the Debtor.

The Report, para 27

16. The Receiver has attempted to obtain further information from Santerra and Marylou with respect to the advances made by the Debtor to Santerra and the mortgages held by Marylou. To date, the Receiver has not received a response.

The Report, para 28

Return of \$10,500.00

17. The Receiver discovered that a cheque from the Debtor's Bank of Montreal account had been written to Zimmerman in the amount of \$10,500 and had been deposited by Zimmerman on July 25, 2017. The cheque was dated June 15, 2017. Zimmerman was aware of the receivership proceedings by July 25, 2017.

The Report, para 33

18. On August 23, 2017, the Receiver wrote to Zimmerman and requested the return of funds in the amount of \$10,500.00. To date, Zimmerman has not returned the funds.

The Report, para 34

Project Development and Site Plan Status

19. On May 23, 2017, the City of Hamilton extended the Conditional Site Plan Approval date to May 25, 2018. On March 13, 2018, the Receiver advised the City of Hamilton that it had entered into an agreement of purchase and sale with Hue and requested for a further one year extension of the Conditional Site Plan Approval. The Receiver is currently awaiting approval from the City of Hamilton.

The Report, para 37-39

Sales Process

20. The Receiver requested marketing proposals from Colliers International and CBRE Limited's Land Services Group ("CBRE"). On July 31, 2017, the Receiver listed the Property for sale with CBRE.

The Report, para 42-43

21. The Receiver prepared a proposed agreement of purchase and sale. The Receiver along with CBRE also prepared a confidentiality agreement. All prospective purchasers were

vetted by CBRE and required to sign confidentiality agreements. The deadline for submission of offers was September 15, 2017.

The Report, para 44

22. CBRE provided the Receiver with weekly marketing reporting letter. CBRE's marketing efforts include but are not limited to, advertisements in Novae Res Urbis, Globe and Mail, and the Hamilton Spectator, personalized letters and brochures were mailed to 770 potential buyers, email campaign blasts, emails to an industry specific group. CBRE received 31 direct inquiries requesting further information as a result of its marketing program.

The Report, para 45

23. Four offers were submitted by the deadline of September 15, 2017. On September 20, 2017, the Receiver held a conference call with representatives of DUCA and the second mortgagee, The Guarantee Company of North America ("Guarantee Co."), to discuss the four offers. Both DUCA and Guarantee Co. supported the acceptance of the offer received from Lifestyle Custom Homes Inc. ("Lifestyle").

The Report, para 46, 48

24. On September 28, 2017, the Receiver entered into a final agreement of purchase and sale with Lifestyle (the "Lifestyle APS"). The Lifestyle APS did not close and was terminated.

The Report, para 49-50

25. On December 20, 2017, the Receiver amended its listing agreement with CBRE such that the Property was listed at an offering price of \$9,900,000.00.

The Report, para 51

26. On January 19, 2018, the Receiver was presented with an offer from Hue Developments & Investments Canada Inc. ("Hue"), which the Receiver understands is partnering with Lifestyle in respect of the development of the Property.

The Report, para 55

27. On February 12, 2018, the Receiver entered into an unconditional APS with Hue, the closing date for which is 113 days following the execution of the APS, namely June 5, 2018,

subject to the Receiver obtaining an Approval and Vesting Order (the “Hue APS”). The Hue APS requires the Receiver to terminate all of the Prebuild Agreements prior to or upon closing of the transaction.

The Report, para 56

28. The Receiver is of the view that the sale process was conducted in a commercially reasonable manner and that the market was extensively canvassed, both domestically and internationally.

The Report, para 58

29. The Hue APS contained the highest purchase price and the best offer attainable for the Property.

The Report, para 62

30. If the Transaction with Hue does not close, the Receiver is of the view that efforts to re-market the Property would be impaired if any of the Confidential Appendices are made public at this time.

The Report, para 67

Prebuild Agreements, Deposits and the Deposit Claims Procedure

31. On March 6, 2018, the Receiver sent notice to each of the unit purchasers to advise them of the acceptance of the Hue APS and of the Receiver’s intention to seek Court approval of the sale of the Property to Hue.

