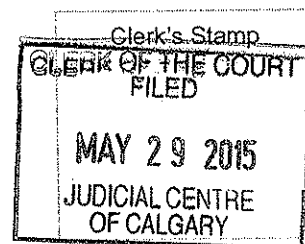


COURT FILE NUMBER 1201 - 05843  
COURT COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL CENTRE CALGARY



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

AND IN THE MATTER OF UBG BUILDERS INC., ALBERTA BUILDERS CAPITAL INC., ALPINE HOMES (2006) INC., AMERICAN BUILDERS CAPITAL (US) INC., EDGEWATER AT GRIESBACH INC., ELITE HOMES (2006) LTD., EVOLUTION BY GREENBORO INC., GREENBORO COMMUNITIES (2006) INC., GREENBORO ESTATE HOMES (2006) LTD., GREENBORO HOMES (2006) LTD., GREENBORO LUXURY HOMES INC., HIGH POINTE INC., MOUNTAINEERS VILLAGE (2006) INC., MOUNTAINEERS VILAGE II INC., ORIGINS AT CRANSTON INC., SOUTH TERWILLEGAR VILLAGE INC., THE BRIDGES MANAGEMENT INC., THE LEDGES INC., TIMBERLINE LODGES (2006) INC., TODAY'S COMMUNITIES (2006) INC., TODAY'S HOMES (2006) INC., TUSCANY DEVELOPMENTS (2006) INC., UBG ALBERTA BUILDERS (2006) INC., UBG ALPINE HOMES (2006) INC., UBG COMMERCIAL INC., UBG LAND INC., UBG LOT DEPOSIT CORP., UBG 4500 CALGARY INC, UBG 75 CANMORE INC., UBG 808 CALGARY INC., UNITY INVESTMENT (2012) INC., VALMONT AT ASPEN STONE INC., VALOUR PARK AT CURRIE INC., VILLAGE AT THE HAMPTONS INC., VILLAGE ON THE PARK INC., WILDERNESS HOMES BY RIVERDALE INC., WILDERNESS RIDGE AT STEWART CREEK INC.

APPLICANT: SQUARE FOOT REAL ESTATE CORPORATION  
RESPONDENTS: VALMONT AT ASPEN STONE INC. and VALMONT AT ASPEN STONE LIMITED PARTNERSHIP

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DOCUMENT: **Written Submissions of the Applicant,  
Square Foot Real Estate Corporation  
Commercial Court "Special"  
Wednesday, June 3, 2015 at 10:00 am**

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**PART ONE: INTRODUCTION**

1. These submissions are respectfully made to the Honourable Commercial Court for purposes of the "Special" to be heard on Wednesday, June 3, 2015, at 10:00am.

**PART TWO: BRIEF STATEMENT OF THE ISSUES**

2. It is respectfully submitted that this Application raises four distinct issues:
  1. Is Square Foot Real Estate Corporation ("Square Foot") entitled to the amount of \$444,492.39, plus GST of 5% (\$22,224.62) for "back-end" commissions pursuant to Sales Management Agreements entered into with Valmont at Aspen Stone Inc.?

Application of Square Foot filed April 8, 2015 (the "**Application**"), page 1, paras 1, 2, 3

2. In the alternative, is it entitled to the \$269,326.40 plus GST of 5% (\$13,466.32), attributable to sales achieved by Square Foot, where the sales of the units actually closed?

**Application**, page 1, para 5

3. Was Square Foot's Supplemental Proof of Claim filed in time?; and

**Application**, page 1, para 4

4. If not, ought this Court to exercise its discretion to allow the late-filed Claim?.

**Application**, page 2, paras 2, 3, 4, 5

**PART THREE: FACTS**

**1. Facts Relevant to Issues 1 and 4:**

3. On or about August 30, 2010, Square Foot entered into a Sales Management Agreement with Valmont at Aspen Stone Ltd. [sic] Inc. ("Valmont") (the "Original Agreement"), by which Square Foot was appointed the sole and exclusive agent to promote and sell units in the second and third phases (Buildings C & D) of a multi-phase residential condominium project located in Calgary, Alberta and known as Valmont at Aspen Stone.

Affidavit of Tim Taylor sworn April 7, 2015 together with Exhibits (the "**Taylor Affidavit**"), page 2, para 2

Sales Management Agreement made August 30, 2010, **Exhibit "A"** to the Taylor Affidavit

4. That Agreement expired by its own terms on August 31, 2011, by which time Square Foot had sold 38 units. A further (almost identical) agreement, made as September 28, 2011 but effective as of September 1, 2011, was then entered into between Valmont and Square Foot (the "New Agreement").

**Taylor Affidavit**, page 2, paras 5, 7, 8

Sales Management Agreement dated September 28, 2011, **Exhibit "C"** to the Taylor Affidavit

5. Under the New Agreement, Square Foot sold 35 further units from September 1, 2011 through to and including May 8, 2012, the date of the Initial CCAA Order. At the request of Valmont, it continued to perform services under the New Agreement after the Initial CCAA Order and sold a further 6 units between May 9, 2012 and September 6, 2013, for a combined total of 79 units.

**Taylor Affidavit**, page 2, para 9; page 3, paras 14, 15, 18; page 7, para 47

6. Under clause 6 of the New Agreement, under the heading "Commission and Remuneration of Square Foot", we find the following:

(A) The remuneration of Square Foot for successfully selling units in the Building is based purely on performance with no retainers, draws or guarantees given by the Principal. The Principal agrees to pay Square Foot the following sums:

- (1) for Units sold by the Salespeople working for Square Foot which are assigned to the Building, a Commission equal to the following shall be paid, plus applicable GST.

Base Commission per deal 2.75%

(B) In respect of every Unit sold for which a Contract exists and for which a Commission is payable to Square Foot under Clause 6(A)(1)...the Principal shall pay to Square Foot:

- (1) fifty percent (50%) of the applicable Commission on the Principal's subsequent cheque run following invoicing from the later of a Purchaser's subject removal or the date of execution of the Contract for the Unit and payment by the Purchaser of the initial deposit to be paid by the Purchaser...
- (2) the balance of the Commission ("Balance Commission") of fifty percent (50%), upon completion of the sale and purchase of the Unit and receipt by the Principal of the balance of purchase price for the Unit.

(C) In the event the sale and purchase of a Unit for which a Commission is payable is not completed, the following shall occur:

- (2) In the case of default by the Vendor, the Balance Commission shall be payable by the Principal to Square Foot on the earlier of the date of completion contemplated in the Contract and thirty (30) days from the issuance of an occupancy permit for the Unit...

(D) All payments to be made by Principal pursuant to this Clause shall be made without demand, withholding, deduction or set-off, and shall be exclusive of GST and any other applicable taxes.

Sales Management Agreement, **Exhibit "C"**, pages 4, 5, 6

7. As to the "front-end" commissions, being the 50% owed upon the execution of an agreement of Purchase and Sale, all of Square Foot's "front-end" commissions were either paid by Valmont prior to the CCAA, or have been accepted for payment by the Monitor, notwithstanding no Closings of unit sales had actually occurred and notwithstanding some of the Proofs of Claim were filed outside the time period prescribed by the Claims Procedure Order issued by this Honourable Court on June 15, 2012 (which provided for Claims Bar Date of July 30, 2012).

**Taylor Affidavit**, page 3, para 13; page 7, para 48

8. Square Foot had had prior such commercial arrangements with the UBG Group of Companies. In practice, what was understood and agreed between Square Foot and UBG, in terms of liability for the "back-end" commissions, was that liability for payment was engaged at the time of successfully signing the Purchase and Sale Agreement, just like the liability for the "front-end" commission. It was just that payment of the "back-end" commission was deferred until Closing.

**Taylor Affidavit**, page 3, para 11

9. Following the CCAA Order on May 9, 2012, Square Foot was told by senior UBG staff (Messrs. Wein and Doherty) to continue business as usual, that Court protection was temporary, and that the matter would be resolved in a few short months.

**Taylor Affidavit**, page 3, para 15

10. Subsequently, in the post-CCA period, it was repeatedly confirmed by a representative of UBG that all Square Foot's "back-end" commissions would be paid for at the time of Closing on any deals that were directly written by Square Foot. These assurances were repeated over a period of many months.

**Taylor Affidavit**, page 4, paras 21, 22; page 5, paras 32, 33

11. At Mr. Scammell's request, Square Foot provided to him all relevant back up information concerning its "back-end" commissions.

**Taylor Affidavit**, page 4, paras 22, 23, 24; page 5, paras 28, 29, 30, 31, 33  
**Taylor Affidavit, Exhibits "D", "E", "G", "H"**

12. On multiple occasions, Mr. Scammell also assured and confirmed to Square Foot that all of this information had been passed along both to the Monitor and to Valmont.

**Taylor Affidavit**, page 4, paras 21, 22; page 5, paras 29, 32; page 6, paras 37, 40, 42  
**Taylor Affidavit, Exhibits "K", "P"**  
**Transcript of Questioning upon Affidavit of Tim Taylor held on May 7, 2015** (the "Transcript"), page 27, lines 2-7; page 23, lines 1-15

13. Square Foot received numerous reports commencing in January, 2013 throughout the first half of 2013 that Valmont's goal was to complete construction of the Project and numerous progress reports that updated us on the construction activity and reaffirmed that UBG was committed to complete construction of the Project.

**Taylor Affidavit**, pages 4, 5, paras 34, 35, 36, 38, 39, 41  
Taylor Affidavit, **Exhibits "I", "J", "L", "M", "O"**

14. At one point, the topic of a possible sale of the Project came up, and Square Foot was assured by the representative of UBG that Square Foot's "back-end" commission would be taken into consideration in the purchase, or the new Purchaser would continue to use Square Foot as the sales entity.

**Taylor Affidavit**, page 6, para 37  
Taylor Affidavit, **Exhibit "K"**  
**Transcript**, page 23, lines 5-15  
**Transcript**, page 34, lines 20-27; page 35, lines 1-16; page 40, lines 16-27; page 41, lines 1-27; page 42, lines 1-23; page 43, lines 10-14; page 46, lines 10-17; page 55, lines 23-27; page 56, lines 1-23

15. When the Project was sold to RDL (through its numbered company, 771280 Alberta Ltd.), it was represented in the material, and expressly provided for in the Vesting Order, that the net sales proceeds would stand in place of all claims against Valmont.

**Affidavit of Robert Friesen** sworn August 22, 2013,  
**Exhibit "2"** to the Questioning of Tim Taylor held on May 7, 2015  
**[TAB A]**, page 3, para 10  
**Valmont Vesting Order** dated August 30, 2013,  
**Exhibit "4"** to the Questioning of Tim Taylor on his Affidavit held on May 7, 2015 **[TAB B]**, page 5, paras 8, 9

## **2. Facts Relevant to Issue 2:**

16. As a result of the CCAA proceedings of Valmont, and the lengthy period of uncertainty that followed as to what was to become a Valmont project, the construction of Valmont units was substantially delayed. It was not until after January, 2013 that construction resumed and it was not until June, 2014 that Closings started to occur in respect of unit Purchase and Sale Agreements that have been obtained by Square Foot.

**Taylor Affidavit**, pages 9, 10, para 67

17. As a result of the substantial delays, many of the individual Purchase and Sale Agreements were terminated by the consent of the Purchaser and the individual unit purchasers.

**Taylor Affidavit**, page 10, para 68

18. In the result, \$175,166 worth of "back-end" commissions claimed by Square Foot are attributable to units where the sales achieved by Square Foot did not actually close. The balance of \$269,326.40 is attributable to units where the sales obtained by Square Foot have in fact closed.

**Taylor Affidavit**, page 10, para 69

## **3. Facts Relevant to Issues 3 and 4:**

19. On May 15, 2012, at the Initial Meeting of Creditors following the issuance of the Initial CCAA Order, being, Square Foot recalls that the Monitor advised the assembled

creditors that they were only to file a Proof of Claim on currently-owed invoices as of May 9, 2012.

**Taylor Affidavit**, page 3, para 16  
**Transcript**, page 53, lines 9-16; page 53, lines 25-27; page 54, lines 1-7

20. On July 30, 2012, the deadline date under the Claim's Procedure Order, Square Foot filed a Proof of Claim in the amount of \$34,933.98 for pre-CCAA sales achieved by Square Foot for which invoices has been issued and were unpaid by Valmont. These were for the "front-end" commissions only. No invoices for "back-end" commissions had been issued.

**Taylor Affidavit**, page 7, para 49  
Taylor Affidavit, **Exhibit "R"**

21. Fifteen and one half months later, on November 18, 2013, and well outside the time provided in the Claims Procedure Order, Square Foot amended its July 30, 2012 Proof of Claim by filing a Supplemental Proof of Claim in the additional amount of \$22,000, for additional "front-end" commissions for sales obtained by Square Foot prior to the date of the Initial CCAA Order, but because of a 10 day rescission period, did not go final until after the date of the Initial CCAA Order.

**Taylor Affidavit**, page 7, para 50  
Taylor Affidavit, **Exhibit "S"**

22. On December 2, 2013, the November 18, 2013 Supplemental Proof of Claim for "front-end" commissions was allowed by the Monitor, notwithstanding it was filed well out of time, and notwithstanding no "Closings" of unit sales had occurred.

**Taylor Affidavit**, page 7, para 51  
Taylor Affidavit, **Exhibit "T"**

23. Further, Square Foot has been paid by the Monitor the amount of \$32,893.96 for the "front-end" commissions for the 6 transactions secured by Square Foot subsequent to the date of Initial CCAA Order, notwithstanding no Closings of units sales had occurred.

**Taylor Affidavit**, pages 7, 8, para 52  
Taylor Affidavit, **Exhibit "U"**

24. Additionally, on October 7, 2013, Square Foot filed an Amended Proof of Claim by which it amended its July 30, 2012 Proof of Claim to add a secured Claim for \$143,710.03 with respect to a Sales Centre. Although this claim was subsequently disallowed, an amount was negotiated and paid pursuant to a Consent Order issued by this Honourable Court on June 9, 2014.

**Taylor Affidavit**, page 8, paras 54, 55, 56, 57  
Taylor Affidavit, **Exhibits "W", "X", "Y"**

25. At no time was any challenge made by the Monitor that this Claim was filed out of time.

**Taylor Affidavit**, page 8, para 56

26. In February, 2014, at about the time units sales were about to close, Square Foot reminded the Monitor of its "back-end" commission Claim. On April 1, 2014, Square Foot's counsel wrote a formal letter inquiring after the Monitor's position, reminding the Monitor of the representations previously received from Valmont as well as the Monitor's knowledge of these claims.

**Taylor Affidavit**, page 8, para 59  
Taylor Affidavit, **Exhibit "Z"**

27. Not having received any answer to its April 1, 2014 letter, Square Foot promptly filed its Proof of Claim in respect of its "back-end" commissions on April 11, 2014.

**Taylor Affidavit**, pages 8, 9, paras 60, 61  
Taylor Affidavit, **Exhibit "AA"**

28. When it was disallowed, a Notice of Dispute was promptly filed on July 21, 2014.

**Taylor Affidavit**, page 9, paras 61, 62  
Taylor Affidavit, **Exhibits "BB", "CC"**

29. At the same time as it filed its Dispute Notice, Square Foot filed a Supplemental Proof of Claim (the "July 21, 2014 Supplemental Proof of Claim") to further amend its July 30, 2012 Proof of Claim by claiming the additional amount of \$444,492.39 for "back-end" commissions.

**Taylor Affidavit**, page 9, para 63  
Taylor Affidavit, **Exhibit "CC"**

30. The use of the "Supplemental" Claim to amend an existing claim was the same procedure used by Square Foot to add, on November 18, 2013, to its July 30, 2012, original Proof of Claim. This procedure had been accepted by the Monitor when it allowed the November 18, 2013 Supplemental Proof of Claim on December 2, 2013.

**Taylor Affidavit**, page 9, para 63  
Taylor Affidavit, **Exhibit "T"**

31. No Notice of Disallowance has ever been issued by the Monitor in respect of the July 21, 2014 Supplemental Proof of Claim.

**Taylor Affidavit**, page 9, para 64

#### **4. Additional Fact Relevant to Issue 4:**

32. No payouts whatsoever have been made to date to any of the unsecured creditors of Valmont.

**Taylor Affidavit**, page 10, para 70  
**Transcript**, page 20, lines 24-27; page 21, lines 1-2

### **PART 4: ARGUMENT**



**ISSUE 1: The Sales Management Agreement Created Liability:**

33. It is respectfully submitted that it is clear that liability for both the "front-end" and "back-end" commissions is created simultaneously and contemporaneously under Sections 6(A). All of Square Foot's legal entitlement to commissions is created here.

New Agreement, **Exhibit "C"** to the Taylor Affidavit, page 4

34. This is clear from the opening words of section 6(B). The **timing** of payment for both the "front-end" and "back-end" commissions are contained in 6 (B)(1) and 6 (B)(2), but the opening words of 6(B) spell out clearly that the triggering event for liability for both is the same: "In respect of every Unit sold for which a contract exists and for which a Commission is payable to Square Foot under Clause 6(A)(i), 6(A)(ii) and 6(A)(iii)".

New Agreement, **Exhibit "C"** to the Taylor Affidavit, pages 4, 5, 6

35. In this case, the relevant trigger of liability is 6(A)(i), where Square Foot "successfully sells" units by causing Purchasers to enter into Purchase and Sale Agreements that have all conditions removed so as to be "unconditional". Thus "Contracts existed" and all commissions are payable, per Clause 6(B).

**Transcript**, page 62, lines 12-27; page 63, lines 1-19

36. This analysis draws strength from looking at other provisions of the Agreement. For example, Clause (2)(C) provides that: "This agreement pertains to any and all **deals written...**". Thus, it is clear that the intention of the parties is that the subject matter of the contract is "written deals".

37. Further assistance can be gleaned as to the intention of the contracting parties by reference to Clause (6)(A) where the remuneration of Square Foot is "for **successfully selling** units in the building". Once again, the clear suggestion is that the completion of a valid and binding sales contract is what Square Foot is to do in order to be entitled to both "front-end" and "back-end" commissions.

38. Still further assistance can be gleaned from the further words in Clause (6)(A) where it says that: "remuneration of Square Foot... is based purely on performance...". All Square Foot can do in **performing** its duties is to obtain written and binding Agreements of Purchase and Sale. The matter of "closing" is entirely between the Vendor and the Purchaser.

39. Further, this analysis is borne out by the fact the Square Foot had already been paid by UBG for the "front-end" commission claims for Purchase and Sale Agreements it had entered into prior to May 9, 2012, notwithstanding Closings had not occurred.

**Taylor Affidavit**, page 3, para 13

40. And with respect to Purchase and Sale Agreements entered into pre-CCAA for which Square Foot had not yet been paid by UBG, these claims for "front-end" commissions have been accepted by the Monitor, notwithstanding Closings had not occurred.

**Taylor Affidavit**, page 7, paras 49, 50, 51

41. Further, for those entered into after the Initial CCAA Order, "front-end" commissions have actually been paid by the Monitor, notwithstanding Closings may or may not have ever taken place.

**Taylor Affidavit**, pages 7, 8, para 52  
Taylor Affidavit, **Exhibit "U"**

42. Accordingly, and to return to the opening words of Clause 6(B), since it is obvious that both Valmont and the Monitor have recognized that liability was engaged under the opening words of that Clause for the "front-end" commissions, liability for the "back-end" interest similarly must be engaged under 6(A), and 6(B)(2) simply provides for the timing of the "back-end" commission upon completion of the sale and purchase of the unit.

43. It is therefore respectfully submitted that, on the construction of the Agreement as a whole, it is not possible to maintain the position that liability for "back-end" commissions is somehow contingent upon the actually Closing. It is only **timing** of payment of the "back-end" commission that is contingent upon the actually Closing.

44. However, if reliance is placed upon the words in Clause 6(B)(ii)...and "receipt by the Principal of the balance of the purchase price for the Unit", then Square Foot respectfully notes that paragraphs 8 and 9 of the Order of this Honourable Court dated August 30, 2013 which vested the Valmont Project in the Purchaser, RDL (through its numbered company, 771280 Alberta Ltd.), expressly provide that that the "Net Proceeds" or "Claims Reserve" stand in the place and stead of the Property transferred and that all Claims attach to the said Net Proceeds.

**Valmont Vesting Order** dated August 30, 2013 [**TAB B**], page 5,  
paras 8, 9

45. Similarly, paragraph 10 of the Affidavit of Robert Friesen sworn on August 22, 2013 in support of the Valmont Sales Order, assures all creditors in paragraph 10 that:

"The Vesting Order provides that the sale proceeds will stand in the stead and place of the Valmont Assets and all claims against Valmont will attach to the sales proceeds, net of all amounts owing to the Bank of Nova Scotia by Valmont...."

**Affidavit of Robert Friesen** sworn August 22, 2013 [**TAB A**], page  
3, para 10

46. Finally, Square Foot relies upon Clause 6(C)(2) of the New Agreement. That clause clearly provides that itself the event the sale and purchase of the unit for which a commission is payable is not completed, and the reason is the fault of the Vendor (ie. Valmont at Aspen Stone), the balance of the commission is nonetheless payable by the Principal to Square Foot.

47. Clearly in selling the Valmont Project, including all of the individual units, Valmont had made it impossible for itself to close the sale of individual units and receive the proceeds from the individual Purchasers.

48. Counsel for Square Foot draws to the attention of this Honourable Court that there are two cases where the courts dealt in passing with "back-end commission" claims. However, little assistance can be gleaned from them. They both deal with complicated facts far removed from the facts of this case. And the "commission" language in those agreements is markedly different than that in the New Agreement Square Foot had with

Valmont. In both of those cases, the "back-end" commission language clearly provided that it was...only **due and payable** on the final closing of each unit comprising the property. And the contractual language further provided that: "if the transaction of Purchase and Sale is not completed" the "front-end" commissions would be retained, and not refunded.