The Report, para 69

32. The Guarantee Co. provided deposit insurance policies to the Debtor. Upon termination of a Prebuild Agreement, the purchaser may be entitled to claim the recovery of the Deposit. Upon payment of such a claim by the Guarantee Co., the Guarantee Co., would have a subrogated claim against the Debtor and the subrogated claims are secured by the second mortgage registered against the Property.

The Report, para 75-77

33. The Deposit Claims Procedure is necessary to enable the Receiver in conjunction with the Guarantee Co., to determine proven Deposit claims and to facilitate the return of

Deposits to purchasers and to assist the Receiver and the Guarantee Co. in quantifying the Guarantee Co.'s secured claim.

The Report, para 79

34. The Claims Deposit Procedure includes a proposed payment protocol.

The Report, para 86

35. In response to the Order of Justice Conway, SR Law provided detailed information on the Prebuild Agreements and the Deposits that it was holding in trust. The Receiver conducted a thorough review of each Prebuild Agreement and reconciled the deposit requirements to the Deposits held in trust by SR Law.

The Report, para 41

36. As at April 30, 2018, the balance of the funds held in trust by SR Law was \$6,314,885.81 including interest. SR Law refuses to deliver the Deposits to the Receiver on the basis of its unpaid accounts.

The Report, para 42

Secured Creditors

37. DUCA has a first priority security interest in the Property, followed by the collateral mortgage of Guarantee Co., which is contingent in nature. The Deposits held in trust by SR Law are anticipated to cover the amount in full that is required to discharge the mortgage in favour of Guarantee Co.

The Report, para 89-90

38. The third mortgage is registered in favour of Diversified, which is a collateral mortgage securing the indebtedness owed to it by a party related to the Debtor, namely Terrasan 327 Royal York Rd. Limited. At this time, the Receiver is unaware of the amount that will ultimately be owing pursuant to this mortgage.

The Report, para 91

39. The fourth mortgage and fifth mortgage are registered in favour of Marylou. The Receiver requires further information of these mortgages to determine their validity.

The Report, para 92

Construction Lien

40. On August 24, 2017, McCallum Sather Architects Inc. (“McCallum”), registered a Construction Lien against the Property as instrument no. WE1231330 and on October 10, 2017 registered a Certificate as instrument no. WE1242330.

The Report, para 93

41. According to McCallum, it last supplied services to the Property on July 11, 2017.

The Report, para 94

42. The last day to register the Certificate perfecting the preserved lien in accordance with the *Construction Lien Act*, R.S.O. 1990, c. C30 (the “CLA”) is October 9, 2017. By failing to perfect the Construction Lien in accordance with the CLA the Receiver is entitled obtain an order to discharge the Construction Lien and the Certificate.

The Report, para 95

Interim Distribution

43. As of June 5, 2018, DUCA is owed \$5,590,401.19 inclusive of interest, with interest accruing at \$897.98 per diem.

The Report, para 99

44. If the sale to Hue is completed, the Receiver will have sufficient funds to repay the indebtedness owing to DUCA in full.

The Report, para 100

PART III: ISSUES AND THE LAW

The Issues

45. The following are the issues before this Honourable Court:

- (a) whether to approve the Hue APS and grant the approval and vesting order;
- (b) whether to seal the Confidential Appendices from public record;
- (c) whether to authorize and approve the interim distribution to DUCA;

- (d) whether to discharge the Construction Lien and Certificate of McCallum;
- (e) whether to authorize and approve the claims procedure and payment process;
- (f) whether to require Zimmerman to pay \$10,500 to the Receiver;
- (g) whether to require Santaguida to attend an examination before the Receiver; and
- (h) whether to require Marylou to attend an examination before the Receiver;

The Law

Approval of Sale and Vesting Order

46. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 100

47. In *Royal Bank of Canada v. Soundair Corp*, the Ontario Court of Appeal accepted that a court should consider the following issues in examining a proposed sale of assets by a receiver:

- (a) whether the receiver has made a sufficient effort to obtain the best price and has not acted improvidently;
- (b) the interest of all parties;
- (c) the efficacy and integrity of the process by which the offers are obtained; and
- (d) whether there has been unfairness in the working out of the process.

Royal Bank of Canada v. Soundair Corp., 1991 Canlii 2727 (ON CA)

48. The Court will grant deference to the opinion of the Receiver with respect to the sale.

Royal Bank of Canada v. Soundair Corp., 1991 Canlii 2727 (ON CA)

49. For the reasons set out in the First Report of the Receiver, Receiver recommends that this Honourable Court approve the Hue APS.

Sealing Order

50. A court may order any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 137(2)

51. The Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)* set out the principles when a sealing order should be granted, they are as follows:

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the rights of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 SCR 522, 2002 SCC 41 (CanLii), para. 53

52. The disclosure of the Confidential Appendices could undermine the integrity of the sale process if the Hue APS is not approved, accordingly the salutary effects far outweigh and deleterious effects.

53. Accordingly, the Receiver submits that the Confidential Appendices ought to be subject to a sealing order.

Discharge of Construction Lien

54. The lien of a contractor for services or materials supplied to an improvement where there is no certification or declaration of substantial performance of the contract or for services or materials supplied to the improvement after the date certified or declared to be the date of substantial performance, expires at the conclusion of the forty-five day period next following the occurrence of the earlier of (a) the date the contract is completed and (b) the date the contract is abandoned.

Construction Lien Act, R.S.O. 1990, c. C30, section 31(2)(b)

55. In order to preserve its Construction Lien in accordance with the CLA, McCallum was required to register its lien, 45 days following July 11, 2017, namely August 25, 2017. McCallum registered its Construction Lien on August 24, 2017.

56. A preserved lien expires unless it is perfected prior to the end of the 45 day period next following the last day to preserve its lien, namely October 9, 2017.

Construction Lien Act, R.S.O. 1990, c. C30, section 36(2)

57. McCallum registered the Certificate on October 10, 2017, accordingly, the Construction Lien was not perfected in accordance with the CLA.

58. Where a lien that attaches to the premises is not preserved or is not perfected within the time allowed for doing so under section 31 and 36, the court upon:

- (a) the motion of any person without notice to any other person,
- (b) proof that the lien has not been preserved or perfected within the time allowed; and
- (c) production of (i) a certificate of search under the Land Titles Act; or (ii) a registrars abstract under the Registry Act, together with a certified copy of the claim for line, shall declare that the lien has expired and other the registration of the claim for lien be vacated.

Construction Lien Act, R.S.O. 1990, c. C30, section 45(1)

59. The time limits set out in the CLA are prescribed by statute and leave no room for judicial discretion.

Delview Construction Ltd. v. Meringolo, 71 O.R (3d) 1, ONCA, para 11

60. The Receiver submits that the Construction Lien and Certificate of McCallum ought to be discharged from title.

Delivery of Deposits

61. When a client discharges a lawyer without just cause, the lawyer may exercise a lien for fees over the documents in his or her possession and the lawyer may retain the file

material until he or she is paid, subject to the courts jurisdiction to interfere with the exercise of the lien, without actually nullifying it, to protect the interest of third parties.

Thomas Gold Pettinghill LLP v. Ani-Wall Concrete Forming Inc., 2012 ONSC 2182 (CanLii), para. 82

62. Pursuant to s. 34 (1) of the *Solicitors Act*, R.S.O. 1990, c S.15, a lawyer has a right to a charging order to encumber any property recovered or preserved by the instrumentality of the lawyer in the proceeding.

Solicitors Act, R.S.O. 1990, c. S. 15, s. 34(1)

63. In a situation where funds held by a solicitor's client are subject to a trust in favour of third parties, such as contractors under the CLA, the charging order would not be applicable to such fund.

Budinsky v. The Breakers East Inc., 1993 canlii 5442 (ONSC)

64. In the present case, SR Law refuses to deliver deposits ,it is holding in trust for the Debtor, to the Receiver as a result of its unpaid account. However, there is no evidence to suggest that SR Law was discharged by the Debtor without cause as is required for a solicitor's lien.