*Toronto Lofts Realty Corp. v. 1580838 Ontario Corp.*, 205 CANLIT 27383 (Ont. S.C.) [TAB C], pages 4, 5, 11, 12, 13  
*Remo Valente Real Estate (1990) Limited v. Portofino Riverside Tower Inc.*, 208 CANLIT 22150 (Ont. S.C.) [TAB D], pages 5, 6, 7

**Issue 2: Alternatively Is Square Foot Entitled to the \$269,326.40 Attributable to Sales Actually Closed?:**

49. If it is decided by this Honourable Court that Square Foot is not entitled to the commissions in those instances where no Closing of any kind took place, then it is further respectfully submitted that Square Foot is still entitled to the balance of the "back-end" commission where sales did in fact close. This amount is \$269,326.40.

50. In this case, it is respectfully submitted that there were clearly Closings 100% attributable to the Purchase and Sale Agreements obtained by Square Foot under its agreements with Valmont. The only issue in this analysis is whether it can be said that Square Foot is not entitled to get its "back-end" commission by virtue of the fact that Valmont did not actually receive a purchase price. The answer to this is two-fold. First, it indeed did receive (at the very least had promised Square Foot that it would receive) value for these units under its sale agreement with RDL. Second, if it is held not to have received any purchase monies, it did so because it had put it out of its own reach to actually close these sales and therefore Clause 6(C)(2) of the New Agreement applies.

**Issue 3: Was Proof of Claim in Time:**

51. It is respectfully submitted that the Supplemental Proof of Claim filed by Square Foot on July 21, 2014, which amended its July 30, 2012 Proof of Claim by adding the additional amount of \$444,492.39 for "back-end" commissions is a Claim filed prior to the Claims Bar Date.

**Taylor Affidavit**, page 9, para 63  
 Taylor Affidavit, **Exhibit "CC"**

52. No Notice of Dispute has ever been issued by the Monitor in respect of the July 21, 2014 Supplemental Proof of Claim.

**Taylor Affidavit**, page 9, para 64

53. The Monitor itself has set a pattern of accepting a Supplemental Proof of Claim to a previously filed-within-time Proof of Claim as being within time. This did in accepting the November 18, 2013 Supplemental Proof of Claim which amended the July 30, 2012 Proof of Claim in the additional amount of \$22,648.02 for additional "front-end" commissions.

**Issue 4: Leave to Allow Late Filed Claim:**

54. In any event, it is respectfully submitted that this case meets all of the criteria for granting leave to the Applicant to late file its Proof of Claim for the "back-end" commissions.

55. The test for allowing late-filed Claims is set out in *Enron Canada Corp. v. National Oil-Well Canada Ltd. et al.*, 2000 ABCA 285 [CA]. Chief Justice Wittman, sitting in the Alberta Court of Appeal, determined that the appropriate criteria to apply to late Claimants is as follows:

1. Was the delay caused by inadvertence and, if so, did the Claimant act in good faith?
2. What is the effect of permitting the Claim in terms of the existence and impact of any relevant prejudices caused by the delay?;
3. If relevant prejudices found, can it be alleviated by attaching appropriate conditions to an Order permitting late filing?; and
4. If relevant prejudices found which cannot be alleviated, are there any other considerations which may nonetheless warrant an Order permitting late filing.

*Enron Canada Corp. v. National Oil-Well Canada Ltd. et al.*,  
2000 ABCA 285 [CA] [TAB E], para 26

56. The Court of Appeal went on in that case to state that:

"In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional".

*Enron* [TAB E], para 27

57. Chief Justice Wittman also states, at paragraph 40:

"In a CCAA context, as in a BIA context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Reorganization under the CCAA involves compromise. Allowing all legitimate creditors to share in all of the available proceeds is an integral part of the process. A reduction in that share cannot be characterized as prejudice".

*Enron* [TAB E], para 40

58. In this case, there is overwhelming evidence that at all times Square Foot:

1. Had made known to UBG and its Monitor the existence of the "back-end" commission claims;
2. Had been told by the Monitor at the First Creditor's Meeting on May 15, 2012 that it was only to file a Proof of Claim on currently-owed invoices as of May 9, 2012;
3. Was repeatedly assured by the Monitor's representative that the "back-end" commission claims would be paid at the time of Closings;
4. Square Foot was also assured by a representative of UBG that, should the site ever be sold, its commission be taken into consideration in the purchase or a new Purchaser would continue to use Square Foot as the sales entity;
5. The Court Order approving the sale by Valmont to RDL expressly provided that the sales proceeds stood as a fund against all claims of all creditors.

59. As in in *Enron*, "there is no evidence that [Square Foot] was attempting to circumvent the CCAA process.

*Enron* [TAB E], para 30

60. As in *Enron*, the late claimants were well known to both UBG and the Monitor.

*Enron* [TAB E], para 39

61. As in *Enron*, there is no evidence in this case or any lack of good faith. It cannot be said that the Claimants were "lying in the weeds, waiting to pounce".

*Enron* [TAB E], paras 31, 39

62. In *Royal Bank of Canada v. Cow Harbour Construction Ltd. et al*, it was observed that:

"[T]he question of whether a late claim should be accepted is an equitable consideration, taking into account the specific circumstances of each case".

***Royal Bank of Canada v. Cow Harbour Construction Ltd. et al***,  
2011 ABQB 223 [TAB F], page 6, para 27

63. On the "good faith question", the Court in *Cow Harbour* addressed the matter thusly:

"Was Hertz acting in bad faith and was it acting in good faith? With respect to the former, the "lying in the weeds" analysis will answer that question. With respect to the latter, a court will find that a claimant is acting in good faith if it submits its claim as soon as it became aware of the situation".

*Cow Harbour Construction* [TAB F], page 7, para 32

64. In this case it is respectfully submitted that it is highly relevant that Square Foot had been repeatedly assured that its "back-end" commission claims were known to UBG and the Monitor, and would be recognized by them if Valmont completed the Project. If Valmont did not complete the Project, Square Foot was assured that it would be recognized in the purchase price reflected on the sale of the Project. And having promptly filed its Proof of Claim once it got no answer from the Monitor, or his counsel, as to what the status of the claim was, it cannot be gain-sayed that Square Foot was acting in good faith.

65. Finally, it is noted that Mr. Taylor gave evidence on his Questioning that one of the further reasons they did not file a Proof of Claim earlier, was that they had been advised by their then-solicitor that the proper time for filing the claim was at the time of Closing. At this point too, *Cow Harbour Construction* is enlightening. On this point, Justice Yamauchi says:

"If a creditor fails to file its claim in those proceedings because of its solicitors' negligence or its own inadvertence, as defined in *Blue Range*, it should be permitted that, nonetheless, a court should permit it to file its claim".

**Transcript**, page 53, lines 17-24

*Cow Harbour Construction* [TAB F], page 9, para 44

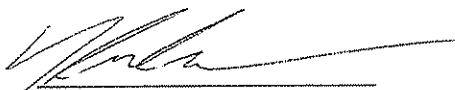
66. It is therefore respectfully submitted that, considering the unique facts of this case, it is appropriate to find that Square Foot was not attempting to seek an unjustified advantage by not filing its claim earlier or that it was improperly manipulating the process. It's failure to file its claim was inadvertent.

**PART FIVE: RELIEF REQUESTED**

67. It is respectfully requested that this Honourable Court grant an Order:
1. Declaring that Square Foot is a creditor in the amount of \$444,492.39, plus GST of 5% (\$22,224.62) for "back-end" commissions owed pursuant to agreements entered into with Valmont;
  2. Declaring that Square Foot's claim of \$444,492.39, which was submitted by way of a Proof of Claim on April 11, 2014, and disallowed by the Monitor's Notice of Disallowance dated July 2, 2014, is a good and valid unsecured claim against Valmont;
  3. Allowing Square Foot's Dispute Notice filed with the Monitor on July 21, 2014;
  4. In the alternative, allowing Square Foot's Supplemental Proof of Claim in the amount of \$444,492.39, plus GST of 5% (\$22,224.62) filed July 4, 2014, for which the Monitor has not issued a Notice of Disallowance;
  5. In the further alternative, allowing Square Foot's Proof of Claim, or its Supplemental Proof of Claim, in the amount of \$269,326.40 plus GST of 5% (\$13,466.32), being the amount of "back-end" commissions on the sales of units achieved by Square Foot, where the sale of the unit ultimately closed; and
  6. Costs of this Application, on a solicitor-client basis.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**, this 29<sup>th</sup> day of May, 2015.

McLeod Law LLP

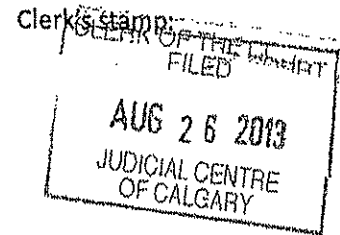
  
FOR Phil Lalonde  
Counsel for Square Foot  
Real Estate Corporation

**TAB A**

COURT FILE NUMBER  
COURT OF QUEEN'S BENCH OF  
ALBERTA  
JUDICIAL CENTRE

1201-05843

CALGARY



IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, RSC  
1985, c C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF UBG  
BUILDERS INC., ALBERTA BUILDERS CAPITAL INC., ALPINE HOMES (2006) INC.,  
AMERICAN BUILDERS CAPITAL (US) INC., EDGEWATER AT GRIESBACH INC.,  
ELITE HOMES (2006) LTD., EVOLUTION BY GREENBORO INC., GREENBORO  
COMMUNITIES (2006) INC., GREENBORO ESTATE HOMES (2006) LTD.,  
GREENBORO HOMES (2006) LTD., GREENBORO LUXURY HOMES INC., HIGH  
POINTE INC., MOUNTAINEERS VILLAGE (2006) INC., MOUNTAINEERS VILLAGE II  
INC., ORIGINS AT CRANSTON INC., SOUTH TERWILLEGAR VILLAGE INC., THE  
BRIDGES MANAGEMENT INC., THE LEDGES INC., TIMBERLINE LODGES (2006)  
INC., TODAY'S COMMUNITIES (2006) INC., TODAY'S HOMES (2006) INC.,  
TUSCANY DEVELOPMENTS (2006) INC., UBG ALBERTA BUILDERS (2006) INC.,  
UBG ALPINE HOMES (2006) LTD., UBG BRIDGES INC., UBG BUILDERS (USA) INC.,  
UBG COMMERCIAL INC., UBG LAND INC., UBG LOT DEPOSIT CORP., UBG 4500  
CALGARY INC., UBG 75 CANMORE INC., UBG 808 CALGARY INC., UNITY  
INVESTMENTS (2012) INC., VALMONT AT ASPEN STONE INC., VALOUR PARK AT  
CURRIE INC., VILLAGE AT THE HAMPTONS INC., VILLAGE ON THE PARK INC.,  
WILDERNESS HOMES BY RIVERDALE INC., WILDERNESS RIDGE AT STEWART  
CREEK INC.

(COLLECTIVELY, THE "APPLICANTS")

AFFIDAVIT

DOCUMENT

ADDRESS FOR SERVICE AND  
CONTACT INFORMATION OF PARTY  
FILING THIS DOCUMENT

DENTONS CANADA LLP  
Bankers Court  
15<sup>th</sup> Floor, 850 - 2<sup>nd</sup> Street S.W.  
Calgary, Alberta T2P 0R8  
Attention: David W. Mann / Derek M. Pontin  
Ph. (403) 268-7097/6301 Fx. (403) 268-3100  
File No.: 549362-1

**AFFIDAVIT OF ROBERT FRIESEN**

Sworn on August 22, 2013

I, Robert Friesen, of the City of Calgary, in the Province of Alberta, MAKE OATH AND  
SAY THAT:

1. I am the founder, owner and Chairman of the Board of the Applicants ("UBG") and I am  
authorized by all of the Applicants to depose this Affidavit and do so on their behalf. I am the  
controlling mind of all of the Applicants and, as such, I have personal knowledge of the matters



herein deposed to, except where stated to be based on information and belief, in which case I do verily believe the same to be true.

2. All capitalized terms in this Affidavit shall have the meaning ascribed to them in the Affidavit sworn by me and filed in these proceedings on May 9, 2012 (the "Initial Affidavit") unless otherwise indicated in this Affidavit.

*Relief Requested*

3. I make this Affidavit in support of the Application of UBG for the following relief:
  - (a) an Order, in substantially the form attached to the Application as Schedule "A", approving the sale of UBG's multi-family project known as Valmont at Aspen Stone (the "Valmont Project") by Valmont at Aspen Stone Limited Partnership, by its general partner Valmont at Aspen Stone Inc. (collectively, "Valmont"), to 771280 Alberta Ltd. ("771"); and
  - (b) such further and other relief as may be sought by the Applicants and granted by this Honourable Court.

*Sale of Valmont at Aspen Stone*

4. Pursuant to an Order of Madame Justice K.M. Horner dated July 10, 2013, a "Stalking Horse" sales process was approved with respect to the sale of certain assets of Valmont including, but not limited to, the lands legally described as:

Firstly: Plan 0813651  
Unit 2  
And 1695 Undivided One Ten Thousandths shares in the  
Common Property  
Excepting thereout all mines and minerals

Secondly: Plan 0813651  
Unit 3  
And 2765 Undivided One Ten Thousandths shares in the  
Common Property  
Excepting thereout all mines and minerals

Thirdly: Plan 0813651  
Unit 4  
And 2768 Undivided One Ten Thousandths shares in the  
Common Property  
Excepting thereout all mines and minerals,

and all appurtenances thereto (collectively the "Valmont Assets"). Copies of title to the foregoing lands are attached hereto and marked as Exhibit "A"

5. The Stalking Horse offer which was approved by the Court was an offer submitted by 771 and included a purchase price equal to \$10,837,595 plus construction draws prior to closing. The

deadline to submit an offer to purchase the Valmont Assets under the Stalking Horse sales process was August 9, 2013.

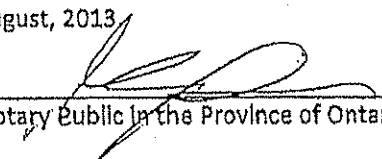
6. The Monitor received four offers for the purchase of the Valmont Assets pursuant to the Stalking Horse sales process. One of the offers was submitted by 771 and included a purchase price equal to \$13,509,000 (the "771 Offer"). The three other offers which were submitted included purchase prices equal to \$13,500,000, \$12,125,000, and \$12,100,000. A copy of the 771 Offer is attached hereto and marked as Exhibit "B".
7. The 771 Offer, which includes an assumption or payout of first charge security held by Bank of Nova Scotia, was the superior offer received for the Valmont Assets and Valmont, in consultation with the Monitor, accepted the 771 Offer. Accepting the 771 Offer also means that Valmont does not have to pay 771 a break fee under the Stalking Horse bid process.
8. Subsequent to the acceptance of the 771 Offer, Valmont and 771 agreed to postpone the Closing Date (as defined in the 771 Offer) under the 771 Offer and, consequently, Valmont and 771 entered into an Amending Agreement dated August 21, 2013 which amended the Closing Date, adjusted how the Purchase Price would be calculated as a result of the amendment to the Closing Date, and made several other minor amendments to the 771 Offer. A copy of the Amending Agreement is attached hereto and marked as Exhibit "C".
9. The 771 Offer constitutes the best offer received for the Valmont Assets. Accordingly, Valmont is seeking an Order approving the sale contemplated in the 771 Offer and vesting title in the Valmont Assets with 771 (the "Vesting Order").
10. The Vesting Order provides that the sale proceeds will stand in the stead and place of the Valmont Assets and all claims against Valmont will attach to the sale proceeds, net of all amounts owing to Bank of Nova Scotia by Valmont, standard closing adjustments, and a deduction in favour of the Applicants in the amount of \$675,450 for their business and operational purposes. The deduction in favour of the Applicants is consistent with deductions made from sale proceeds respecting other sales by UBG in these proceedings, in an amount equivalent to approximately 5% of the purchase price.
11. The Monitor supports and approves of Valmont's application for the Vesting Order.

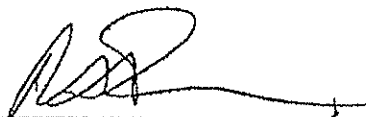
*Monitor's Report*

12. I have reviewed the Court-appointed Monitor's Report respecting the Valmont Project and agree with the summaries and conclusions contained therein.

13. I make this Affidavit in support of the Application of UBG for the relief described in paragraph 3, above.

Sworn before me in the City of Kenora in  
the Province of Ontario, the 22<sup>nd</sup> day of  
August, 2013

  
\_\_\_\_\_  
Notary Public in the Province of Ontario

  
\_\_\_\_\_  
Robert Friesen

KYLEE M. RONNING, B.A.(Hons.), J.D.  
BARRISTER, SOLICITOR  
NOTARY PUBLIC

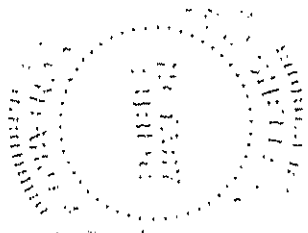
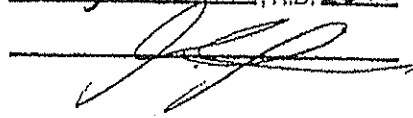


Exhibit "A"

THIS IS EXHIBIT " A "  
referred to in the Affidavit of  
Robert Friesen

Sworn before me this 22 day of  
August, A.D. 2013



KYLEE M. RONNING, B.A.(Hons.), J.D.  
BARRISTER, SOLICITOR  
NOTARY PUBLIC



LAND TITLE CERTIFICATE

S  
LINE                      SHORT LEGAL                      TITLE NUMBER  
0033 528 986              0813651;2                      081 387 244 +1

LEGAL DESCRIPTION

CONDOMINIUM PLAN 0813651  
UNIT 2  
AND 1695 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY  
EXCEPTING THEREOUT ALL MINES AND MINERALS

ATS REFERENCE: 5;2;24;16;SE  
ESTATE: FREE SIMPLE

MUNICIPALITY: CITY OF CALGARY

REFERENCE NUMBER: 081 297 971 +1

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REGISTRATION	DATE (DMY)	REGISTERED OWNER(S) DOCUMENT TYPE	VALUE	CONSIDERATION
081 387 244	15/10/2008	PLAN CORRECTION		

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OWNERS

VALMONT AT ASPEN STONE INC.  
OF 808-55 AVE NE  
CALGARY  
ALBERTA T2E 6Y4

---

ENCUMBRANCES, LIENS & INTERESTS

REGISTRATION NUMBER	DATE (D/M/Y)	PARTICULARS
051 350 246	21/09/2005	UTILITY RIGHT OF WAY GRANTED - THE CITY OF CALGARY. AS TO PORTION OF PLAN: 0513220
051 350 249	21/09/2005	CAVEAT RE : RESTRICTIVE COVENANT
051 350 250	21/09/2005	CAVEAT RE : RESTRICTIVE COVENANT

( CONTINUED )

## ENCUMBRANCES, LIENS &amp; INTERESTS

PAGE 2

# 081 387 244 +1

## REGISTRATION

NUMBER DATE (D/M/Y) PARTICULARS

071 244 794 18/05/2007 MORTGAGE  
MORTGAGEE - THE BANK OF NOVA SCOTIA.  
240 - 8 AVENUE S.W., CALGARY  
ALBERTA T2P2N7  
ORIGINAL PRINCIPAL AMOUNT: \$40,000,000

071 244 795 18/05/2007 CAVEAT  
RE : ASSIGNMENT OF RENTS AND LEASES  
CAVEATOR - THE BANK OF NOVA SCOTIA.  
316, 240-8 AVE SW  
CALGARY  
ALBERTA T2P2N7  
AGENT - JOHN R SHERMAN

081 297 968 14/08/2008 EASEMENT  
AS TO PORTION OR PLAN:0813650  
OVER AND FOR BENEFIT OF; SEE INSTRUMENT

081 297 969 14/08/2008 UTILITY RIGHT OF WAY  
GRANTEE - ATCO GAS AND PIPELINES LTD.

081 297 970 14/08/2008 UTILITY RIGHT OF WAY  
GRANTEE - ENMAX POWER CORPORATION.  
AS TO PORTION OR PLAN:0813649

091 082 341 27/03/2009 EASEMENT  
OVER AND FOR BENEFIT OF: SEE INSTRUMENT

121 128 420 28/05/2012 BUILDER'S LIEN  
LIENOR - ZYTECH BUILDING SYSTEMS INC.  
262029 HALEZAC BLVD  
HALEZAC  
ALBERTA T4B2T3  
AGENT - ROSS CLEMENTS  
AMOUNT: \$91,431

121 131 237 30/05/2012 BUILDER'S LIEN  
LIENOR - GIENOW WINDOW LTD.  
GIENOW WINDOWS & DOORS  
C/O JAMES S. CHARNOCK  
601,11012 MACLEOD TRAIL SW  
CALGARY  
ALBERTA T2J6A5  
AGENT - JAMES S CHARNOCK  
AMOUNT: \$104,489

121 131 922 31/05/2012 BUILDER'S LIEN  
LIENOR - KEYSTONE EXCAVATING LTD,  
ATTEN: B ADAM E BRENER

( CONTINUED )

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ENCUMBRANCES, LIENS & INTERESTS

PAGE 3  
# 081 387 244 +1

REGISTRATION  
NUMBER      DATE (D/M/Y)      PARTICULARS  
-----

C/O LEON BICKMAN BRENER  
350, 603 7 AVE SW  
CALGARY  
ALBERTA  
AGENT - B ADAM E BRENER  
AMOUNT: \$222,901

121 135 201    04/06/2012 BUILDER'S LIEN  
LIENOR - SUPER SAVE DISPOSAL (ALBERTA) LTD.  
ATTN: BRIAN O PHILLIPS  
C/O MOORE WITTMAN PHILLIPS  
850, 1015-4TH STREET  
CALGARY  
ALBERTA T2RLJ4  
AGENT - LARRY GIBSON  
AMOUNT: \$5,627

121 137 088    05/06/2012 BUILDER'S LIEN  
LIENOR - BURSCO ROCK PRODUCTS LTD.  
C/O ROBB & EVENSON PROFESSIONAL CORPORATION  
506, 933 17 AVE SW  
CALGARY  
ALBERTA T2T5R6  
AGENT - CALVIN C ROBB  
AMOUNT: \$269,940

121 141 840    08/06/2012 BUILDER'S LIEN  
LIENOR - HARRIS STEEL SERVICES LIMITED.  
C/O MCLENNAN ROSS LLP  
ATTN: JAMIE P. FLANAGAN  
1600, 300-5 AVE SW  
CALGARY  
ALBERTA T2P3C4  
AGENT - JAMIE P FLANAGAN  
AMOUNT: \$252,657

121 141 844    08/06/2012 BUILDER'S LIEN  
LIENOR - CONFORM WORKS INC.  
5007-28 ST SE  
CALGARY  
ALBERTA T2B3B4  
AGENT - BRADLEY A RASMUSSEN  
AMOUNT: \$16,288

121 141 892    08/06/2012 BUILDER'S LIEN  
LIENOR - NATIONAL CONCRETE ACCESSORIES CANADA INC.  
C/O DUNCAN & CRAIG LLP  
2800,10060 JASPER AVE  
EDMONTON

( CONTINUED )

ENCUMBRANCES, LIENS & INTERESTS

PAGE 4

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REGISTRATION

NUMBER	DATE (D/M/Y)	PARTICULARS
		ALBERTA T5J3V9 AGENT - MARY ANNE BILLINGHAM AMOUNT: \$24,306
121 142 480	11/06/2012	BUILDER'S LIEN LIENOR - 1556175 ALBERTA LTD. O/A COMCAST CONTRACTING C/O FERCHO LAW OFFICES #14, 205 1ST STREET EAST COCHRANE ALBERTA T4C1X6 AGENT - VINCE BUSSIERE AMOUNT: \$853,603
121 146 108	13/06/2012	BUILDER'S LIEN LIENOR - TECH-WOOD BUILDING COMPONENTS LTD. C/O LIEN-PRO INC 201, 11062-156 ST EDMONTON ALBERTA T5P4M8 AGENT - LIEN-PRO INC. AMOUNT: \$72,801
121 147 843	14/06/2012	BUILDER'S LIEN LIENOR - H & H NORWEST LIMITED. C/O WILSON LAYCRAFT 1601, 333-11 AVE SW CALGARY ATTN: JEFFREY L. SMITH ALBERTA T2R1L9 AGENT - JEFFREY L SMITH AMOUNT: \$337,500
121 148 843	15/06/2012	BUILDER'S LIEN LIENOR - CHOCO CONSTRUCTION INC. 2202 MILLRISE POINT SW CALGARY ALBERTA T2Y3W4 AGENT - HEBERT ALFONSO VALOYES AMOUNT: \$31,560
121 150 753	19/06/2012	BUILDER'S LIEN LIENOR - RONA REVY INC. ATTEN: DAVID, F YOUNGGREN DUNPHY BEST BLOCKSON LLP 2100, 777 8 AVE SW CALGARY ALBERTA T2P3R5 AGENT - DAVID F YOUNGGREN

( CONTINUED )



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ENCUMBRANCES, LIENS & INTERESTS

PAGE 5  
# 081 387 244 +1

REGISTRATION

NUMBER DATE (D/M/Y) PARTICULARS

-----

AMOUNT: \$99,688

121 162 546 28/06/2012 BUILDER'S LIEN  
LIENOR - MERIAM CONTRACTING LTD.  
BOX 1851  
COCHRANE  
ALBERTA T4C1B7  
AGENT - SCOTT LEE MERIAM  
AMOUNT: \$67,608

121 162 548 28/06/2012 BUILDER'S LIEN  
LIENOR - 1006910 ALBERTA LTD.  
189 MOUNT SELKIRK CLOSE SE  
CALGARY  
ALBERTA T2Z2P8  
AGENT - MERVYN FRIESEN  
AMOUNT: \$5,258

121 162 553 28/06/2012 BUILDER'S LIEN  
LIENOR - 1261310 ALBERTA LTD.  
236 HARVEST GLEN PL NE  
CALGARY  
ALBERTA T3X4J1  
AGENT - KENNETH DARRELL FRIESEN  
AMOUNT: \$61,778

121 183 711 20/07/2012 BUILDER'S LIEN  
LIENOR - UNITED RENTALS OF CANADA, INC.  
C/O SMITH MACK LAMARSH  
450, 808-4 AVE SW  
CALGARY  
ALBERTA T2P3E8  
AGENT - KAREN D JACOBSON  
AMOUNT: \$19,383

121 192 176 27/07/2012 BUILDER'S LIEN  
LIENOR - UNITED PROTECTION SERVICES INC.  
E909-83 ST  
EDMONTON  
ALBERTA T6E4Y3  
AGENT - BRUCE MCGLOAN  
AMOUNT: \$38,333

121 194 334 31/07/2012 BUILDER'S LIEN  
LIENOR - CONCEPT ELECTRIC LTD.  
MILLER THOMSON LLP  
ATTN: NICOLE F. TAYLOR-SMITH  
3000, 700-9TH AVE SW  
CALGARY

( CONTINUED )

ENCUMBRANCES, LIENS & INTERESTS

PAGE 6  
# 081 387 244 +1

REGISTRATION

NUMBER	DATE (D/M/Y)	PARTICULARS
		ALBERTA T2P3V4 AGENT - NICOLE T TAYLOR-SMITH AMOUNT: \$428,162
121 265 814	10/10/2012	CERTIFICATE OF LIS PENDENS AFFECTS INSTRUMENT: 121150753
121 288 392	02/11/2012	CERTIFICATE OF LIS PENDENS AFFECTS INSTRUMENT: 121137088
121 305 092	21/11/2012	CERTIFICATE OF LIS PENDENS AFFECTS INSTRUMENT: 121141844
121 305 787	22/11/2012	CERTIFICATE OF LIS PENDENS AFFECTS INSTRUMENT: 121128420
121 306 735	22/11/2012	CERTIFICATE OF LIS PENDENS AFFECTS INSTRUMENT: 121131237
121 308 644	23/11/2012	CERTIFICATE OF LIS PENDENS AFFECTS INSTRUMENT: 121141840
121 309 662	26/11/2012	CERTIFICATE OF LIS PENDENS AFFECTS INSTRUMENT: 121131922
121 309 768	26/11/2012	CERTIFICATE OF LIS PENDENS AFFECTS INSTRUMENT: 121146108
121 313 710	29/11/2012	BUILDER'S LIEN LIENOR - SUPER SAVE DISPOSAL (ALBERTA) LTD. ATTN: BRIAN O PHILLIPS C/O MOORE WITTMAN PHILLIPS 850, 1015-4TH STREET CALGARY ALBERTA T2R1J4 AGENT - PHILIP VANDEKERKHOVE AMOUNT: \$3,057
121 314 941	30/11/2012	CERTIFICATE OF LIS PENDENS AFFECTS INSTRUMENT: 121135201 AFFECTS INSTRUMENT: 121313710
121 318 342	04/12/2012	CERTIFICATE OF LIS PENDENS AFFECTS INSTRUMENT: 121141892
121 333 678	20/12/2012	CERTIFICATE OF LIS PENDENS AFFECTS INSTRUMENT: 121162553
131 007 092	08/01/2013	CERTIFICATE OF LIS PENDENS AFFECTS INSTRUMENT: 121183711

( CONTINUED )

ENCUMBRANCES, LIENS & INTERESTS

PAGE 7  
# 081 387 244 +1

REGISTRATION NUMBER	DATE (D/M/Y)	PARTICULARS
131 024 068	25/01/2013	CERTIFICATE OF LIS PENDENS AFFECTS INSTRUMENT: 121194334
131 176 780	23/07/2013	BUILDER'S LIEN LIENOR - BURSCO ROCK PRODUCTS LTD. C/O ROBB & EVENSON PROFESSIONAL CORPORATION 506, 933 17 AVE SW CALGARY ALBERTA T2T5R6 AGENT - CALVIN C ROBB AMOUNT: \$10,959

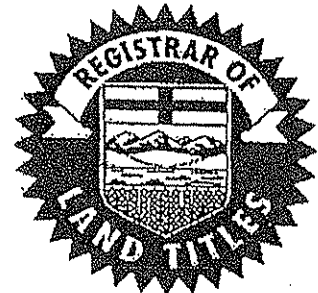
\* ADDITIONAL REGISTRATIONS MAY BE SHOWN ON THE CONDOMINIUM ADDITIONAL  
PLAN SHEET

TOTAL INSTRUMENTS: 043

THE REGISTRAR OF TITLES CERTIFIES THIS TO BE AN  
ACCURATE REPRODUCTION OF THE CERTIFICATE OF  
TITLE REPRESENTED HEREIN THIS 22 DAY OF AUGUST,  
2013 AT 01:18 P.M.

ORDER NUMBER: 24229162

CUSTOMER FILE NUMBER: 549362-1



\*END OF CERTIFICATE\*

THIS ELECTRONICALLY TRANSMITTED LAND TITLES PRODUCT IS INTENDED  
FOR THE SOLE USE OF THE ORIGINAL PURCHASER, AND NONE OTHER,  
SUBJECT TO WHAT IS SET OUT IN THE PARAGRAPH BELOW.

THE ABOVE PROVISIONS DO NOT PROHIBIT THE ORIGINAL PURCHASER FROM  
INCLUDING THIS UNMODIFIED PRODUCT IN ANY REPORT, OPINION,  
APPRAISAL OR OTHER ADVICE PREPARED BY THE ORIGINAL PURCHASER AS  
PART OF THE ORIGINAL PURCHASER APPLYING PROFESSIONAL, CONSULTING  
OR TECHNICAL EXPERTISE FOR THE BENEFIT OF CLIENT(S).



LAND TITLE CERTIFICATE

S  
 LINC                      SHORT LEGAL                      TITLE NUMBER  
 0033 528 994            0813651;3                      081 387 244 +2

LEGAL DESCRIPTION

CONDOMINIUM PLAN 0813651  
 UNIT 3  
 AND 2765 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY  
 EXCEPTING THEREOUT ALL MINES AND MINERALS

ATS REFERENCE: 5;2;24;16;SE  
 ESTATE: FEE SIMPLE

MUNICIPALITY: CITY OF CALGARY

REFERENCE NUMBER: 081 297 971 +2

REGISTERED OWNER (S)				
REGISTRATION	DATE (DMY)	DOCUMENT TYPE	VALUE	CONSIDERATION
081 387 244	15/10/2008	PLAN CORRECTION		

OWNERS

VALMONT AT ASPEN STONE INC.  
 OF 808-55 AVE NE  
 CALGARY  
 ALBERTA T2E 6Y4

ENCUMBRANCES, LIENS & INTERESTS

REGISTRATION NUMBER	DATE (D/M/Y)	PARTICULARS
051 350 246	21/09/2005	UTILITY RIGHT OF WAY GRANTEE - THE CITY OF CALGARY. AS TO PORTION OR PLAN:0513220
051 350 249	21/09/2005	CAVEAT RE : RESTRICTIVE COVENANT
051 350 250	21/09/2005	CAVEAT RE : RESTRICTIVE COVENANT

( CONTINUED )

## ENCUMBRANCES, LIENS &amp; INTERESTS

PAGE 2

# 081 387 244 +2

REGISTRATION NUMBER	DATE (D/M/Y)	PARTICULARS
071 244 794	18/05/2007	MORTGAGE MORTGAGEE - THE BANK OF NOVA SCOTIA. 240 - 8 AVENUE S.W., CALGARY ALBERTA T2P2N7 ORIGINAL PRINCIPAL AMOUNT: \$40,000,000
071 244 795	18/05/2007	CAVEAT RE : ASSIGNMENT OF RENTS AND LEASES CAVEATOR - THE BANK OF NOVA SCOTIA. 316, 240-8 AVE SW CALGARY ALBERTA T2P2N7 AGENT - JOHN R SHERMAN
081 297 968	14/08/2008	EASEMENT AS TO PORTION OR PLAN:0813650 OVER AND FOR BENEFIT OF: SEE INSTRUMENT
081 297 969	14/08/2008	UTILITY RIGHT OF WAY GRANTEE - ATCO GAS AND PIPELINES LTD.
081 297 970	14/08/2008	UTILITY RIGHT OF WAY GRANTEE - ENMAX POWER CORPORATION. AS TO PORTION OR PLAN:0813649
091 082 341	27/03/2009	EASEMENT OVER AND FOR BENEFIT OF: SEE INSTRUMENT
121 116 030	15/05/2012	BUILDER'S LIEN LIENOR - HOOVER MECHANICAL PLUMBING & HEATING LTD. 2003A 10 AVE SW CALGARY ALBERTA T3C0K4 AMOUNT: \$222,610
121 126 150	25/05/2012	BUILDER'S LIEN LIENOR - LENBETH WEEPING TILE CALGARY. C/O BUTLIN OKE ROBERTS NOBLES BRAUN 100, 1501 - 1 STREET SW CALGARY ALBERTA T2R0W1 AGENT - BILL TILLAPAUGH AMOUNT: \$34,965
121 131 921	31/05/2012	BUILDER'S LIEN LIENOR - KHYSTONE EXCAVATING LTD. ATTN: B. ADAM E. BRENER, C/O LEON BICKMAN BRENER 350, 603 - 7 AVE SW CALGARY

( CONTINUED )

ENCUMBRANCES, LIENS & INTERESTS

PAGE 3  
# 081 387 244 +2

REGISTRATION

NUMBER DATE (D/M/Y) PARTICULARS

ALBERTA T2P2T5  
AGENT - B ADAM E BRENER  
AMOUNT: \$222,901

121 137 077 05/06/2012 BUILDER'S LIEN  
LIENOR - BURSCO ROCK PRODUCTS LTD.  
ROBB & EVENSON PROFESSIONAL CORP  
506, 933- 17 AVE SW  
CALGARY  
ALBERTA T2T5R6  
AGENT - CALVIN C ROBB,  
AMOUNT: \$269,940

121 141 840 08/06/2012 BUILDER'S LIEN  
LIENOR - HARRIS STEEL SERVICES LIMITED,  
C/O MCLENNAN ROSS LLP  
ATTN: JAMIE P. FLANAGAN  
1600, 300-5 AVE SW  
CALGARY  
ALBERTA T2P3C4  
AGENT - JAMIE P FLANAGAN  
AMOUNT: \$252,657

121 141 892 08/06/2012 BUILDER'S LIEN  
LIENOR - NATIONAL CONCRETE ACCESSORIES CANADA INC,  
C/O DUNCAN & CRAIG LLP  
2800, 10060 JASPER AVE  
EDMONTON  
ALBERTA T5J3V9  
AGENT - MARY ANNE BILLINGHAM  
AMOUNT: \$24,306

121 142 480 11/06/2012 BUILDER'S LIEN  
LIENOR - 1556175 ALBERTA LTD.  
O/A COMCAST CONTRACTING  
C/O FERCHO LAW OFFICES  
#14, 205 1ST STREET EAST  
COCHRANE  
ALBERTA T4C1X6  
AGENT - VINCE BUSSIÈRE  
AMOUNT: \$853,603

121 148 843 15/06/2012 BUILDER'S LIEN  
LIENOR - CHOCO CONSTRUCTION INC.  
2202 MILLRISE POINT SW  
CALGARY  
ALBERTA T2Y3W4  
AGENT - HEBERT ALFONSO VALOYES  
AMOUNT: \$31,560

( CONTINUED )

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 ENCUMBRANCES, LIENS & INTERESTS

PAGE 4  
 # 081 387 244 +2

REGISTRATION

NUMBER	DATE (D/M/Y)	PARTICULARS
121 156 434	22/06/2012	BUILDER'S LIEN LIENOR - FOX AIR SYSTEMS INC. C/O RUSSELL Q GREGORY 1000, 818 3 AVE SW CALGARY ALBERTA T2P5C5 AMOUNT: \$56,700
121 164 439	29/06/2012	BUILDER'S LIEN LIENOR - G & M STONE 1993 LTD. C/O MCMAHON LAW ATT: J P MCMAHON 259, 708 - 11 AVENUE SW CALGARY ALBERTA T2R0E4 AGENT - J PETER MCMAHON AMOUNT: \$33,547
121 183 711	20/07/2012	BUILDER'S LIEN LIENOR - UNITED RENTALS OF CANADA, INC. C/O SMITH MACK LAMARSH 450, 808-4 AVE SW CALGARY ALBERTA T2P3E8 AGENT - KAREN D JACOBSON AMOUNT: \$19,383
121 194 334	31/07/2012	BUILDER'S LIEN LIENOR - CONCEPT ELECTRIC LTD. MILLER THOMSON LLP ATTN: NICOLE T. TAYLOR-SMITH 3000, 700-9TH AVE SW CALGARY ALBERTA T2P3V4 AGENT - NICOLE T TAYLOR-SMITH AMOUNT: \$428,162
121 288 392	02/11/2012	CERTIFICATE OF LIS PENDENS AFFECTS INSTRUMENT: 121137077
121 295 197	09/11/2012	CERTIFICATE OF LIS PENDENS AFFECTS INSTRUMENT: 121116030
121 303 043	20/11/2012	CERTIFICATE OF LIS PENDENS AFFECTS INSTRUMENT: 121126150
121 308 644	23/11/2012	CERTIFICATE OF LIS PENDENS AFFECTS INSTRUMENT: 121141840
121 309 662	26/11/2012	CERTIFICATE OF LIS PENDENS

( CONTINUED )

ENCUMBRANCES, LIENS & INTERESTS

PAGE 5  
# 081 387 244 +2

REGISTRATION

NUMBER	DATE (D/M/Y)	PARTICULARS
		AFFECTS INSTRUMENT: 121131921
121 318 342	04/12/2012	CERTIFICATE OF LIS PENDENS AFFECTS INSTRUMENT: 121141892
121 333 568	20/12/2012	CERTIFICATE OF LIS PENDENS AFFECTS INSTRUMENT: 121164439
131 007 092	08/01/2013	CERTIFICATE OF LIS PENDENS AFFECTS INSTRUMENT: 121183711
131 024 068	25/01/2013	CERTIFICATE OF LIS PENDENS AFFECTS INSTRUMENT: 121194334

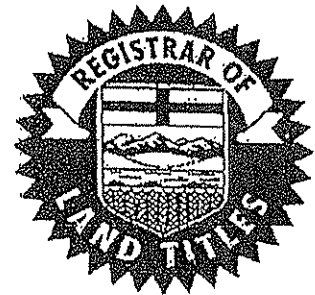
\* ADDITIONAL REGISTRATIONS MAY BE SHOWN ON THE CONDOMINIUM ADDITIONAL  
PLAN SHEET

TOTAL INSTRUMENTS: 030

THE REGISTRAR OF TITLES CERTIFIES THIS TO BE AN  
ACCURATE REPRODUCTION OF THE CERTIFICATE OF  
TITLE REPRESENTED HEREIN THIS 22 DAY OF AUGUST,  
2013 AT 01:18 P.M.

ORDER NUMBER: 24229162

CUSTOMER FILE NUMBER: 549362-1



\*END OF CERTIFICATE\*

THIS ELECTRONICALLY TRANSMITTED LAND TITLES PRODUCT IS INTENDED  
FOR THE SOLE USE OF THE ORIGINAL PURCHASER, AND NONE OTHER,  
SUBJECT TO WHAT IS SET OUT IN THE PARAGRAPH BELOW.

THE ABOVE PROVISIONS DO NOT PROHIBIT THE ORIGINAL PURCHASER FROM  
INCLUDING THIS UNMODIFIED PRODUCT IN ANY REPORT, OPINION,  
APPRAISAL OR OTHER ADVICE PREPARED BY THE ORIGINAL PURCHASER AS  
PART OF THE ORIGINAL PURCHASER APPLYING PROFESSIONAL, CONSULTING  
OR TECHNICAL EXPERTISE FOR THE BENEFIT OF CLIENT(S).