65. Furthermore, SR Law did not play any role in the recovery or preservation of the Deposits as is required under s.34 of the *Solicitors Act*. The Deposits were being held by SR Law in the ordinary course until the completion of the Prebuild Agreements. Accordingly, SR Law did not have any involvement in the recovery or preservation of the Deposits.

66. Even if SR Law is entitled to a solicitor's lien, the court should exercise its jurisdiction to interfere with the exercise of the lien to protect the unit purchasers, who are entitled to the return of their deposits upon termination of the Prebuild Agreements.

67. Lastly, the deposits held by SR Law monies held in trust for a third party, ie the unit purchasers, accordingly even if SR Law obtained a charging order, same would not be applicable to the Deposits.

Return of \$10,500

68. Upon the appointment of the Receiver, the Receiver was given exclusive control over the assets of the Debtor.

69. The cheque in the amount of \$10,500.00 was deposited by Zimmerman on July 25, 2017, well after Zimmerman was made aware of the receivership proceedings, and after the Receivership Order and the Order Justice Conway dated July 21, 2017.

Examination of Marylou and Santaguida

70. A court-appointed receiver derives its powers and authority wholly from the order of the court appointing it.

Royal Trust Co. v. Montex Apparel Industries Ltd. (1972), 17 C.B.R. (N.S) 45 (Ont. C.A)

71. Pursuant to paragraph 5 the Receivership Order, all current directors and all individuals and corporations having notice of the Receivership Order, shall forthwith advise the Receiver of the existence of any Property in such person's possession and control, shall grant immediate and continued access to the Property to the Receiver and shall deliver all such Property to the Receiver upon the Receiver's request.

72. Pursuant to paragraph 6 of the Receivership Order, all persons and corporations having notice of the Receivership Order shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records and any other papers, records, and information of any kind related to the business or affairs of the Debtor.

73. The Order of Justice Conway dated July 21, 2017, further reiterated that Santaguida was to comply with the Receivership Order, in particular as it relates to paragraph 5.

74. To date, Santaguida has been uncooperative.

75. By virtue of being a mortgagee of the Property, Marylou has information and documents related to the business of the Debtor, but to date has failed to cooperate with the Receiver.

PART IV: RELIEF SOUGHT

76. Given the foregoing, the Receiver respectfully requests an Order(s) in the form contained in the Receiver's Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of May, 2018



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SCHEDULE “A”

LIST OF AUTHORITIES

1. *Royal Bank of Canada v. Soundair Corp.*, 1991 Canlii 2727 (ON CA)
2. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 SCR 522, 2002 SCC 41 (CanLii)
3. *Delview Construction Ltd. v. Meringolo*, 71 O.R (3d) 1, ONCA
4. *Thomas Gold Pettinghill LLP v. Ani-Wall Concrete Forming Inc.*, 2012 ONSC 2182 (CanLii)
5. *Budinsky v. The Breakers East Inc.*, 1993 canlii 5442 (ONSC)
6. *Royal Trust Co. v. Montex Apparel Industries Ltd. (1972)*, 17 C.B.R. (N.S) 45 (Ont. C.A)

SCHEDULE "B"

STATUTES AND REGULATIONS

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 100

Vesting orders

100 A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed. R.S.O. 1990, c. C.43, s. 100.

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 137(2)

Procedural matters

Commencement

137.2 (1) A motion to dismiss a proceeding under section 137.1 shall be made in accordance with the rules of court, subject to the rules set out in this section, and may be made at any time after the proceeding has commenced. 2015, c. 23, s. 3.

Motion to be heard within 60 days

(2) A motion under section 137.1 shall be heard no later than 60 days after notice of the motion is filed with the court. 2015, c. 23, s. 3.

Hearing date to be obtained in advance

(3) The moving party shall obtain the hearing date for the motion from the court before notice of the motion is served. 2015, c. 23, s. 3.

Limit on cross-examinations

(4) Subject to subsection (5), cross-examination on any documentary evidence filed by the parties shall not exceed a total of seven hours for all plaintiffs in the proceeding and seven hours for all defendants. 2015, c. 23, s. 3.