LAND TITLE CERTIFICATE

S  
LINC SHORT LEGAL TITLE NUMBER  
0033 529 000 0813651;4 081 387 244 +3

LEGAL DESCRIPTION

CONDOMINIUM PLAN 0813651  
UNIT 4  
AND 2768 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY  
EXCEPTING THEREOUT ALL MINES AND MINERALS

ATS REFERENCE: 5;2;24;16;SE  
ESTATE: FEE SIMPLE

MUNICIPALITY: CITY OF CALGARY

REFERENCE NUMBER: 081 297 971 +3

REGISTRATION	DATE (DMY)	REGISTERED OWNER(S) DOCUMENT TYPE	VALUE	CONSIDERATION
081 387 244	15/10/2008	PLAN CORRECTION		

OWNERS

VALMONT AT ASPEN STONE INC.  
OF 808-55 AVE NE  
CALGARY  
ALBERTA T2E 6Y4

ENCUMBRANCES, LIENS & INTERESTS

REGISTRATION NUMBER	DATE (D/M/Y)	PARTICULARS
051 350 246	21/09/2005	UTILITY RIGHT OF WAY GRANTED - THE CITY OF CALGARY. AS TO PORTION OF PLAN:0513220
051 350 249	21/09/2005	CAVEAT RE : RESTRICTIVE COVENANT
051 350 250	21/09/2005	CAVEAT RE : RESTRICTIVE COVENANT

( CONTINUED )

## ENCUMBRANCES, LIENS &amp; INTERESTS

PAGE 2

# 081 387 244 +3

## REGISTRATION

NUMBER	DATE (D/M/Y)	PARTICULARS
071 244 794	18/05/2007	MORTGAGE MORTGAGE - THE BANK OF NOVA SCOTIA. 240 - 8 AVENUE S.W., CALGARY ALBERTA T2P2N7 ORIGINAL PRINCIPAL AMOUNT: \$40,000,000
071 244 795	18/05/2007	CAVEAT RE : ASSIGNMENT OF RENTS AND LEASES CAVEATOR - THE BANK OF NOVA SCOTIA. 316, 240-8 AVE SW CALGARY ALBERTA T2P2N7 AGENT - JOHN R SHERMAN
081 297 968	14/08/2008	EASEMENT AS TO PORTION OR PLAN:0813650 OVER AND FOR BENEFIT OF: SEE INSTRUMENT
081 297 969	14/08/2008	UTILITY RIGHT OF WAY GRANTEE - ATCO GAS AND PIPELINES LTD.
081 297 970	14/08/2008	UTILITY RIGHT OF WAY GRANTEE - ENMAX POWER CORPORATION. AS TO PORTION OR PLAN:0813649
091 082 341	27/03/2009	EASEMENT OVER AND FOR BENEFIT OF: SEE INSTRUMENT
121 132 282	31/05/2012	BUILDER'S LIEN LIENOR - KEYSTONE EXCAVATING LTD. C/O LEON BICKMAN BRENER 350, 603 7TH AVE SW ATTENTION: B. ADAM E BRENER CALGARY ALBERTA T2P2T5 AGENT - B ADAM E BRENER AMOUNT: \$222,901
121 141 892	08/06/2012	BUILDER'S LIEN LIENOR - NATIONAL CONCRETE ACCESSORIES CANADA INC. C/O DUNCAN & CRAIG LLP 2800,10060 JASPER AVE EDMONTON ALBERTA T5J3V9 AGENT - MARY ANNE BILLINGHAM AMOUNT: \$24,306
121 142 480	11/06/2012	BUILDER'S LIEN LIENOR - 1556175 ALBERTA LTD.

( CONTINUED )

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 ENCUMBRANCES, LIENS & INTERESTS  
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PAGE 3  
 # 081 387 244 +3

REGISTRATION

NUMBER      DATE (D/M/Y)      PARTICULARS

-----

O/A COMCAST CONTRACTING  
 C/O FERCHO LAW OFFICES  
 #14, 205 1ST STREET EAST  
 COCHRANE  
 ALBERTA T4C1X6  
 AGENT - VINCE BUSSIERE  
 AMOUNT: \$853,603

121 164 441      29/06/2012 BUILDER'S LIEN  
 LIENOR - G & M STONE 1993 LTD.  
 C/O MCMAHON LAW  
 ATT: J P MCMAHON  
 259, 708 - 11 AVENUE SW  
 CALGARY  
 ALBERTA T2R0B4  
 AGENT - J PETER MCMAHON  
 AMOUNT: \$33,547

121 183 711      20/07/2012 BUILDER'S LIEN  
 LIENOR - UNITED RENTALS OF CANADA, INC.  
 C/O SMITH MACK LAMARSH  
 450, 808-4 AVE SW  
 CALGARY  
 ALBERTA T2P3E8  
 AGENT - KAREN D JACOBSON  
 AMOUNT: \$19,383

121 194 334      31/07/2012 BUILDER'S LIEN  
 LIENOR - CONCEPT ELECTRIC LTD.  
 MILLER THOMSON LLE  
 ATTN: NICOLE T. TAYLOR-SMITH  
 3000, 700-9TH AVE SW  
 CALGARY  
 ALBERTA T2P3V4  
 AGENT - NICOLE T TAYLOR-SMITH  
 AMOUNT: \$428,162

121 309 662      26/11/2012 CERTIFICATE OF LIS PENDENS  
 AFFECTS INSTRUMENT:    121132282

121 318 342      04/12/2012 CERTIFICATE OF LIS PENDENS  
 AFFECTS INSTRUMENT:    121141892

121 333 568      20/12/2012 CERTIFICATE OF LIS PENDENS  
 AFFECTS INSTRUMENT:    121164441

131 007 092      08/01/2013 CERTIFICATE OF LIS PENDENS  
 AFFECTS INSTRUMENT:    121183711

131 024 068      25/01/2013 CERTIFICATE OF LIS PENDENS

( CONTINUED )

ENCUMBRANCES, LIENS & INTERESTS

PAGE 4  
# 081 387 244 +3

REGISTRATION  
NUMBER DATE (D/M/Y) PARTICULARS

AFFECTS INSTRUMENT: 121194334

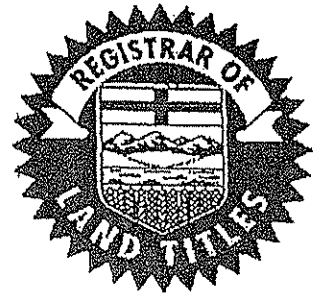
\* ADDITIONAL REGISTRATIONS MAY BE SHOWN ON THE CONDOMINIUM ADDITIONAL  
PLAN SHEET

TOTAL INSTRUMENTS: 020

THE REGISTRAR OF TITLES CERTIFIES THIS TO BE AN  
ACCURATE REPRODUCTION OF THE CERTIFICATE OF  
TITLE REPRESENTED HEREIN THIS 22 DAY OF AUGUST,  
2013 AT 01:18 P.M.

ORDER NUMBER: 24229162

CUSTOMER FILE NUMBER: 549362-1



\*END OF CERTIFICATE\*

THIS ELECTRONICALLY TRANSMITTED LAND TITLES PRODUCT IS INTENDED  
FOR THE SOLE USE OF THE ORIGINAL PURCHASER, AND NONE OTHER,  
SUBJECT TO WHAT IS SET OUT IN THE PARAGRAPH BELOW.

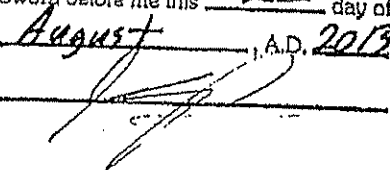
THE ABOVE PROVISIONS DO NOT PROHIBIT THE ORIGINAL PURCHASER FROM  
INCLUDING THIS UNMODIFIED PRODUCT IN ANY REPORT, OPINION,  
APPRAISAL OR OTHER ADVICE PREPARED BY THE ORIGINAL PURCHASER AS  
PART OF THE ORIGINAL PURCHASER APPLYING PROFESSIONAL, CONSULTING  
OR TECHNICAL EXPERTISE FOR THE BENEFIT OF CLIENT(S).

Exhibit "B"

THIS IS EXHIBIT " B "  
referred to in the Affidavit of

Robert Friesen

Sworn before me this 22 day of  
August, A.D. 2013

  
KYLEE M. RONNING, B.A.(Hons.), J.D.  
BARRISTER, SOLICITOR  
NOTARY PUBLIC

## ASSET PURCHASE AGREEMENT

THIS AGREEMENT is dated as of August 12, 2013 between;

Valmont at Aspen Stone LP by its General Partner Valmont at Aspen Stone Inc. (the "Vendor")

- and -

771280 Alberta Ltd. (the "Purchaser").

WHEREAS pursuant to an order (the "Initial Order") of the Court of Queen's Bench (Alberta) (the "Court") made as of the 9<sup>th</sup> day of May, 2012, the Vendor sought and obtained protection under the *Companies' Creditors Arrangement Act* (Canada);

AND WHEREAS pursuant to the Initial Order, Ernst & Young Inc. (the "Monitor") has been appointed as the monitor of the Vendor;

AND WHEREAS as part of the Vendor's restructuring efforts, the Vendor and the Monitor have determined that it is in the best interests of the Vendor to sell the Lands (as defined herein);

AND WHEREAS the Vendor has agreed to sell and the Purchaser has agreed to purchase the Lands upon the terms and conditions hereinafter set forth;

NOW THEREFORE in consideration of the mutual covenants and agreements contained herein, the parties hereby agree with each other as follows:

### ARTICLE 1 INTERPRETATION

1.1 Definitions. Unless the context otherwise requires, the following terms and expressions shall have the meanings set forth below wherever used in this Agreement:

"Agreement" means this Asset Purchase Agreement;

"Approval and Vesting Order" has the meaning ascribed thereto in Section 3.33.2;

"Assets" means the Lands and other property listed on Schedule "A";

"Closing Date" has the meaning ascribed thereto in Section 3.1;

"Deposit" means a deposit in the amount of Two Hundred Thousand (\$200,000) Canadian dollars payable by the Purchaser to the Vendor's Solicitors upon execution and delivery of this Agreement which shall be refundable if the conditions set out in Sections 3.3, 3.4, and 3.5 are not met or waived;

"GST" has the meaning ascribed thereto in Section 2.4;

"ITA" means the *Income Tax Act* (Canada), as amended;

"Lands" means all of the Vendor's right, title and interest in and to the real property described in Schedule "A" hereto;

"Purchase Price" means the purchase price for the Lands as set forth in Section 2.2;

"**Purchaser's Conditions**" has the meaning ascribed thereto in Section 3.3

"**Time of Closing**" has the meaning ascribed thereto in Section 3.1, or such other date as may be agreed to in writing between the Vendor and the Purchaser;

"**Title Qualifications**" mean the permitted encumbrances, liens and interests in respect of the Lands as set forth in Schedule "B" attached hereto that will not be discharged from the lands pursuant to the Approval and Vesting Order;

"**Transaction**" means a transaction of purchase and sale and assignment and assumption contemplated by this Agreement; and

"**Vendor's Solicitors**" means Dentons Canada LLP, Attention: Joe Pfaefflin.

- 1.2 **Headings, etc.** The division of this Agreement into articles, sections and paragraphs and the insertion of headings is for convenience of reference only and shall not affect the construction or interpretation hereof. Unless otherwise stated, all references herein to articles or sections are to those of this Agreement.
- 1.3 **Plurality and Gender.** Words used herein importing the singular number only shall include the plural and vice versa and words importing gender shall include all genders and words importing individuals shall include corporations, partnerships, trusts, syndicates, joint ventures, governments and governmental agents and authorities and vice versa.
- 1.4 **Governing Law.** This Agreement shall be construed and enforced in accordance with, and the rights of the parties shall be governed by, the laws of the Province of Alberta. Each of the parties hereto irrevocably submits to the non-exclusive jurisdiction of the Court over any action or proceeding arising out of or relating to this Agreement and the parties hereto irrevocably agree that all claims in respect of such action or proceeding may be heard and determined in such courts of the Province of Alberta.
- 1.5 **Schedules.** The following Schedules are incorporated and form part of this Agreement:
- |              |                        |
|--------------|------------------------|
| Schedule "A" | Lands and Other Assets |
| Schedule "B" | Title Qualifications   |

**ARTICLE 2**  
**PURCHASE AND SALE**

- 2.1 **Sale of Assets.** Upon the terms and conditions stated herein, as of the Closing Time, the Purchaser hereby purchases from the Vendor, and the Vendor hereby sells, assigns, sets over and delivers to the Purchaser, the Assets at and for the purchase price hereinafter described.
- 2.2 **Purchase Price.** The aggregate purchase price payable by the Purchaser to the Vendor for the Assets shall be the amount of Twelve million and fifty thousand (\$ 13,509,000 ) Canadian dollars (the "Purchase Price").
- 2.3 **Payment of Purchase Price.** Subject to this Agreement, the Purchaser shall pay, on or before the Closing Date, the Purchase Price as follows:
- (a) the Deposit upon execution and delivery of this Agreement;

- (b) an amount equal to the sum required to satisfy all of the Vendor's obligations in favour of the Bank of Nova Scotia which amount is calculated to be \$7,837,595 as at July 10, 2013 plus (i) all outstanding letters of credit, (ii) construction draws advanced after July 10, 2013, and (iii) fees and interest accrued prior to the Closing Date; and
- (c) the balance of the Purchase Price (subject to adjustments as provided herein).

Unless otherwise agreed, all amounts payable pursuant to clauses (a) and (c) above shall be paid to the Vendor's Solicitors by Solicitor's trust cheque, wire transfer, in cash, or by cheque certified by, or draft of, a Canadian chartered bank to be released as applicable upon Closing.

- 2.4 GST. The Purchase Price shall not include the amount of Goods and Services Tax exigible on the within transaction pursuant to the provisions of the *Excise Tax Act* (Canada) (the "GST"), which GST shall be tendered in accordance with the provisions of Section 4.2(b).
- 2.5 Late Interest. In the event the Vendor agrees to accept late payment, the Purchaser agrees to pay interest at the rate of Bank of Nova Scotia Prime Interest Rate on the Closing Date plus one percent (Prime rate + 1.0%) calculated and payable monthly not in advance on the Purchase Price owing to the Vendor.

### ARTICLE 3 CLOSING

- 3.1 Time of Closing. The closing of the transactions contemplated by this Agreement (the "Time of Closing") shall occur at the earlier of 2:00 p.m. (M.D.T.) on August 23, 2013 or 2:00 p.m. (M.D.T.), seven (7) days after satisfaction of the conditions contained in Section 3.3 or such other date as the parties hereto may agree upon in writing (the "Closing Date").
- 3.2 Post-Closing Adjustments. Adjustment for the actual costs of realty taxes, utilities, closing costs, and rent payments (as applicable) will be made not later than three days after Closing (the Closing Date to be for the account of the Purchaser) and shall be reflected on a Post-Closing Statement of Adjustments to be delivered by the Purchaser to the Vendor and the Monitor within five days after Closing.
- 3.3 Conditions to Closing. The obligation of the Purchaser and the Vendor to proceed with the closing of the Transaction is conditional upon the Vendor obtaining an order of the Court:
  - (a) approving the Transaction; and
  - (b) conveying title to the Lands free of claims of the Vendor and the parties claiming through the Vendor (other than as specifically referenced herein),

which order shall be: (i) in form and substance satisfactory to the Vendor and the Purchaser, acting reasonably, and (ii) in full force and effect, free of any stay or other impediment to execution (iii) the stalking horse offer will be deemed null and void on closing and this Asset Purchase agreement will stand in its place (the "Approval and Vesting Order").



3.4 Vendor's Conditions. The obligation of the Vendor to complete the Transaction on the Closing Date is subject to the following conditions being fulfilled or performed at or prior to the Time of Closing, as applicable:

- (a) all representations and warranties of the Purchaser contained in this Agreement shall be true as of the Closing Date with the same effect as though made on and as of that date; and
- (b) the Purchaser shall have performed each of its obligations under this Agreement to the extent required to be performed on or before the Closing Date.

The foregoing conditions are for the exclusive benefit of the Vendor. Any condition may be waived by the Vendor in whole or in part. Any such waiver shall be binding on the Vendor only if made in writing.

#### ARTICLE 4 DELIVERY

4.1 Deliveries by the Vendor. The Vendor shall deliver, or cause to be delivered, the following to the Purchaser:

- (a) a duly executed and registrable transfer of land in respect of the Lands;
- (b) the Approval and Vesting Order;
- (c) an assignment of all licences affecting the Lands;
- (d) an assignment of all permits and plans affecting the Lands;
- (e) an assignment of all rights under agreements registered against title to the Lands, as the Purchaser may require, along with registrable transfers of caveats with regard to such agreements; and
- (f) such further and other documentation as is referred to in this Agreement or as the Purchaser may reasonably require to give effect to this Agreement.

4.2 Deliveries by the Purchaser. At the Time of Closing the Purchaser shall deliver, or cause to be delivered, the following to the Vendor:

- (a) a certified cheque or bank draft, payable to the Vendor's Solicitor in an amount equal to the balance of the Purchase Price set out in Section 2.3;
- (b) a statutory declaration or officer's certificate confirming that the Purchaser is registered for the purposes of Part IX of the *Excise Tax Act* (Canada) (the "Act") and confirming that, by virtue of the registration and the provisions of the Act, the Purchaser covenants to assume the liability for the GST accruing in respect of this transaction. The Purchaser further covenants that it shall either pay the GST payable in respect of the transaction or complete and execute such forms, make such filings and reports and do all other things that are necessary or required pursuant to the Act, all within the time limits prescribed in the Act. The Purchaser hereby agrees to indemnify and save the Vendor harmless from and against all liability, costs and expenses, including legal fees and disbursements on a

solicitor and its own client basis, that the Vendor may incur or become subject to as a result of a default by the Purchaser of its obligations pursuant to this paragraph; and

- (c) such further and other documentation as is referred to in this Agreement or as the Vendor may reasonably require to give effect to this Agreement.

- 4.3 Escrow. The Vendor agrees to deliver, or cause the Vendor's Solicitors to tender, the items outlined for delivery pursuant to paragraph 4.1 hereof, together with any other documents or items reasonably requested by the Purchaser, with a reasonable time prior to the Closing Date on such trust conditions as are customarily used by solicitors in the City of Calgary for transactions similar in nature for the sole purpose of facilitating the conveyance of the Lands.

**ARTICLE 5**  
**REPRESENTATIONS AND WARRANTIES OF THE VENDOR**

- 5.1 Vendor's Representations and Warranties. The Vendor represents and warrants, and acknowledges that the Purchaser is relying upon such representations and warranties in connection with the acquisition of the Lands, that, as at the Closing Date, the Vendor is a resident of Canada within the meaning of the ITA.

**ARTICLE 6**  
**REPRESENTATIONS AND WARRANTIES OF THE PURCHASER**

- 6.1 Purchaser's Representations and Warranties. The Purchaser represents and warrants, and acknowledges that the Vendor is relying upon such representations and warranties in connection with the sale of the Lands, that, as at the Closing Date:
  - (a) the Purchaser is a validly existing corporation under the laws of the Province of Alberta, has all requisite corporate power and authority to execute, deliver and perform this Agreement and the consummation of the transactions contemplated hereunder have been duly authorized by all necessary corporate action on the part of the Purchaser;
  - (b) the Purchaser is registered under Part IX of the *Excise Tax Act* (Canada); and
  - (c) the Purchaser is not a non-Canadian as defined in the *Investment Canada Act* (Canada) and that the completion of the within transaction is not nullifiable or reviewable under the said legislation.

**ARTICLE 7**  
**ADDITIONAL COVENANTS OF THE PARTIES**

- 7.1 As is-where is. The Purchaser and the Vendor represent, warrant, covenant and agree with each other as follows:
  - (a) the Assets are sold on an "as is - where is" basis and there are no representations, warranties or conditions, whether express or implied (by law or by equity), with respect to the Assets including without limitation any representation, warranty or condition respecting the environmental condition, presence of hazardous substances or any other environmental matter concerning the Assets, the merchantability of the Assets, the condition, quality or fitness for any particular purpose or the Assets, the conformity of the Assets to any description, or any warranty of title with respect to the Assets. The Purchaser acknowledges that it has conducted or will conduct its own independent inspection and investigation of the Assets and is satisfied with the Assets in all respects; and

- (b) the Lands shall be conveyed to the Purchaser free and clear of all right, title, and interest of the Vendor and those claiming through the Vendor by virtue of the Vesting and Approval Order, but subject to the Title Qualifications registered against title to the Lands.

7.2 Confidential Information. The Purchaser agrees that any information obtained by the Purchaser from the Vendor in respect of the Transaction shall be treated as strictly confidential and such confidentiality shall continue to be governed by the provisions of the confidentiality agreement currently in place between the parties.

**ARTICLE 8**  
**NOTICES**

8.1 Notices. Any notices or other communications required or given under this Agreement shall be in writing, shall be delivered in person or by facsimile and shall be deemed to have been given and received when delivered in person or when communicated by facsimile during normal business hours on a business day (and otherwise on the next business day):

- (a) If to the Vendor, addressed to:

Dentons Canada LLP  
15<sup>th</sup> Floor, Bankers Court  
850 - 2<sup>nd</sup> Street SW  
Calgary, AB T2P 0R8

Attention: Joe O. Pfafflin/David W. Mann  
Facsimile: (403) 266-3100

- (b) If to the Purchaser, addressed to:

- Bishop and McKenzie
- 1700 Watermark Tower
- 530-5<sup>th</sup> Avenue, SW
- Calgary, Alberta

Attention: Armand Moss  
E-mail: a.moss@bishopmckenzie.com

or at such other place or places or to such other person or persons as shall be designated in writing by a party to this Agreement in the manner herein provided.

**ARTICLE 9**  
**MISCELLANEOUS**

9.1 Declaration of Trust. In the event the Vendor has not complied with all the necessary legal requirements to transfer the legal title to any or all of the Lands as of the Closing Time, the Vendor acknowledges and declares that, as of the Closing Time, the Vendor shall hold and stand possessed of and shall continue to hold and stand possessed of the beneficial interest in the Lands for which legal title has not been transferred in trust for and on behalf of the Purchaser for the Purchaser's sole use, enjoyment and benefit, and further acknowledges that all benefit and advantage accruing to the beneficial interest shall, if and when received, be received and held by the Vendor, its successors or its assigns, fully for the benefit, use and ownership of the Purchaser as aforesaid.

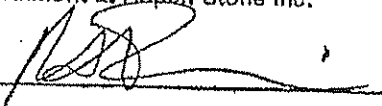
9.2 Enurement. This Agreement shall be binding upon and enure to the benefit of the parties hereto and their legal representatives, successors and permitted assigns.

- 9.3 **Severability.** In case any provision in this Agreement shall be prohibited, invalid, illegal or unenforceable in any jurisdiction, such provision shall be ineffective only to the extent of such prohibition, invalidity, illegality or unenforceability in such jurisdiction without affecting or impairing the validity, legality or enforceability of the remaining provisions hereof, and any such prohibition, invalidity, illegality or unenforceability shall not affect or impair such provision in any other jurisdiction.
- 9.4 **Further Assurances.** Each of the parties hereto shall at the request and expense of the other party hereto so requesting execute and deliver such further or additional documents and instruments as may reasonably be considered necessary or desirable to properly reflect and carry out the true intent and meaning of this Agreement.
- 9.5 **Survival.** The representations, warranties, covenants and agreements made by the parties each to the other in or pursuant to this Agreement shall survive the closing of the transactions herein provided for.
- 9.6 **Time of Essence.** Time shall be of the essence of this Agreement.
- 9.7 **Commission.** The Purchaser acknowledges that there are no commissions, including without limitation any agent or brokerage fees, payable in connection with the Transaction and the Purchaser agrees to indemnify the Vendor against any claim for compensation or commission by any third party or agent retained by the Purchaser in connection with, or in contemplation of, the Transaction.
- 9.8 **Costs.** Each party shall be responsible for its own costs in preparation of this Agreement and completion of the Transaction. For further certainty, the Vendor shall bear the cost of obtaining the Approval and Vesting Order and preparing the transfer of the Lands. All other costs including the cost of registration of the transfer of the Lands and the preparation and registration of any mortgage documentation are to be paid by the Purchaser.
- 9.9 **Waiver.** Failure by either party hereto to insist in any one or more instances upon the strict performance of any one of the covenants contained herein shall not be construed as a waiver or relinquishment of such covenant. No waiver by any party hereto (whether in whole or in part) of any such covenant shall be deemed to have been made unless expressed in writing and signed by the waiving party.
- 9.10 **Amendment.** This Agreement may not be amended, modified or terminated except only in a non-material respect and, in such an event, only:
- (a) by an instrument in writing signed by the parties hereto; and
  - (b) approved by the Monitor.
- 9.11 **Counterparts and Facsimile.** This Agreement may be executed in counterparts, each of which when so executed shall be deemed to be an original and all counterparts together shall constitute one and the same instrument. A signed counterpart provided by way of facsimile transmission or by e-mail in PDF format shall be as binding upon the parties as an originally signed counterpart.

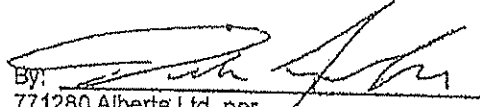
IN WITNESS WHEREOF the parties hereto have caused this Agreement to be signed and delivered by its duly authorized officer on the date indicated below.

Dated Aug 22, 2013

Valmont at Aspen Stone LP by its General Partner Valmont at Aspen Stone Inc.

By: 

Dated August 12, 2013

By:   
771280 Alberta Ltd, per  
Dale Anda, President

SCHEDULE "A"

Lands

All undertaking, property, and assets used on or in the lands municipally known as 15, 25 and 45 Aspenmont Heights, Calgary, Alberta, and legally described as:

- Firstly: Plan 0813651  
Unit 3  
And 2765 Undivided One Ten Thousandths shares in the Common Property  
Excepting thereout all mines and minerals
- Secondly: Plan 0813651  
Unit 2  
And 1695 Undivided One Ten Thousandths shares in the Common Property  
Excepting thereout all mines and minerals
- Thirdly: Plan 0813651  
Unit 4  
And 2768 Undivided One Ten Thousandths shares in the Common Property  
Excepting thereout all mines and minerals

Other Assets

Any and all supplies, equipment, chattels and personal property located on the Lands owned by the Vendor and used in the management, operation, maintenance or repair of the Lands and Improvements.

All site improvements in place, all working drawings and right to use same, licenses, development permits, environmental reports, geotechnical investigation, and all transmittal letters as required, to provide the Purchaser the benefit thereof.

Any and all deposits prepaid by the Vendor to the City of Calgary or any utility supplier or contractor and outstanding as at the Date of Closing.

Any and all purchase contracts respecting the sale of units to customers.

SCHEDULE "B"

Title Qualifications

Plan 0813651 Unit 3

Registration Number	Encumbrances, Liens & Interests
051 350 246	Utility Right of Way in favour of the City of Calgary
051 350 249	Caveat Re: Restrictive Covenant
051 350 250	Caveat Re: Restrictive Covenant
081 297 968	Easement
081 297 969	Utility Right of Way in favour of Atco
081 297 970	Utility Right of Way in favour of Enmax
091 082 341	Easement
To be determined	Purchaser's Financing

Plan 0813651 Unit 2

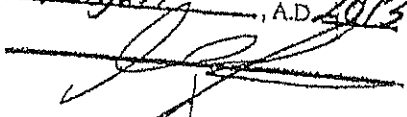
Registration Number	Encumbrances, Liens & Interests
051 350 246	Utility Right of Way In favour of the City of Calgary
051 350 249	Caveat Re: Restrictive Covenant
051 350 250	Caveat Re: Restrictive Covenant
081 297 968	Easement
081 297 969	Utility Right of Way In favour of Atoe
081 297 970	Utility Right of Way In favour of Enmax
091 082 341	Easement
To be determined	Purchaser's Financing



Plan 0813651 Unit 4

Registration Number	Encumbrances, Liens & Interests
051 350 246	Utility Right of Way In favour of the City of Calgary
051 350 249	Caveat Re: Restrictive Covenant
051 350 250	Caveat Re: Restrictive Covenant
081 297 968	Easement
081 297 969	Utility Right of Way In favour of Atco
081 297 970	Utility Right of Way In favour of Enmax
091 082 341	Easement
To be determined	Purchaser's Financing

Exhibit "C"

THIS IS EXHIBIT " C " referred to in the Affidavit of  
Robert Friesen  
Sworn before me this 22 day of  
August, A.D. 2013  


KYLEE M. RONNING, B.A.(Hons.), J.D.  
BARRISTER, SOLICITOR  
NOTARY PUBLIC

AMENDING AGREEMENT

THIS AGREEMENT is dated as of August 21, 2013 between;

Valmont at Aspen Stone LP by its general partner, Valmont at Aspen Stone Inc. (the "Vendor")

- and -

771280 Alberta Ltd. (the "Purchaser")

WHEREAS the parties hereto entered into an Asset Purchase Agreement dated August 12, 2013 respecting various assets of the Vendor (the "APA");

AND WHEREAS the APA contemplated a Closing Date of August 23, 2013;

AND WHEREAS the parties must delay the Closing Date to September 6, 2013;

AND WHEREAS between August 23, 2013 and the Closing Date, the Bank of Nova Scotia may make draw advances related to the Land and Improvements which will affect the consideration to be paid by the Purchaser to the Vendor under the APA;

AND WHEREAS the parties must make certain changes to the APA to change the Closing Date, to clarify certain other points, and to provide for an adjustment of the Purchase Price in the event the Draw Advances are made;

AND WHEREAS all capitalized terms not defined herein shall take the meaning ascribed to them in the APA;

NOW THEREFORE in consideration of the mutual covenants and agreements contained herein, the parties hereby agree as follows:

1. The definition of "Purchaser's Conditions" in Paragraph 1.1 of the APA is deleted in its entirety and the following definition will be added to Paragraph 1.1 of the APA;

"Vendor's Conditions" has the meaning ascribed thereto in Section 3.4;"

2. The definition of "Approval and Vesting Order" in Paragraph 1.1 of the APA is deleted in its entirety and replaced by the following;

"Approval and Vesting Order" has the meaning ascribed thereto in Section 3.3;"

3. The definition of "Deposit" in Paragraph 1.1 of the APA is deleted in its entirety and replaced by the following;

"Deposit" means a deposit in the amount of Two Hundred Thousand (\$200,000) Canadian dollars payable by the Purchaser to the Vendor's Solicitors upon execution and

delivery of this Agreement which shall be refundable if the conditions set out in Sections 3.3 and 3.4 are not met or waived;"

4. Paragraph 2.2 of the APA is amended by removing the words "Twelve million and fifty thousand" and replacing them with "Thirteen million five hundred nine thousand".

6. A new Paragraph 2.6 will be added to the APA, which will state the following:

"Trade Payable Adjustment. The Purchaser will be responsible for payment of all new trade payable invoices dated from and after August 23, 2013 and the Vendor will be responsible for all trade payable invoices dated prior to August 23, 2013."

6. Paragraph 3.1 of the APA is deleted in its entirety and replaced by the following:

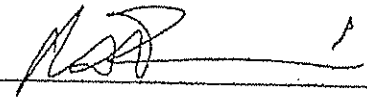
"Time of Closing. The closing of the transactions contemplated by this Agreement (the "Time of Closing") shall occur at 2:00 M.D.T. on September 6, 2013 or such other date as the parties hereto may agree to in writing."

7. The following is added to the end of Schedule "A" to the APA:

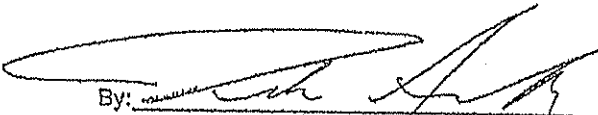
"Any and all contracts with trades in relation to the Lands and Improvements,"

IN WITNESS WHEREOF the parties hereto have caused this Amending Agreement to be signed and delivered by their respective duly authorized officer on the date first written above.

Valmont at Aspen Stone LP by its general partner Valmont at Aspen Stone Inc.

By: 

771280 Alberta Ltd.

By:   
Date *April*

**TAB B**

Exhibit: 4 Date: May 7, 2015  
Exam of: Timothy Charles Taylor  
Court Reporter: Elizabeth Hoyle

Clerk's stamp:  
CLERK OF THE COURT  
FILED  
AUG 30 2013  
JUDICIAL CENTRE  
OF CALGARY

COURT FILE NUMBER 1201-05843  
COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL CENTRE CALGARY

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,  
RSC 1985, c C-36, AS AMENDED

AND IN THE MATTER OF UBG BUILDERS INC., ALBERTA BUILDERS CAPITAL INC., ALPINE HOMES (2006) INC., AMERICAN BUILDERS CAPITAL (US) INC., EDGEWATER AT GRIESBACH INC., ELITE HOMES (2006) LTD., EVOLUTION BY GREENBORO INC., GREENBORO COMMUNITIES (2006) INC., GREENBORO ESTATE HOMES (2006) LTD., GREENBORO HOMES (2006) LTD., GREENBORO LUXURY HOMES INC., HIGH POINTE INC., MOUNTAINEERS VILLAGE (2006) INC., MOUNTAINEERS VILLAGE II INC., ORIGINS AT CRANSTON INC., SOUTH TERWILLEGAR VILLAGE INC., THE BRIDGES MANAGEMENT INC., THE LEDGES INC., TIMBERLINE LODGES (2006) INC., TODAY'S COMMUNITIES (2006) INC., TODAY'S HOMES (2006) INC., TUSCANY DEVELOPMENTS (2006) INC., UBG ALBERTA BUILDERS (2006) INC., UBG ALPINE HOMES (2006) LTD., UBG BRIDGES INC., UBG BUILDERS (USA) INC., UBG COMMERCIAL INC., UBG LAND INC., UBG LOT DEPOSIT CORP., UBG 4500 CALGARY INC., UBG 75 CANMORE INC., UBG 808 CALGARY INC., UNITY INVESTMENTS (2012) INC., VALMONT AT ASPEN STONE INC., VALOUR PARK AT CURRIE INC., VILLAGE AT THE HAMPTONS INC., VILLAGE ON THE PARK INC., WILDERNESS HOMES BY RIVERDALE INC., WILDERNESS RIDGE AT STEWART CREEK INC. (COLLECTIVELY, THE "APPLICANTS")

I hereby certify this to be a true copy of  
the original.

Dated this 30 day of August  
for Clerk of the Court

DOCUMENT

Order  
(re: Valmont Vesting)

ADDRESS FOR SERVICE AND  
CONTACT INFORMATION OF  
PARTY FILING THIS DOCUMENT

DENTONS CANADA LLP  
Bankers Court  
15<sup>th</sup> Floor, 850 - 2<sup>nd</sup> Street S.W.  
Calgary, Alberta T2P 0R8  
Attention: David W. Mann / Derek M. Pontin  
Ph. (403) 268-7097/6301 Fx. (403) 268-3100  
File No.: 549362-1

DATE ON WHICH ORDER WAS  
PRONOUNCED

August 30, 2013

LOCATION WHERE ORDER WAS  
PRONOUNCED

Calgary Courts Centre, Calgary, Alberta

NAME OF JUSTICE WHO MADE  
THIS ORDER

The Honourable Madam Justice C.A. Kent

ORDER

(re: Valmont Vesting)

UPON the application of the Applicants in these proceedings (collectively, "UBG"); AND UPON having read the Application of the Applicants, dated August 23, 2013, the Affidavit of Robert Friesen, dated August 22, 2013 (the "Friesen Affidavit"), the Report of the Monitor respecting the Valmont Project, dated August 22, 2013, the Affidavit of Anna Collister, dated August 29, 2013 (the "Service Affidavit"), and such other material in the pleadings and proceedings as deemed necessary; AND UPON hearing counsel for UBG, counsel for the Monitor, and other interested parties; IT IS HEREBY ORDERED AND DECLARED THAT:

*Service*

1. The time for service of notice of this application is abridged to the time actually given and service of the Application and supporting material as described in the Service Affidavit is good and sufficient, and this hearing is properly returnable before this Honourable Court today and further service thereof is hereby dispensed with.
2. All capitalized terms not otherwise defined in this Order shall have the meaning ascribed to them in the Initial Order granted in these proceedings on May 9, 2012 (the "Initial Order"), and the following terms shall have the following meaning:

(a) "Closing Adjustments" means the ordinary and specific closing adjustments described at clause 3.2 of the Purchase and Sale Agreement (as defined herein);

(b) "Lands" means the lands legally described as:

Firstly: Plan 0813651  
Unit 2  
And 1695 Undivided One Ten Thousandths shares in the  
Common Property  
Excepting thereout all mines and minerals

Secondly: Plan 0813651  
Unit 3  
And 2765 Undivided One Ten Thousandths shares in the  
Common Property  
Excepting thereout all mines and minerals

Thirdly: Plan 0813651  
Unit 4  
And 2768 Undivided One Ten Thousandths shares in the  
Common Property  
Excepting thereout all mines and minerals;

(c) "Net Proceeds" means the proceeds from the sale of the Property, less amounts required to pay the Closing Adjustments and all other reasonable and ordinary closing costs, including without limitation goods and services and other applicable sales taxes, property taxes, commissions, applicable condominium fees and legal fees and

disbursements, calculated in a manner consistent with the calculation of 'Net Proceeds' described in the Order granted by this Honourable Court in these proceedings on date June 15, 2012, and including, without limitation, a deduction in favour of the Applicants of \$675,450 for their business and operational purposes;

(d) "Property" means all of the Vendor's right, title and interest in and to the Lands and:

Any and all supplies, equipment, chattels and personal property located on the Lands owned by the Vendor and used in the management, operation, maintenance or repair of the Lands and Improvements.

All site Improvements in place, all working drawings and right to use same, licenses, development permits, environmental reports, geotechnical investigation, and all transmittal letters as required, to provide the Purchaser the benefit thereof.

Any and all deposits prepaid by the Vendor to the City of Calgary or any utility supplier or contractor and outstanding as at the Date of Closing.

Any and all purchase contracts respecting the sale of units to customers.

Any and all contracts with trades in relation to the Lands and Improvements.

(all capitalized terms in this subparagraph 2(d) shall take the meaning ascribed to them in the Purchase and Sale Agreement);

(e) "Purchase and Sale Agreement" means the Asset Purchase Agreement dated August 12, 2013 respecting the sale of the Property from the Vendor to the Purchaser, as amended by an Amending Agreement between the Vendor and the Purchaser dated August 21, 2013;

(f) "Purchaser" means 771280 Alberta Ltd.; and

(g) "Vendor" means Valmont at Aspen Stone Limited Partnership.

***Approval of Sale and Vesting of the Property***

3. The sale and conveyance of the Property to the Purchaser be and is hereby authorized and approved.
4. UBG and the Monitor are hereby authorized and directed to execute all deeds, documents, and agreements, and to do all things reasonably necessary to complete the conveyance of the Property pursuant to the terms of the Purchase and Sale Agreement and carry out the terms of this Order.
5. Upon the Monitor delivering a certificate (the "Monitor's Certificate") certifying that the sale of the Property has closed in accordance with the terms of the Purchase and Sale Agreement and all purchase monies due and owing in respect of such sale have been tendered to UBG's solicitors, then:



- (a) the Property shall be vested in the name of the Purchaser free of all estate, right, title, interest, royalty, rental, and equity of redemption of UBG and all persons who claim by, through or under UBG in respect of the Property whose interests are subordinate to those of the Purchaser by virtue of its security on the Property, subject only to the permitted encumbrances outlined in Schedule "A" of this Order (the "Permitted Encumbrances");
- (b) UBG and all persons who claim by, through or under UBG in respect of the Property, save and except the Permitted Encumbrances, shall stand absolutely barred and foreclosed from all estate, right, title, interest, royalty, rental, and equity of redemption of the Property and, to the extent that any such person remains in possession or control of any of the Property, they shall forthwith deliver possession of same to the Purchaser or its nominee;
- (c) the Purchaser shall be entitled to enter into and upon, hold and enjoy the Property for its own use and benefit without any interference of or by UBG, or any person claiming by or through or against UBG; and
- (d) the Registrar of the Land Titles Office of Alberta shall:
  - (i) discharge all encumbrances in respect of the Lands, save and except the Permitted Encumbrances, and shall register the Property in the name of the Purchaser, and
  - (ii) upon this Order being submitted for registration, register this Order against Condominium Plan No. 0813651 and any redivision thereof (on the Condominium Additional Plan Sheet) and, upon registration, this Order shall operate as and shall be a discharge of all builders' liens as they pertain to the Purchaser's share in the common property for Condominium Plan No. 0813651,

notwithstanding the requirements of section 191 of the *Land Titles Act* (Alberta).

- 6. UBG is authorized and empowered, in respect of the Property, to execute and deliver: (a) such additional, related and ancillary documents and assurances governing or giving effect to the conveyance of the Property, which, in UBG's discretion are reasonably necessary or advisable to conclude the transactions contemplated in or in furtherance of the transfer of the Property and/or this Order; and (b) any and all instruments and documents in respect of the Property as may be required by the Registrar of the Land Titles Office of Alberta or deemed necessary by UBG, and the Registrar is hereby directed, notwithstanding any restrictions in the *Land Titles Act* (Alberta) (the "LTA"), including but not limited to s. 191(1) of the LTA, to effect registration of any such instrument or document so executed by UBG or its solicitors.
- 7. Upon the filing of the Monitor's Certificate, the Monitor shall discharge, or authorize the discharge of, any security registration or registrations in the Personal Property Registry of the Province where the Property is located as may be required to properly convey clear title of the Property to the Purchaser.

8. Upon the filing of the Monitor's Certificate, the Net Proceeds shall be held in the place and stead of the Property transferred pursuant to this Order, and not disbursed to any party without the consent of the Monitor or upon further Order of this Honourable Court (the "Claims Reserve").
9. All claims of whatsoever nature or kind, including without limitation, all real property taxes not subject to adjustment under the Purchase and Sale Agreement, liens, claims, encumbrances, mortgages, proprietary claims, trust claims, lease claims, royalty claims, and other interests, other than the Permitted Encumbrances, (the "Claims") shall attach solely to the Claims Reserve, and only to such extent as such Claims have been proven in accordance with the Claims Procedure Order granted in these proceedings on June 15, 2012, with the same validity, priority and in the same amounts and subject to the same defences that were or may have been available when the Claims were attached to the Property itself.

*Miscellaneous*

10. Any conveyance or transfer of the Property made pursuant to the provisions of this Order shall be valid and enforceable and not be rendered invalid or unenforceable and the rights and remedies of the parties thereto shall not otherwise be limited or impaired in any way by: (i) the pendency of these proceedings and the declaration of insolvency made herein; (ii) any Bankruptcy Order sought or issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) ("BIA") in respect of any of the Petitioners; or (iii) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of encumbrances, contained in any existing agreement, lease, sub-lease, offer to lease or other arrangement which binds any of the Petitioners (a "Third Party Agreement"), and notwithstanding any provision to the contrary in any Third Party Agreement:
  - (a) the transaction contemplated hereby shall not create or be deemed to constitute a breach by any of the Petitioners of any Third Party Agreement to which they are a party; and
  - (b) the Purchaser shall not have liability to any person whatsoever as a result of any breach of any Third Party Agreement caused by or resulting from the creation, execution, delivery or performance of any transaction contemplated hereby.
11. Notwithstanding (i) the pendency of these proceedings and the declaration of insolvency made herein, (ii) any Bankruptcy Order sought or issued pursuant to the BIA in respect of any of the Petitioners, and (iii) the provisions under the BIA, or any other applicable federal or provincial legislation or common law, the Purchase and transaction contemplated hereby shall constitute legal, valid and binding obligations of the Petitioners enforceable against them in accordance with the terms thereof, and no transaction contemplated herein will be void or voidable at the instance of creditors and claimants and do not constitute nor shall they be deemed to constitute settlements, fraudulent preferences, assignments, fraudulent conveyances, oppressive conduct, or other reviewable transactions under the BIA, or any other applicable federal or provincial legislation or common law.
12. UBG, the Monitor, the Purchaser, or any interested party may apply to this Court for advice and direction on notice to any party likely to be affected by the Order sought or on such notice as this Court directs.