Same, extension of time

(5) A judge may extend the time permitted for cross-examination on documentary evidence if it is necessary to do so in the interests of justice. 2015, c. 23, s. 3.

Construction Lien Act, R.S.O. 1990, c. C30, section 31(2)(b)

Contractor's liens

(2) Subject to subsection (4), the lien of a contractor,

- (a) for services or materials supplied to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the forty-five-day period next following the occurrence of the earlier of,

Note: On July 1, 2018, the day named by proclamation of the Lieutenant Governor, clause 31 (2) (a) of the Act is amended by striking out "forty-five" in the portion before subclause (i) and substituting "60". (See: 2017, c. 24, s. 26 (1))

- (i) the date on which a copy of the certificate or declaration of the substantial performance of the contract is published as provided in section 32, and
- (ii) the date the contract is completed or abandoned; and

Note: On July 1, 2018, the day named by proclamation of the Lieutenant Governor, subclause 31 (2) (a) (ii) of the Act is amended by striking out “completed or abandoned” and substituting “completed, abandoned or terminated”. (See: 2017, c. 24, s. 26 (2))

(b) for services or materials supplied to the improvement where there is no certification or declaration of the substantial performance of the contract, or for services or materials supplied to the improvement after the date certified or declared to be the date of substantial performance, expires at the conclusion of the forty-five-day period next following the occurrence of the earlier of, Note: On July 1, 2018, the day named by proclamation of the Lieutenant Governor, clause 31 (2) (b) of the Act is amended by striking out “forty-five” in the portion before subclause (i) and substituting “60”. (See: 2017, c. 24, s. 26 (3))

(i) the date the contract is completed, and

(ii) the date the contract is abandoned. R.S.O. 1990, c. C.30, s. 31 (2); 2017, c. 24, s. 26 (4), 66.

Note: On July 1, 2018, the day named by proclamation of the Lieutenant Governor, subclause 31 (2) (b) (ii) of the Act is amended by adding “or terminated” at the end. (See: 2017, c. 24, s. 26 (5))

Note: On July 1, 2018, the day named by proclamation of the Lieutenant Governor, section 31 of the Act is amended by adding the following subsection: (See: 2017, c. 24, s. 26 (6))

Construction Lien Act, R.S.O. 1990, c. C30, section 36(2)

Expiry of preserved lien

36(2) A lien that has been preserved expires unless it is perfected prior to the end of the forty-five-day period next following the last day, under section 31, on which the lien could have been preserved. R.S.O. 1990, c. C.30, s. 36 (2).

Note: On July 1, 2018, the day named by proclamation of the Lieutenant Governor, subsection 36 (2) of the Act is amended by striking out “forty-five” and substituting “90”. (See: 2017, c. 24, s. 31 (1))

Construction Lien Act, R.S.O. 1990, c. C30, section 45(1)

Declaration by court that preserved lien has expired

45 (1) Where a lien that attaches to the premises is not preserved or is not perfected within the time allowed for doing so under section 31 or 36, the court upon,

- (a) the motion of any person without notice to any other person;
- (b) proof that the lien has not been preserved or perfected within the time allowed; and
- (c) production of,
 - (i) a certificate of search under the *Land Titles Act*, or
 - (ii) a registrar’s abstract under the *Registry Act*,

together with a certified copy of the claim for lien,

shall declare that the lien has expired and order that the registration of the claim for lien be vacated. R.S.O. 1990, c. C.30, s. 45 (1); 2017, c. 24, s. 63, 70.

Solicitors Act, R.S.O. 1990, c. S. 15, s. 34(1)

Charge on property for costs

34 (1) Where a solicitor has been employed to prosecute or defend a proceeding in the Superior Court of Justice, the court may, on motion, declare the solicitor to be entitled to a charge on the property recovered or preserved through the instrumentality of the solicitor for the solicitor's fees, costs, charges and disbursements in the proceeding. R.S.O. 1990, c. S.15, s. 34 (1); 2006, c. 19, Sched. C, s. 1 (1).

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and

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Respondent

Court File No.: CV-17-11827-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding commenced at

TORONTO

**FACTUM
OF THE RECEIVER, MSI SPERGEL INC.**

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