*General*

13. UBG shall serve, by courier, facsimile transmission, e-mail transmission, or ordinary post, a copy of this Order on all parties present at this application and on all parties who received notice of this application or who are presently on the service list established in these proceedings, and service on any or all other parties is hereby dispensed with. Service affected as aforesaid shall be good and sufficient service.

  
Justice of the Court of Queen's Bench of Alberta

SCHEDULE A  
(Order re: Valmont Vesting)

PERMITTED ENCUMBRANCES

Plan 0813651 Unit 2

Registration Number	Encumbrances, Liens & Interests
051 350 246	Utility Right of Way in favour of the City of Calgary
051 350 249	Caveat Re: Restrictive Covenant
051 350 250	Caveat Re: Restrictive Covenant
081 297 968	Easement
081 297 969	Utility Right of Way in favour of Atco
081 297 970	Utility Right of Way in favour of Enmax
091 082 341	Easement
To be determined	Purchaser's Financing

Plan 0813651 Unit 3

Registration Number	Encumbrances, Liens & Interests
051 350 246	Utility Right of Way in favour of the City of Calgary
051 350 249	Caveat Re: Restrictive Covenant
051 350 250	Caveat Re: Restrictive Covenant
081 297 968	Easement
081 297 969	Utility Right of Way in favour of Atco
081 297 970	Utility Right of Way in favour of Enmax
091 082 341	Easement
To be determined	Purchaser's Financing

Plan 0813651 Unit 4

Registration Number	Encumbrances, Liens & Interests
051 350 246	Utility Right of Way in favour of the City of Calgary
051 350 249	Caveat Re: Restrictive Covenant
051 350 250	Caveat Re: Restrictive Covenant
081 297 968	Easement
081 297 969	Utility Right of Way in favour of Atco
081 297 970	Utility Right of Way in favour of Enmax
091 082 341	Easement
To be determined	Purchaser's Financing

**TAB C**

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN: )  
)  
TORONTO LOFTS REALTY CORP. ) *Heidi Rubin* for the Plaintiff  
)  
)  
Plaintiff )  
)  
)  
- and - )  
)  
) *Robert Watson* for the Defendants  
)  
1580838 ONTARIO CORPORATION, )  
TANNERY LOFTS INC., )  
CHRISTOPHER WALSH and )  
DUROSHOLA TEMITOPE AWONIYI )  
)  
)  
Defendants )  
)  
)  
) HEARD: June 14, 15, 16 and 17, 2005

2005 CanLII 27383 (ON SC)

Pitt J.

REASONS FOR JUDGMENT

- [1] This is a claim for commission allegedly owing to the plaintiff, a real estate broker.
- [2] At the opening of trial, the plaintiff moved to amend the statement of claim in the following areas:
  - 1 (b) a declaration that the plaintiff is entitled to the payment of its commission for services rendered in the sale of lofts on behalf of the defendants, which shall be paid to the plaintiff immediately as they become due from the deposit and purchase monies held in trust for the defendants by their solicitors;

- (c) a mandatory order requiring the defendants to execute an irrevocable direction to their solicitors stating that any commissions owing to the plaintiff are to be transferred to the plaintiff immediately as they become due from the deposit and purchase monies held in trust for the defendants by their solicitors.
- (d) an order that any commissions to which the plaintiff is entitled to be paid into court immediately, and be released to the plaintiff as they become due;

19. In the alternative, the defendants are in a common group enterprise where they are alter egos and agents of each other.

### NEGLIGENT MISREPRESENTATION AND FRAUDULENT MISREPRESENTATION

27. In making these false representations, Walsh and Awoniyi [spokespeople for the defendant corporation] intended that Toronto Lofts would rely on their statements and intended to mislead Toronto Lofts.

28. Alternative, the representations relating to Walsh's corporate authority were untrue, in accurate and misleading and were made negligently.

31. The plaintiff relies on the doctrine of *quantum meruit*.

[3] Because of the low threshold to be met on motions to amend pleadings, and after having given the defence the option of an adjournment, I granted the amendments with respect to paragraphs 17, 27, 28, 30 and 31, and reserved on paragraphs 1 (b), (c) and (d), which focused on the relief sought.

### **FACTS**

[4] The principal of the plaintiff company, and Walsh, a key representative of the defendant companies, were familiar with each other prior to the events giving rise to this action.

[5] In response to a request from Walsh, the plaintiff forwarded a document, the first page of which reads as follows:

#### **TORONTO LOFTS REALTY CORP.**

Toronto LOFTS Realty Corp. ("Toronto LOFTS") was incorporated in 2002 as the first (and only) company in the city dedicated exclusively to selling lofts. The unique and specialized nature of the loft market positions Toronto LOFTS to be at the forefront of this exciting part of our city's downtown revitalization.



The combination of our unequalled loft knowledge, market research and experience, enables us to provide our developer clients with the most in-depth and up-to-date loft market information available. This comprehensive information enables the developer to make timely and profitable decisions, which translates into maximizing the return from your loft development.

Edwin Brklik – broker/owner of Toronto LOFTS – began his real estate career in 1990 selling condominiums and then moving into selling lofts in 1998. His most recent positions include Associate Broker with Harry Stinson Realty (2001 – 2002) and V.P. Operations with Brad Lamb Realty (1998 – 2001) in which he has directly involved in the launch and sale of at least a half dozen new projects.

We look forward to putting our specialized loft expertise to work for you and your new lost project at 736 Dundas St. E.

#### **MARKETING**

Given the intimate nature of this loft project, marketing costs can be minimized with good signage and proper website utilization. The project information would be available on our site. We can also recommend a reasonable graphic designer for all marketing/sales material and web design. Proper project perception and positioning are critical. Other marketing should also include newspaper ads and targeted flyers.

The building itself, with some cosmetic preparation, is also a key ingredient. As well, I recommend a sales office/model suite in the actual building. Once construction commences, our office can be used for the final sales. [My emphasis.]

[6] I set this document out because, of the harsh allegations made against the principal of the plaintiff, the one suggesting that he misrepresented his experience by his reference to “developer clients” is perhaps the most unfair. In light of the prior relationship between Edwin Brklik and Walsh, and the full and frank disclosure of other matters, like the date of incorporation of the plaintiff company, the use of the plural should be viewed prospectively.

#### **ENTERING OF THE SALES AGREEMENT**

[7] The most significant provisions of a sales agreement into which the parties entered, dated September 23, 2005, and prepared by the plaintiff, read as follows:

To: Toronto Lofts Realty Corp. (the "Sales Agent") in consideration of your acting as Sales Agent in listing and agreeing to offer the loft condominium property as 736 Dundas Street East (the "property"). 1580838 Ontario Corporation (the "Vendor") hereby grants to you the sole and exclusive authority, irrevocable except in accordance with the terms hereinafter contained, to offer the property for sale upon the terms and conditions hereinafter set out:

1. The Vendor agrees to pay you a commission of two percent (2%) plus exigible GST, of the total gross sale price of each unit comprising the property. For the purpose of the within agreement, the total net sale price shall be defined as the sale price of each such unit, plus without limiting the generality of the foregoing, the price of any parking space(s), locker(s) appliances added to or included as part of the purchase price in any Agreement of Purchase and Sale or upgrade addendum, for any units comprising of the property, less exigible GST.
2. The undersigned further agrees that all commission calculated in accordance with the provisions of paragraph 2 hereof, shall become due and payable by the undersigned to the Sales Agent by way of bank draft or certified cheque, as follows:
  - (a) one half (1/2) or one per cent (1%) of the commission of the sale of each unit comprising the property shall become due and payable as aforesaid, upon the Sales Agent reaching one half (1/2) or fifty per cent (50%) of unit sales, with respect to all Agreements of Purchase and Sale entered into by the undersigned for the sale of units which are firm and binding, provided all the deposits for sale have been placed into Trust;
  - (b) the remaining one half (1/2) or one per cent (1%) of all commission due and payable as aforesaid, shall become due and payable on the final closing of each unit comprising the property, and for greater certainty, final closing shall be defined as the date upon which title to each such unit is transferred to, and becomes registered in the name of each respective Purchaser thereof;

- (c) no commission for the sale of a unit comprising the property shall become due and payable unless and until all conditions have been either met or waived in an Agreement of Purchase and Sale that has been executed by both the Purchaser and the Vendor where applicable, the Purchasers has been approved for financing;
- (d) in the event that a Purchaser enters into an Agreement of Purchase and Sale with the undersigned acting as Sales Agent and pays a deposit for the purchase of a unit comprising the property, but the transaction of Purchase and Sale is not completed then the first half of the commission paid to the Sales Agent in accordance with the provisions of paragraph 3(a) will be retained by the Sales Agent and will not be refunded back to the Vendor;
- (e) the Sales Agent shall invoice the Vendor monthly and all commissions earned in that month shall become due and payable in full by the Vendor within seven (7) days of receipt of each such invoice.

...

- 4. The parties hereto covenant and agree that the within agreement may only be terminated as follows:
  - (a) the within agreement will be automatically terminated in the event that:
    - (i) all of the units comprising the property are sole; or,
    - (ii) the undersigned abandons the project before the commencement of construction on the property; and
  - (b) the agreement may be terminated by the Vendor giving fifteen (15) days written notice or the Sales Agent giving fifteen (15) days written notice, at any time, provided that in such event all commissions due and payable in accordance with the provisions of paragraph 3 hereof are paid in full, and will continue to be paid in full. In addition, all commissions due the Sales Agent for sales that have not yet gone firm will be payable to the Sales Agent should they become firm after he is terminated, subject to the provisions of 2 (a) and (b).

5. The Vendor represents, warrants, acknowledges and agrees with the Sales Agent that is as Legal control of the property, has the corporate authority to enter into this Agreement, and has the authority to offer the property for sale. The undersigned further agrees that it will not hold the Sales Agent responsible for any loss or damage to the persons, property or its contents occurring or arising during the term of this agreement however caused, including without limiting the generality of the foregoing, by way of theft, fire or vandalism, or otherwise than by the gross negligence or willful acts of the Sales Agent, or those for whom in law the Sales Agent is responsible. [My emphasis.]

[8] Edwin Brklik, the principal of the plaintiff corporation, testified that shortly after the sales agreement was executed, perhaps sometime between February and March 2004, he formed the opinion that paragraph 2(a) and part of paragraph 2(b) were ambiguous.

[9] That belief, coupled with Edwin Brklik's perception that a rift had developed between Walsh and Awoniyi, the principal shareholder of both defendant companies, according to Edwin Brklik, led him to demand an amendment to the sales agreement, which was executed by the parties on March 19, 2004 in the following form.

#### AMENDMENT TO SALES AGREEMENT

Regarding property and project known as:

TANNERY LOFTS, 736 DUNDAS STREET  
EAST, TORONTO

Between

Sales Agent: TORONTO LOFTS REALTY CORP.

And

Vendor: 1580838 ONTARIO CORPORATION

Date of Sales Agreement: SEPTEMBER 23, 2003

It is hereby understood and agreed between the undersigned parties hereto that the following changes shall by [sic] made to the above mentioned Sales Agreement, and except for such changes noted below all other terms and conditions in the Agreement shall remain as stated herein:

Delete:

Section 2., clause (a) in its entirety

Section 2., clause (b): "the remaining one half (1/2) or one percent (1%)"

Insert:

Section 2., clause (a): Upon the delivery of 19 firm and bona fide purchase and sale agreements from the Sales Agent to the Vendor, that \$45,000 of the total commission under the terms and conditions of the sales agreement will be deemed as earned. The terms of payment of which are certified funds for \$30,000 payable upon delivery to the Vendor of said purchase & sale agreements and all associated deposit moneys. The remaining \$15,000 is payable to Toronto Lofts Realty Corp.'s lawyers in trust by way of certified cheque as they may direct. The terms of release of which are that all deposits must have cleared the trust account of the Vendors condominium lawyers, Harris Sheaffer prior to the release of these funds.

Section 2., clause (b): "The balance of"

Dated at Toronto this 19<sup>th</sup> of March, 2004 in the presence of:

Signed, Sealed and Delivered, in witness whereof I have hereto set my hand and seal in the presence of:

_____	_____	<u>March 19/04</u>
Witness	Sales Agent	Dated

Dated at Toronto this 19<sup>th</sup> day of March, 2004 in the presence of:

Signed, Sealed and Delivered, in witness whereof I have hereto set my hand and seal in the presence of:

_____	_____	<u>March 19/04</u>
Witness	Vendor	Dated

**ANALYSIS**

[10] Contrary to Edwin Brklik's assertions, I believe that the plaintiff's difficulties begun when Edwin Brklik, without any reasonable basis, judged the contract prepared by himself, to be ambiguous, and demanded, without justification, the above-noted amendment to the contract.

[11] According to Edwin Brklik, his concern arose from his belief that, based on what Awoniyi had said to him in late February or early March, Walsh had no authority to sign the agreement on behalf of 1580838 Ontario Corporation. Strangely, Awoniyi, not only witnessed Walsh's signature during the signing, thereby representing that Walsh had the required authorization, but in the statement of defence, as principal of the corporate defendants, he also affirmed the contract.

[12] Judging from the original and amended statements of claim, the real problem the plaintiff may have faced is that it had signed a contract to sell property with a company, 1580838 Ontario Corporation that did not, and would not, own the property, and therefore would not be receiving the deposits and purchase money on which the plaintiff would be relying as some form of "security" for the payment of its commission.

[13] However, Edwin Brklik did not ask that the amendment be signed by the corporation that was or would be the owner of the property. He seemed to think that receiving early payment was the best solution.

[14] In any event, the vendor defendants paid only the first \$30,000.00 required by the amended agreement, and on March 20, 2004, the plaintiff purported to exercise its cancellation rights pursuant to section 4 (b) of the original agreement.

[15] The defendants take the position that the amended agreement is unenforceable as it was extracted in circumstances that breached the plaintiff's fiduciaries duties, by demanding an amendment when the defendants were vulnerable, in the middle of a sales campaign, with the plaintiff refusing to hand over signed sales contracts and deposits until the defendant 1580838 Ontario Corporation had signed the amendment. Those circumstances, the defendants argue, amount to economic duress. That allegation, I believe, is probably the key issue in the litigation.

[16] The defendants have raised a number of other issues, many of which they characterize as breaches of fiduciary duties, that would disentitle the plaintiff to any commission. They are as follows:

- (a) That the "grand opening" on February 28, 2004 was unprofessionally handled by the plaintiff.

I disagree. The evidence is to the contrary. Of the 40 units offered, 15 final sales were made on opening day and an additional 4 conditional sales were made. I believe the evidence of the plaintiff, that the corporate defendant's key man, Walsh, and his staff were very pleased with the opening.

- (b) The plaintiff allocated two units to their group, one to Edwin Brklik and his spouse, and another to a salesperson, neither of whom completed the purchases, nor provided deposits. In the case of the salesperson, an agreement was not even signed. Initially, the plaintiff indicated to the defendants that those units were sold to investors.

- (c) The plaintiff mishandled the allocation of parking spaces by not complying with the oral instructions of the defendants to allocate parking spaces, that were admittedly at a premium, to purchasers of the more expensive lots.

There is some merit to that allegation. However, I believe the complaint is exaggerated. In the first place, the instructions to the plaintiff were not in writing, but rather were transmitted in a rather loose manner. Secondly and also related to the first, the contracts for the sale of units were drafted by counsel for the defendants and no attempt was made to deal with parking in those contracts. The defendants did not convey to the plaintiff the importance of this issue as it now urges the court. The plaintiff testified and I believe the evidence that parking was not an issue with significant financial implications, and it believed that the allocation procedure it followed was known to the defendants and that no indication of disapproval was ever conveyed to it during the term of the contract.

- (d) The plaintiff retained the names and email addresses of prospective purchasers, who came to the launching, and subsequently used some of those names for their own benefit, approximately one year later.

I cannot accept that allegation as a breach of fiduciary duty. The plaintiff volunteered the information in a manner that suggested it was done in the normal course of business. Sales people collect names of potential customers from whatever sources they are obtained. The evidence was clear that at the launching, the plaintiff tried to sell as many units as they could, and certainly did not "compete" for names with, nor conceal names from, the defendants. In fact, the plaintiff had no other ongoing project at the relevant time. At the worst, the names were a residual unplanned for benefit of the contract.

- (e) The plaintiff failed to hand over all records and other documents to which the defendants, as owners, were entitled at the termination of the contract, and in particular, materials stored in the plaintiff's computers.

I reject that allegation for the following reasons:

The material used for the sales promotions was always accessible to the defendants, and the evidence does not reveal that the plaintiff had any desire to conceal anything from the defendants.

- (f) Most serious, when the plaintiff made its demand to amend the contract, it made threats to the defendants not to handover documents and deposits and to generally undermine the remainder of the project.
- (g) The plaintiff contacted the defendants' bank and misrepresented that it was in possession of a cheque drawn by the defendant on its bank.

- (h) When the plaintiff received the part payment of \$30,000.00, Edwin Brklik did not advise the defendants of its intention to terminate the agreement on the next day.

[17] I find as a fact that the plaintiff handed over to the defendants all the contracts, files and whatever computerized material that appeared to be either relevant or belonged to the defendants. Apart from contracts, deposits and names of potential buyers, there was nothing else for the plaintiff to handover to the defendant.

[18] The defendants presented Walsh's mother as a witness to testify that she was told on the telephone by someone at the plaintiff's office that no unit was available, which was untrue, but the witness could not testify when the phone call was made. I thought that item of evidence was contrived.

[19] Another incident is indicative of the length to which the defendants went to charge the plaintiff with improper conduct. One of the plaintiff's salespersons testified, clearly in error, that she in effect co-signed the sales contract with Edwin Brklik as attorney for the vendor. When plaintiff's counsel attempted to clarify the evidence by asking Walsh whether there was any evidence of such signing, defence counsel objected. It was clear that the sales lady meant that she witnessed Edwin Brklik's signature; and in any event, she certainly did not sign as a substitute for Edwin Brklik.

#### SUMMARY

[20] As I suggested earlier, the plaintiff was the architect of most of its difficulties when it forced the renegotiation of its own contract, without, in my view, any legal basis, or indeed any good reason for doing so. Frankly, the plaintiff needed and ought to have had legal counsel before it signed the initial agreement. Edwin Brklik obviously believed he knew much more about contracts than he actually knew.

[21] Edwin Brklik's threat to undermine the project if the defendant did not agree to amend the contract, is not excused by his subsequent assertion that he was only posturing. From admissions, it is clear that he recognized the moral and legal implications of the threats and must be held to account.

[22] There was no proof of either negligent or intentional misrepresentation on material issues by either the plaintiff or defendants, a subject to which I shall return.

[23] There is real substance to the defendants' allegations that the amendment was extracted through economic duress.

#### THE NATURE OF THE CONTRACT

[24] Whatever difficulties of interpretation there may have been with the original or amended contract, it is clear that the obligation of the "vendor" was to pay the plaintiff a commission of 2 percent of the sales price of each unit comprising the property. It is also clear the intention of the



parties was that the plaintiff was entitled to commission for each unit sold. While the agreement granted the plaintiff the exclusive authority to market the entire project, the payment of commissions was based on unit sales. The plaintiff was not obliged to sell the entire project before it became entitled to commission, although it would have to await completion of the sale before it became entitled to full payment. The evidence indicates that the plaintiff sold 17 lots unconditionally by March 14, 2004, and an additional 2 by March 20, 2004, making a total of 19 out of 40 by that date. Even if there may have been a breach of the original contract by the plaintiff, such breach was certainly not fundamental in nature, as the failure to perform did not have the effect of depriving the defendants of substantially the whole benefit of the contract. See *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1987] 1 S.C.R. 426.

### REPRESENTATIONS

[25] In paragraph 5 of the original agreement 1580838 Ontario Corporation represented, warranted and acknowledged that it had legal control of the property, had the corporate authority to enter into the agreement, and finally, had the authority to offer the property for sale. There was no evidence that those representations, warranties or acknowledgements were false.

[26] The form of "agreements of purchase and sale" prepared by the solicitor for the defendant vendor, described Tannery Lofts Inc. as the vendor, and provided for the deposit money to be paid to Harris, Sheaffer LLP in trust, and described them as "the Declarant's Solicitors and Trustees." The agreements did not indicate to whom the balance due on closing was to be paid.

[27] Commissions are paid to agents either from monies received on sales or from monies that are owed to the party responsible to pay the commissions as result of the work of the agents. It would certainly have been the intention of the parties that the commission be paid by the party on whose behalf the purchase money was received or the party entitled to receive it.

[28] There is no reason to believe that Walsh or Awoniyi either intended to represent that they would be personally responsible for paying the commission, or that a corporation (in this case 158038 Ontario Corporation), which would not be entitled to receive the purchase money, would be responsible to pay the commission.

[29] It goes without saying that the plaintiff, when it entered into the agreement, would have expected that the party entitled to receive the purchase money would be responsible for paying the commission. 158038 Ontario Corporation did not contract to pay an amount equal to the commission. Paragraph 2 of the agreement was not concerned with which party was responsible to pay the commission. It was concerned with commission rates, and how and when they become payable. In fact paragraph 3 (d) contemplated a circumstance in which the plaintiff would be entitled to retain deposits.

[30] Awoniyi controlled both the numbered corporation and Tannery Lofts Inc. The plaintiff was not obliged to enquire as to which one of them would be receiving the purchase money. Indeed, there is no evidence that the plaintiff knew of the existence of Tannery Lofts Inc. at the time the contract was signed or whether, if it did, it would mean anything. The plaintiff believed

it was contracting with the corporation that had "legal control of the property and all the other powers recited in paragraph 5 of the agreement, and that was thereby entitled to receive the purchase money. That Tannery Lofts Inc. happens to be that corporation ought not to redound to the detriment of the plaintiff. Awoniyi witnessed the agreement that Walsh signed on behalf of 158038 Ontario Corporation in which were made the representations, warranties and acknowledgement that it had the legal control of the subject property, the corporate authority to enter into the sales agreement, and the authority to offer the property for sale.

[31] There is no need to presume bad faith on the part of the personal defendants. They, along with 158038 Ontario Corporation, were representing at the time of the execution of the sales agreement that the plaintiff was contracting with the party who was the vendor and who would receive the purchase money and be, therefore, responsible for paying the commissions. At a minimum, 158038 Ontario Corporation was representing at the time that if it did not receive the purchase money itself, it would see to the payment of the commission by the party that received the purchase money. I see no reason to believe that the personal defendants and 158038 Ontario Corporation were attempting to mislead the plaintiff so that it would sign a contract with the wrong party.

Accordingly both the 158038 Ontario Corporation and Tannery Lofts Inc. are jointly and severely liable for paying the commissions.

#### DAMAGES

[32] I am not satisfied that the defendants signed the amended agreement voluntarily; and the agreement was not supported by consideration flowing from the plaintiff. In a business sense, the defendant had no realistic alternative but to sign the agreement, and the plaintiff knew this. See *Stott v. Merit Investment Corp.* (1988), 48 D.L.R. (4<sup>th</sup>) 288. Although the plaintiff acted out of an irrational fear rather than from bad faith, it cannot enforce the terms of that amended agreement. Notably, real estate agents are not usually paid before the sales transactions they broker, are completed.

[33] However, the plaintiff sold 19 units and is entitled to commission at the rates agreed upon in the original agreement. It is noteworthy that only the time for payment was changed in the amended agreement.

[34] In the statement of defence, the defendants pleaded that the sale of units was not completed. The evidence at trial, as I understood it, did not contradict the defendant's pleadings.

[35] I believe it is appropriate to grant the leave sought by the plaintiff for the amendments to its claim for relief.

[36] The commission on the 19 units sold by the plaintiff is 2 percent of \$3,797,900.00 for a total of \$75,958.00, plus G.S.T in the amount of \$81,275.05. From this sum must be deducted \$30,000.00 already received by the plaintiff, leaving a balance of \$51,275.06.

[37] The plaintiff earned and is entitled to its commission. There is no issue here of allowing the plaintiff as a fiduciary to profit from its misconduct. See for example *Visage v. TVX Gold Inc.* (2000), 49 O.R. (3<sup>rd</sup>) 198 C.A. at 210 cited in *Reichman v. Verod*, [2003] O.J. No. 1029 S.C.J. at par. 226. However, while the defence did not meet the evidentiary onus of proving damages in its counterclaim, as I observe below, I believe and find that the circumstances surrounding the plaintiff's demand for an amending contract, its relatively lax handling of the allotment of parking spaces, and the other reasonable complaints alluded to earlier, entitle the defendant to a reduction of approximately one-half of the damages claimed by the defendant in its counterclaim, in the amount of \$27,000.00.

### COUNTERCLAIM

[38] In the first place, the agreement provided for cancellation on 15 days' notice, a right the plaintiff exercised.

[39] In the second place, the defendants have not satisfactorily proved their damages. Indeed the defendants made no serious effort to prove such damages. They never provided the plaintiff with any damage information until the very end of the trial when it offered a summary claiming approximately \$53,000.00 at a time when the plaintiff had no opportunity to properly contest the basis for the claim.

### GENERAL REMARKS

[40] There are two aspects of the trial on which I feel obliged to comment. One was that despite early requests from the plaintiff's solicitor [a relatively new member of the bar] for the authorities on which the defendants relied, the defendant did not provide those authorities until shortly before closing submissions. The other was that the defendants provided the material to support the special damages claimed in the counterclaim for the first time when Walsh testified, at which time defence counsel handed a summary to the plaintiff, who had no opportunity to test its reliability.

### DISPOSITION

[41] It is ordered and adjudged that 158038 Ontario Corporation and Tannery Lofts Inc. are jointly and severally liable for the payment of commission to which I have found the plaintiff entitled. It is also ordered, adjudged and declared that the plaintiff is entitled to payment of a commission of \$24,275.06 for services rendered in the sale of 19 units on behalf of the defendants, which shall be paid to the plaintiff immediately as they become due.

### COSTS

[42] Subject to any agreement between the parties, brief written submissions on costs are to be made within 20 days of the release of these reasons.

Released: August 8, 2005

COURT FILE NO.: 04-CV-268473SR  
DATE: 20050708

ONTARIO  
SUPERIOR COURT OF JUSTICE

B E T W E E N:

TORONTO LOFTS REALTY CORP.

Plaintiff

- and -

1580838 ONTARIO CORPORATION, 1586612  
ONTARIO CORPORATION carrying on  
business as TANNERY LOFTS INC.,  
CHRISTOPHER WALSH and DUROSHOLA  
TEMITOPE AWONIYI

Defendants

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REASONS FOR JUDGMENT

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Pitt J.

Released: August 8, 2005

**TAB D**

ONTARIO  
SUPERIOR COURT OF JUSTICE

B E T W E E N: )  
)  
REMO VALENTE REAL ESTATE (1990) ) Gino Morga, Q.C., for the Plaintiff  
LIMITED )  
)  
)  
Plaintiff )  
)  
- and - )  
)  
)  
PORTOFINO RIVERSIDE TOWER INC., ) William V. Sasso and Jacqueline A. Horvat,  
WESTVIEW PARK GARDENS (2004) INC., ) for the Defendant, Dante J. Capaldi  
PORTOFINO CORPORATION and DANTE )  
J. CAPALDI )  
)  
Defendants )  
)  
)  
) HEARD: January 28, 29, 30 and 31, 2008

2008 CanLII 22150 (ON SC)

Brockenshire J.

REASONS FOR DECISION

BACKGROUND

[1] This is an action in which the plaintiff realtor sought, directly or indirectly, payment of real estate commissions, past and future, plus damages, and other relief against the defendants, principally under s. 248 of the *Ontario Business Corporations Act (OBCA)*. Remo Valente, the principal of the plaintiff, Dante Capaldi, now the principal of the defendant corporations, and two others had been partners or principals in a joint venture to develop, build and sell off a large luxury condominium building. The plaintiff had an exclusive listing on the proposed units in the building, and before construction had realtors on site and sold a number of proposed units.

[2] A lengthy trial was held before me, in which evidence was given that Capaldi had exercised his rights under a shotgun clause in the agreement with the other partners to buy them out. Additionally, it was alleged that once in control of the project, through conveyances and corporate maneuvers, he sought to make the exclusive listing agreement valueless and thus avoid or evade commissions already earned through sales, and future commissions on sales, of condominium units. Allegedly, those manoeuvres would also thwart the plaintiff from earning commissions on leases of units, and sales of the homes of buyers of condominiums.

[3] At the end of the trial, in my written reasons for judgment, I found that the plaintiff was properly entitled to make a claim under s. 248 of the *OBCA* as a creditor, that the defendants had acted in a manner that was oppressive or unfairly prejudicial to the valid interests of the plaintiff, and that on the basis of the evidence before me in addition to entitlement to commissions re the condominium units, there would have been a 20% chance of the plaintiff earning commissions on the sale of homes owned by buyers of the condo units. I granted an immediate judgment of \$1,000,000 against the defendants in favour of the plaintiff, ordered security of an additional \$2,000,000 be posted by the defendant, and then, under the authority of s. 248(3) of the *OBCA*, made a further order that an accounting be held to determine the details needed to complete the assessment of damages against the defendants.

[4] The particular issues listed in my decision were the subject of the now completed three day trial of issues, and will be the subject of this decision.

#### **THE SELLING PRICE OF ALL CONDOS SOLD TO THE DATE OF THE ACCOUNTING**

[5] During the original trial, this topic was the subject of some conjecture. Between that trial and this accounting, disclosures were made, documents exchanged, there were discussions between lawyers, and on January 29, 2008 this court was provided with what is now marked as Exhibit 2, a comprehensive accounting of all units including the closing date for the sales of various units, the name or names of the purchasers, the "purchase price" and the commissions paid or to be paid (less GST) to Valente. The table, backed up by the evidence of Capaldi, also indicated that a number of the units not yet closed would close very shortly, but further that there were a number of "troubled transactions", and another group, apparently past the "troubled stage", which were simply described as not expected to close. The information available at the start of this accounting was that sales of 61 units had actually closed, and a further 11 were expected to close in the very near future, leaving a further 51 units of the total of 123 with either no offers on them, or "troubled transactions" where an offer had been made but was not now expected to close.

[6] It was argued that the exclusive listing agreement spoke of an expiry date in 2006, but it was clear that this exclusive listing agreement was entered into by what was then the four principals in this project, dealing with the real estate company of one of the principals, and the



joint intent was obviously, as testified to by Valente, that in return for his bringing the other three into a potentially very profitable development project on land which he had acquired, his real estate company was to have the exclusive right to sell all of the condominium units. I do not accept the argument that the entitlement of the plaintiff to list the units and receive commissions ended at the end of 2006. I accept the evidence of Valente that the exclusive selling right is to continue until all the units are sold, and read the termination clause in the listing agreement as providing a date only for reasons of certainty, in view of the automatic annual extension provision.

[7] From the table above referred to, Exhibit 2, it would appear to be a simple arithmetic problem to work out the commission amounts due to Valente at any time, except for a new subject introduced on this table – extras.

#### COMMISSION ON EXTRAS

[8] The position of Valente was that commissions should be paid to the plaintiff on extras included in the final purchase price of a unit. The position of Capaldi was that commissions should be paid only on the basic unit price set out in the original agreement of purchase and sale.

[9] Considerable evidence was heard from both Valente and Capaldi, as well as from Tim O'Neill, an interior decorator and designer.

[10] Valente's evidence was that on certain development projects, the developer will make it clear with the realtors that any extras to the unit are to be something between the buyer and the developer and not subject to commission. However usually, and particularly on the Portofino project, where there were realtors on site, the purchasers would be discussing upgrades and changes to the units with the on site realtors, the cost of these upgrades would be included in the final purchase price, and the commission would be based on that final purchase price. In his view, upgrades and extras are the sort of thing that are discussed and worked out once the building is actually under construction. In fact, in his view, if a pre-construction buyer wished to discuss extras, that buyer would be told to wait until the building was actually under construction. In this case, Capaldi took over the project before construction started, and changed realtors before the construction process progressed very far, if at all.

[11] Capaldi denied that the Valente realtors did anything about selling extras, and indicated that he brought in Tim O'Neill to assist buyers in decorating and improving their units, and to thereby sell them on the idea of extras. He himself would deal with the suppliers in getting prices and quantities for extras for individual unit buyers.

[12] Tim O'Neill, an interior designer with over 30 years experience, testified to being brought in to the Portofino development to deal with the design and decoration of the common areas, and to choose standard colours and finishes, including four different colour schemes for the units. Once the building started going up he would be available on a no obligation basis to

talk to buyers about decorating their units and also about buying upgrades. He only dealt with people that had signed purchase agreements. He would take buyers out to the cabinet maker, lighting shops, etc., to look at upgrades, but Capaldi would work out the prices with the suppliers.

[13] The exclusive listing agreement at Tab 3 of Exhibit 1, the document brief of the plaintiff at this hearing, gave the plaintiff the exclusive authority to promote and sell the condominium units at a commission of 4% of the sale price if sold by sales representatives assigned to the project and 5% if sold by other "Valente" sales people or other sales people registered with outside real estate brokers. The term "sale price" is not defined in that document, and no mention is made therein of selling upgrades or extras.

[14] The agreement of purchase and sale form used for each sale of individual units is a multi-page document that, unlike the usual agreement of purchase and sale of an individual home, does not contain at the end thereof a separate commission agreement stating the dollar amount of the commission payable to the realtor for the sale. On the face of the document there is a place to insert a purchase price. Immediately below this there is a provision that there would be a \$2,500 deposit and that the balance of the purchase price would be payable on closing, "subject to adjustments for extras and as hereinafter provided." Paragraphs 24 to 30 of this document deal with finishes, appliances and extras. Paragraph 24 indicates that the purchase price shall include the standard finishes and appliances described in a schedule. Paragraph 28 provides that if the vendor chooses to make changes to the standard materials and specifications, and the vendor agrees to make such changes, then the vendor is not liable for any delays in closing arising therefrom. Paragraph 29 provides that if the buyer wants extras that the vendor is not prepared to supply or construct, then the buyer shall not arrange for any work services and/or materials to be undertaken, etc., before the buyer's possession date.

[15] I was told at the hearing before me that if a buyer arranged for extras through Portofino, then the cost of those extras would be added on a statement of adjustments to the purchase price payable on closing. If the buyer arranged for upgrades or extras direct with a supplier, then the price thereof would not appear on the adjustments and it was up to the buyer to pay and deal with the supplier.

[16] From the foregoing I conclude that if the contract with Valente had not been terminated by Capaldi, the Lunaus (the on-site sales representatives of Valente) would have continued, and have been the people the buyers would normally have contacted in relation to upgrades and extras, and that the Lunaus would have been the persons dealing with Capaldi, at least in the initial stages, in relation to such upgrades and extras.

[17] I accept the evidence of Valente, that unless a specific agreement has been reached between the realtor and the developer in relation to a particular condominium project, providing that the realtor is not to get any commissions on extras, the standard and accepted practice is that upgrades or extras which are done through the developer (as opposed to ones where a buyer brings in an independent third party contractor) are treated as increasing the purchase price, and

the commission is calculated on that increased price. In this development, this approach is clearly supported by the special agreement of sale form, which specifically contemplates adding the cost of upgrades and extras to the sale price through a statement of adjustments.

[18] Capaldi did not directly contradict that evidence. Instead, in his testimony he stated the Lunaus had not been involved in actively selling upgrades and extras, and would not have been because, as it developed, he dealt with the buyers and the suppliers in relation to upgrades and extras.

[19] According to my notes, this topic was not raised with Gary Lunau when he testified at the earlier trial. However Capaldi's evidence was to some extent contradicted by his own witness, Tim O'Neill, who testified that part of his duties involved actively encouraging buyers to upgrade the finishes, cabinets, lighting, etc., in the units they were buying, and to acquire extras, and in so doing he would take them to the showrooms of suppliers and assist them in making choices. It may be that Capaldi took care of the final bargaining on contract prices, but clearly his own employee did a lot of the sales work.

[20] Further, and most importantly, the evidence at the earlier trial and at this hearing was that the time to sell upgrades and extras was not while the building remained a concept, but when the building was going up or, except for structural changes like moving walls, when the basic construction was completed and finishing work was being started. In my view, the complete answer to Capaldi's argument that the Valente forces did not sell any upgrades or extras, and so should not earn commission on them is, as I found in my previous judgment, particularly in paragraphs 76, 77 and 78 thereof, that the Lunaus never had the expected opportunity to deal with buyers and prospective buyers of the condo units, through to the completion of their purchases, because they were locked out by Capaldi and his companies to "get rid of the commissions" in breach of s. 248 of the *OBCA*.

[21] I find that all of the upgrades and extras to any of the units, (except such as may be or have been arranged directly by unit purchasers with independent contractors, who were or will be paid direct by such purchasers), which would include all of the extras shown in two separate lists on Exhibit 2, as well as all future costs of upgrades and extras except those specifically excluded as above, would be included in the statement of adjustments per the agreement of purchase and sale and become part of the purchase price of the unit, and thus are subject to commission thereon per the terms of the exclusive listing agreement.

### **THE COMMISSION RATES**

[22] The exclusive listing agreement provided for two different commission rates – 4% if sold by "sales representatives assigned to the project", which here would mean Mr. and Mrs. Lunau, and 5% if sold by other "Valente" sales people or other sales people registered with outside real estate brokers. It was clear from the evidence at trial that Mr. and Mrs. Lunau had dedicated themselves to this project, and did excellent work both in selling units, and in doing their best to

hold together the sales they made, despite the long and unexplained delays in getting the project started. If there had not been a falling out between Capaldi and his partners, the most reasonable expectation would be that the Lunaus would have carried on until all of the units had been sold. Indeed, after the break up, and despite the antipathy between Capaldi and particularly Remo Valente, Capaldi wanted to keep the Lunaus on the job, and was trying to persuade Mr. Lunau to change to another real estate agency but continue to work on the Portofino project. Therefore, in my view, the rate of commission for sales in the normal course of business after the exclusive listing agreement was unilaterally cancelled by Capaldi would be 4%.

[23] However, there was a class of sales that were not made in the ordinary course of business. I discovered that there was a well known and often followed practice in the condominium development trade of the developers looking to prospective contractors and sub-trades to "support the project" by purchasing condominiums in the proposed building. It was not clear from the evidence whether such expectations were expected to be crystallized by signed offers before or after construction contracts were entered into with these contractors, but it was clear that dealings of this type had occurred in previous projects involving Valente and Capaldi, and it was also perfectly clear that the negotiating of such agreements to purchase units would not be handled by the regular sales staff but would have been taken care of by Remo Valente, the partner with abundant experience in such matters. In that case, the agreed commission rate of 5% would apply. I accept the evidence of Mr. Valente, and the argument of his counsel, that Mr. Valente's driving motivation for turning over land he had acquired at, in effect, cost price to the partnership in which he had entered, was a desire to generate commissions for his real estate business. The sales to suppliers and contractors, although perhaps entered into by the buyers for different motivations from other buyers, nevertheless involved all of the complexities and all of the steps required in conventional sales and certainly would command the commission called for under the exclusive listing agreement.

#### **THE DATE UPON WHICH ONE HALF OF PRE-SALE COMMISSIONS WOULD BE PAYABLE**

[24] The exclusive listing agreement contained an agreement that with pre-sales, 50% of the commission plus applicable taxes would be due and payable 45 days from the day "in which the necessary pre-sales had been achieved to satisfy the condition in the Project Financing commitment." There is a further proviso that after the minimum pre-sales had been attained then 50% of commissions comes due and payable within 30 days of the offer becoming unconditional, and the remaining 50% (in all cases) upon the completion of each sale. In the evidence at trial and on this reference it was made clear that on a project like this, a developer starts by selling a "concept" with glowing words and lovely plans and pictures, but little else, until enough prospective buyers had been signed up, at low initial deposit amounts, to show prospective lenders that the project is financially viable. These pre-sale contracts are conditional, so if the developer cannot put together a sufficient number to satisfy prospective lenders, a developer can call off the various deals. However if the developer gets a sufficient number of

these offers then the developer can declare the agreements to be unconditional, in which case the buyers are required under their agreements to put up an additional and much larger deposit. Here, there was no specific condition in any project financing commitment about the number of pre-sales required. However, it is clear that by November 12, 2004 bank financing was available for this project. On that date BMO Bank of Montreal forwarded a detailed 15-page long proposal addressed to the developers for a loan for \$26,500,000 for construction of the building. While that proposal called for the guarantees of all four of the original partners, it is clear that after Capaldi bought out the others, he was able to arrange the needed financing.

[25] In my view, the essence of the condition in the exclusive listing agreement re payment of 50% of commissions on pre-sales was that the project was in fact going ahead. The best evidence of that, in my view, is the formal notice of removal of conditions by Portofino Riverside Tower Inc. dated January 11, 2005 and signed by Capaldi as president. That was backed up by letters sent out by Capaldi on January 11, 2005 to Gary Lunau, Rosemary Lunau, (Tabs 33 and 34 of the plaintiff's document book) and to presumably all other pre-sale purchasers, such as the Colavitas, (Tab 35) in each case advising that construction of Portofino would commence in the spring of 2005 or earlier, enclosing the formal notice of removal of conditions, requesting an additional \$17,500 deposit and inviting the recipient to a reception for all of the purchasers to be held January 20, when the construction timetable would be provided. At that time, Valente Real Estate certainly felt the condition had been met because on January 25 they sent out an invoice detailing all of the 50% of commissions, saying they were due and payable by February 25, 2005. The total, including GST was \$466,733.86.

[26] I accept the January 11, 2005 date as the appropriate triggering date under the exclusive listing agreement, so 50% of the commissions would be due and payable 45 days from that date.

[27] To clarify, in relation to these one-half commission payments, and to later one-half commission payments becoming due and payable within 30 days of the offer becoming unconditional, this one-half would apply to the base selling price only. The scheme re upgrades and extras, as above explained, was to add these to the purchase price on the statement of adjustment on closing, so the totality of commissions on such upgrades and improvements would be added to the other one-half of commission due when the sale closed.

[28] Capaldi raised in argument that the contract provision for payment of one-half of commissions before the deal closed should in effect be struck as legally impossible. The argument was that bank financing was specifically for the purpose of construction of the condominium building, and diverting money from that purpose to the unconnected purpose of paying real estate agents in advance would be a breach of the trust provisions under the *Construction Lien Act*. As Portofino had only a few hundred dollars cash, there would therefore be no way to pay the commissions until the purchase monies were paid on closing. The practical answer to that was provided by Mr. Valente, who testified that in previous deals including Capaldi, advanced commissions had in fact been paid, and the idea of using such a clause was picked up from a large home builder from Toronto who regularly made such advances. A hint of how prepaid commissions could be accomplished is found in note C at page 8 of the financing

proposal which speaks of third party financing provided by Tarion or a bonding company, secured by a collateral second mortgage fully postponed and subordinated to the banks first mortgage. I reject the suggestion that financing for commission advances could not, in a practical or legal sense, be obtained.

### INTEREST ON UNPAID COMMISSIONS

[29] The initial billing by Valente Real Estate made no mention of interest. On March 23, 2005 a reminder was sent out. It contained advice that "interest is now accruing at a rate of 18% per annum." Capaldi never agreed to that rate nor in fact did he ever apparently acknowledge that these partial commissions were due or that interest had been claimed.

[30] It is clear that there is no contractual basis supporting a claim for interest on the overdue partial commissions, or indeed on other monies found due by Capaldi in this litigation. It is also clear that the broad powers of the court under s. 248 of the *Ontario Business Corporations Act*, R.S.O. c. B.16, to "make an order to rectify the matters complained of" which forms the basis of the judgments and orders herein, is essentially an equitable jurisdiction. While the pre-judgment interest provisions under the rules of practice is authority to add interest, at a rate set by regulation, to a money judgment despite a lack of agreement between the parties on such interest, the courts have long recognized that in relation to equitable claims, the court can go further. See *Brock v. Cole et al.* (1983), 40 O.R. (2d) 97 (Ont. C.A.); *Bank of America Canada v. Mutual Trust Co.*, [2002] 2 S.C.R. 601 (S.C.C.); and many others at the trial level.

[31] Here, I had found that the driving force behind Capaldi's "reorganization" of Portofino was to "get rid of the commissions". This oppressiveness, and in fact *male fides*, opens the door to the full range of equitable remedies. However, as is pointed out in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 440, while plaintiffs are entitled to be placed in as good a position as they would have been in had the breach not occurred, they are not entitled to be placed in a better position.

### THE INTEREST RATE

[32] Valente Real Estate Limited purported to add 18% per annum interest to its invoices. Valente, in his evidence, attempted to support rates of this kind by indicating they were common in dealings with real estate agents. Particularly, he indicated that his company would charge rates like that on advances of commissions to sales people and told us the Lunaus were charged only 12% interest, as a special favour to them, on expense they owed the real estate firm for rental on their office, etcetera, while waiting for commissions from Portofino to come in. He admitted to having a line of credit with the Toronto-Dominion Bank, on which his firm would be charged prime plus one-quarter of one percent, but said the line of credit was not used, because if it was, there would have to be monthly reporting documents filed as to receivables, etcetera, and

he had found it preferable to simply use a credit card to pay bills even though on a couple of occasions the balance was not paid off before the high credit card interest rate started.

[33] Capaldi denied ever paying high interest rates. He admitted to receiving invoices showing interest at one and a half or two per cent per month chargeable, but denied every paying those high interest rates to creditors. The interest rate set out in the proposal of the Bank of Montreal to Portofino was prime rate plus 0.85% per annum floating, calculated and payable monthly in arrears. It was hinted in evidence that the final financing agreement was at a somewhat lower interest rate.

[34] I conclude that the 18% per annum set out in the Valente invoices was an "*in terrorem*" rate, set out for the purpose of frightening a debtor, or at least encouraging a debtor to pay up promptly. Here, prompt payment was not forthcoming, but we heard no evidence of Valente Realty having to go out and borrow to cover the delay in receiving these commissions. However, applying *Hodgkinson v. Simms*, supra, if Valente Realty was to be put in as good a position as it would have been had the failure to pay the commission not occurred, it could have simply covered the shortfall by borrowing on its line of credit with the Toronto-Dominion Bank.

[35] I find the appropriate rate of interest to apply to all monies due to Valente Realty from Capaldi to be the Toronto-Dominion Bank prime rate from time to time plus one half of one per cent, to be calculated at the time of each change in the prime rate, and at the time of any payment on the debt, with annual rests when all accruing and unpaid interest would be added to the principle, with interest thereafter to be calculated on the new principle amount. Such interest shall commence 45 days after January 11, 2005 on the initial one half of the commissions on the original pre-sales, and from the due dates of all other commissions, whether initial or final.

#### **THE FUTURE SELLING PRICE OF UNSOLD CONDOS**

[36] My information was that the condominium building contained 123 units, and as of January 29, 2008 there were some 50 units still unsold. The best evidence of the state of things on January 29, 2008 is Exhibit Two on the reference, a comprehensive accounting of all the units showing those that are available for sale, some that were leased by Portofino, the ones that had closed, and also five units listed for sale on the MLS, 25 more available for sale but not listed on MLS, 12 units expected to close by the end of February, and a further 19 units described as either "troubled transactions" or as "not expected to close."

[37] The exercise of attempting to determine potential selling prices in the future is not to come up with individual prices for each unit, but rather to arrive at one bulk figure upon which a single total commission figure could be calculated.

[38] On my understanding, the majority of the floors in this building have ten units on each floor. The first and second floor have considerably fewer units, to allow for amenities for the building. The ninth, tenth and eleventh floor have eight, presumably larger, units each. The

twelfth, thirteenth and fourteenth floor have six units each, and the fifteenth and sixteenth floor have five units each. I further presume that while for example unit 1604 would have a similar square footage and layout to unit 1504, and that the same would likely apply to say unit 310 as compared with unit 810, nevertheless, all other things being equal, the higher units would command a better price than the lower units, simply because a large attraction of the building is the panoramic views of the Detroit River and of the City of Detroit. I further understand, that while the developer would attempt to maintain a price structure, nevertheless there would be some individual bargaining that would enter into the prices of at least some of the units, and further that Capaldi introduced a ten per cent price increase in 2005 and another ten per cent in 2006. Further, most of the sold units included extras. These range anywhere from \$1,000.00 or so to several of \$90,000.00 or more.

[39] I heard evidence from Margot Stevenson who is a market analyst for C.M.H.C., with some 20 years experience, particularly in the Windsor area market. She recognizes that in the Windsor area there is a very definite slow down in the local economy, exacerbated as far as this development is concerned by the rise in the Canadian dollar as against the U.S. dollar and security induced backups at the Tunnel and Bridge, because originally a number of buyers in this development were Americans. However, in her view, because these are high end units, of which only a limited number are available in the Windsor area, mainly in the Portofino development, she does not expect the economic and other problems to press the price of the units down by more than say one per cent. For that reason, I feel the past history could provide a generally accurate guide for the future, and so for units that had been sold but now are not expected to close, I would use the old price as the best indicator of the expected new price on a resale of the unit. On the 30 units shown as listed for sale or available for sale but not listed, in my view the asking price would be the best guide. These would be figures which Capaldi testified would be reasonable prices, and would be amounts arrived at on the basis of a general pricing scheme for all of the units in the building. In view of Ms. Stevenson's evidence of the prices of these high end units holding up, I see no reason for reducing those figures.

[40] In addition to the base price, as I have noted, most of the sold units included extras. The number for extras on units sold, according to Exhibit Number Two, was \$1,313,607.73. My view is that that figure should be divided by the number of units sold to give an average cost for extras per unit, and then that average figure be multiplied by the number of unsold units and the result added to the lump sum selling price.

[41] The commission to be applied to that lump sum figure would be 4%. If Valente Realty had not been put out of the project, all of these future sales would have been handled by the Valente sales people assigned to the project at the 4% rate under the exclusive listing agreement. I understand that all of the special supplier deals have now been formalized by written offers so would not form part of the future sales.

[42] I appreciate that in some, if not most, of the "troubled transactions" or "deals not expected to close" a 50% of commission figure has already been calculated as payable to the Plaintiff that was earned and due for attracting the original sale and services in trying to hold it

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together. That portion of commission would presumably be payable out of forfeited deposits if the deal did not close. A resale would of course be a completely new transaction, and per the exclusive listing agreement would be a new transaction handled by the Valente agents on site.

[43] In addition to sales, I was advised that some four of these units were leased out. The evidence I heard was it was likely in the remaining sales another four or so would result later in leases and the evidence was that the realtors on site would be the persons most likely to handle finding and negotiating with prospective tenants. The evidence was that on a one year lease the commission would be a month's rent which would be in the neighborhood of \$2,000.00. I appreciate that this evidence is pretty vague and not backed up with any solid documentation, but on the other hand there is no evidence to the contrary. I accordingly accept that evidence especially since I see on Exhibit Number Two reference in at least two places to units being leased. I would award \$16,000.00 as commissions on the leasing of eight units.

#### **THE APPROPRIATE DATE OR DATES OF ANTICIPATED SALES**

[44] There was a divergency of views on how long it would take to sell off the remaining units in this development. Valente was quite sure that if the project was marketed aggressively all the remaining units could be sold within two years. Capaldi, looking to current local conditions and the withering away of sales over the last three years, felt it would take a further five or six years to completely sell out the development. In view of that divergence, I much prefer the evidence of Ms. Stevenson, the market analyst for C.M.H.C. who has had many years of experience in forecasting such things. Her evidence was that in 2005, in her view it would have taken 12 to 18 months to sell out the units in the project. In 2006 she had stretched out that estimate to 18 to 24 months. In January of 2008, in her view, six to 12 months should be added to that because of the slowdown in the economy. The midpoint in her original estimate would have been 21 months, and the midpoint in her later adjustment would be nine months, totaling 30 months or two and a half years. I have no evidence before me to indicate that there would be more sales at the beginning or towards the end of that two and a half year period, so I have to assume that the sales process would continue evenly over that time. If so, a convenient way to get an average for the purpose of doing a present value calculation on the lump sum would be to take the midpoint of the two and a half years or one and three-quarter years, then arithmetically treating all sales as occurring at that point.

#### **PRESENT VALUE CALCULATIONS**

[45] Mr. Morga filed, at Tab 13 in his Exhibit Brief on the Reference, an opinion letter dated January 25, 2008, from Dilks Jeffrey & Associates Inc., consulting actuaries. This firm, located in London, Ontario, is well known in the Southwest Region. As indicated in the C.V. of Mr. Jeffrey annexed, he and the reports of his firm have been accepted as expert evidence in

numerous trials. There was no objection raised to his report or to the conclusions he set forth in it.

[46] Mr. Jeffrey did present value calculations based upon sales as of January 23, 2008 on government treasury bills and bonds, came up with an interest discount rate of 3.37%, and calculated the present value of \$1,000.00 payable one year from January 28, 2008 at \$967.00, at two years out at \$936.00 and at three years at \$905.00. Extrapolating to produce a number for one and three quarter years in the future, I arrive at \$943.75 as the present value of the \$1,000.00 payable one and three-quarter years after January 28, 2008. Subject to my arithmetic being corrected, I find that the commission figure calculated against the lump sum of the future sales be discounted by the figure of .94375.

### ANCILLARY SALES

[47] At the trial in this matter, there was some evidence from Valente and Gary Lunau that Valente Realty could anticipate, in connection with the sale of condo units, being asked to sell the homes of these buyers. From the evidence I then had, I made a finding in paragraph 94 of my decision, that the chance of Valente Realty getting to handle sales for buyers of Portofino condos would be 20%. For purposes of this reference, detailed information has been gathered and was presented in Tab 9 of Exhibit One on the reference, an exhibit brief of the plaintiff. This shows the resales of buyers homes, both of Portofino units that closed as of September 12, 2007 and of further units that had been sold but not closed as of that date. These lists, on my count, show of the 63 units sold, 16 of the buyers were selling their previous homes. Interesting, five of them listed with Valente Realty. There is an additional list of troubled deals, showing 12 buyers, two of whom listed previous homes and one of those actually sold. I find Tabs 10 and 11 in that same exhibit book supportive of the argument that the on-site realtors would get ancillary deals, as out of 14 unit holders that wanted to lease their condos, all but one listed with Pedlar and out of 15 unit holders trying to re-sell units, no one listed with anyone but Pedlar.

[48] Of the 63 condo sales listed at Tab 9, I would conclude that, as Valente Realty already had six of the 16 resales, it should be credited with seven more to bring their share of the resales up to the 20% I had anticipated if Valente Realty had not been removed from the scene. I see, from that list, there are at least two of what I assume are small condos (listings under \$100,000.00) and perhaps two others (listed under \$200,000.00) two of which had not sold, with the other two bringing down the average sale price. For the seven sales I would attribute to Valente Realty, I would use a rough average selling price of \$250,000.00 and a commission of 5%, yielding a commission figure of \$87,500.00. In connection with the remaining unsold condo units, I would continue my finding that 20% of future buyers would list existing homes for resale with Valente Realty and again use an average price of \$250,000.00 and a commission of 5%, with again all of the sales being treated as lumped 1 3/4 years after January 28, 2008 so that the commissions would be discounted by .94375.

## CONDO RESALES

[49] Tab 12 of the exhibit brief shows 15 condo units being listed for resale by the buyers, all of whom listed with Pedlar. A number of these listings have expired, and apparently none of them resulted in a sale. The issue of commissions on resales was not specifically raised before me, and I do not recall any evidence on that subject, except for some concern being expressed by Capaldi of resales conflicting with, and limiting the prices, on original sales in the project. I am therefore not making any findings on that subject.

## CONCLUSIONS

[50] I leave it to counsel to do the arithmetic and put dollar amounts on the conclusions I have reached. If there is any difficulty between counsel in settling on the numbers, I may be spoken to. I expect that even without difficulties, I will be called upon to approve or sign the draft judgment.

[51] I have not dealt with the form and terms of the \$2,000,000.00 security ordered in my previous judgment, because that was not raised on the reference, leading me to assume that in some way it had been dealt with.

[52] If counsel cannot agree on costs, written submissions can be made to me, within 30 days.

[53] If there are remaining issues, on which I have not made a finding, or difficulties with the calculations or wordings contained in this decision, I would ask counsel to contact me.

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John H. Brockenshire  
Justice

Released: May 13th, 2008

COURT FILE NO.: 05-CV-5864CM  
DATE: 2008-05-13

*ONTARIO*

SUPERIOR COURT OF JUSTICE

BETWEEN:

REMO VALENTE REAL ESTATE (1990)  
LIMITED

Plaintiff

- and -

PORTOFINO RIVERSIDE TOWER INC.,  
WESTVIEW PARK GARDENS (2004) INC.,  
PORTOFINO CORPORATION and DANTE J.  
CAPALDI

Defendants

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REASONS FOR JUDGMENT

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Brockenshire J.

Released: May 13th, 2008

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# **TAB E**

IN THE COURT OF APPEAL OF ALBERTA

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THE COURT:

THE HONOURABLE MADAM JUSTICE RUSSELL  
THE HONOURABLE MR. JUSTICE SULATYCKY  
THE HONOURABLE MR. JUSTICE WITTMANN

---

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985 c.  
C-36, as amended  
AND IN THE MATTER OF BLUE RANGE RESOURCES CORPORATION

BETWEEN:

ENRON CANADA CORP., and THE CREDITOR'S COMMITTEE

Appellants (Appellants)

- and -

NATIONAL OIL-WELL CANADA LTD. et al.

Respondents (Respondents)

Appeal from the Decision of  
THE HONOURABLE MR. JUSTICE LoVECCHIO  
Dated the 9<sup>th</sup> day of November, 1999

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REASONS FOR JUDGMENT RESERVED

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REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE WITTMANN  
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE RUSSELL  
AND CONCURRED IN BY THE HONOURABLE MR. JUSTICE SULATYCKY

COUNSEL:

A. Robert Anderson  
and Scott J. Burrell

(for Enron Canada Corp. and the Creditors' Committee)

S. Collins (for TransAlta Utilities Corporation)

D. W. Dear (for Rigel Oil & Gas Ltd.)

D. Mann (for Barrington Petroleum Ltd. and PetroCanada Oil & Gas)

K. E. Staroszik (for Founders Energy Ltd.)

J. N. Thom (for National-Oilwell Canada Ltd. and Campbell's Industrial Supply Ltd.)

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REASONS FOR JUDGMENT OF THE HONOURABLE  
MR. JUSTICE WITTMANN

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**Introduction**

[1] The *Companies' Creditors Arrangement Act*, R.S.A. 1985, c. C-36, as amended ("*CCAA*"), permits the compromise and resolution of claims of creditors against an insolvent corporation. In this appeal, as part of the ongoing resolution of the insolvency of Blue Range Resources Corporation ("Blue Range"), this Court has been asked to state the applicable criteria in considering whether to allow late claimants to file claims after a stipulated date in an order ("claims bar order").

[2] In his decision below, the chambers judge determined that in the circumstances of this case it was appropriate to allow the respondents ("late claimants") to file their claims thus entitling them to participate in the *CCAA* distribution.

**Facts**

[3] Blue Range sought and received court protection from its creditors under the *CCAA* on March 2, 1999. The claims procedure established by PriceWaterhouse Coopers Inc. ("the Monitor"), and approved by the court in a claims bar order, fixed a date of May 7, 1999 at 5:00 p.m. by which all claims were to be filed. Due to difficulties in obtaining the appropriate records, the date was extended in a second order to June 15, 1999 at 5:00 p.m., for the joint venture partners. The relevant orders stated that claims not proven in accordance with the set procedures "shall be deemed forever barred" (A.B.P.01, A.B.P.06). Under this procedure \$270,000,000 in claims were filed.

[4] The respondent creditors in this appeal fall into two categories: first, those who did not file their Notices of Claim before the relevant dates in the claims bar orders, and second, those who filed their initial claims in time but sought to amend their claims after the relevant dates. All of these creditors applied to the chambers judge for relief from the restriction of the date in the claims bar orders and to have their late or amended claims accepted for consideration by the Monitor.

[5] The chambers judge allowed the late and amended claims to be filed. The appellants, Enron Capital Corp. ("Enron") and the Creditor's Committee, seek to have that decision overturned. I granted leave to appeal on January 14, 2000 on the following question:

What criteria in the circumstances of these cases should the Court use to exercise its discretion in deciding whether to allow late claimants to file claims which, if proven, may be recognized, notwithstanding a previous claims bar order containing a claims bar date which would otherwise bar the claim of the late claimants, and applying the criteria to each case, what is the result? (A.B.928).



### Judgment Below

[6] The chambers judge found that the applicable section of the *CCAA*, s. 12(2)(iii) did not mandate a claims procedure. He stated that preserving certainty in the *CCAA* process was not a sufficient reason to deny the late claimants a second chance. In his view, taking a strict reading of the claims bar orders would have the effect of denying creditors, who have a logical explanation for their non-compliance with the order, any recovery. While the chambers judge noted that compromise is required by creditors in a *CCAA* proceeding, he did not think it fair that these late claimants be required to compromise 100 per cent of their legitimate claims. In addition, the chambers judge was of the view that process required flexibility and should avoid pitting creditors against one another.

[7] Having decided that flexibility in the process was required, the chambers judge then considered an appropriate test for allowing the filing of late claims. Although encouraged by the appellants to adopt an approach similar to that contained in the *United States Bankruptcy Code, Federal Rules of Bankruptcy Procedure*, for Chapter 11 Reorganization Cases, ("*U.S. Bankruptcy Rules*") the chambers judge chose to incorporate the test in place under the *Bankruptcy and Insolvency Act* R.S.C. 1985 c. B-3 ("*BIA*"). Specifically, he found that because the situation of Blue Range was essentially a liquidation, the approach used in the *BIA* was appropriate. Under the *BIA*, late claims are permitted under almost any circumstance provided no injustice is done to other creditors. A late filing creditor under the *BIA* may only share in undistributed assets. Therefore, the chambers judge found that the creditors should be allowed to file late claims, or to amend existing claims late.

### Standard of Review

[8] It has been recently held by this court that decisions of a *CCAA* supervising judge should only be interfered with in clear cases. Deference to a *CCAA* supervising judge is generally appropriate where the questions before the court deal with management issues and are of necessity matters which must be decided quickly. This issue was addressed by Macfarlane, J.A. in *Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C.C.A.) (cited with approval by Hunt, J.A. in *Luscar Ltd. v. Smoky River Coal Ltd.*, [1999] A.J. No. 676 (C.A.)) as follows at 272:

...I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the *CCAA*. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made...

...  
Orders depend on a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the *CCAA*.

The chambers judge was exercising his discretion under the *CCAA* in granting an extension of the claims bar dates. However, the criteria upon which that discretion is to be exercised is a matter of legal principle, and therefore on that issue, the standard of review is correctness.

### Analysis

[9] As a preliminary matter I wish to comment on the nature of the order granted and the notices sent out to the individual creditors. The order dated April 6, 1999 stated in paragraph 2:

Claims not proven in accordance with the procedures set out in Schedules "A" and "B" shall be deemed forever barred and may not thereafter be advanced as against Blue Range in Canada or elsewhere. (A.B.P.01)

The first page of Schedule "A" stated in part:

A Claims' Bar Date of 5:00 p.m. Calgary time on May 7, 1999 has been set by the Alberta Court of Queen's Bench. All claims received by the monitor or postmarked after the Claims' Bar Date will be forever extinguished, barred and will not participate in any voting or distributions in the CCAA proceedings.

[Emphasis added] (A.B.P.03).

The language used in Schedule "A" goes beyond the text of the order. Although it may not be of practical significance, barring the right of a claimant to a remedy is fundamentally different from erasing the debt. The court under the *CCAA* has powers to compromise and determine, but only in accordance with the process prescribed in the statute.

[10] It was urged before the court in oral argument by counsel for the appellants that the purpose of the wording of the claims bar orders was to "smoke out" the creditors. I am dubious that the severe wording of the claims bar orders is effective to "smoke out" the creditor who may otherwise lie dormant. The objective of making certain that all legitimate creditors come forward on a timely basis has to be balanced against the integrity and respect for the court process and its orders. Courts should not make orders that are not intended to be enforced in accordance with their terms. All counsel conceded that the court had authority to allow late filing of claims, and that it was merely a matter of what criteria the court should use in exercising that power. It necessarily follows that a claims bar order and its schedule should not purport to "forever bar" a claim without a saving provision. That saving provision could be simply worded with a proviso such as "without leave of the court", which appears to be not only what was contemplated, but what in fact occurred here.

### The Appropriate Criteria

[11] The appellants advocated the adoption of the criteria under the *U.S. Bankruptcy Rules*, Chapter 11, while the respondents favoured either the application of the tests under the *BIA* or some blending of the two standards.

[12] Rule 9006 of the *U.S. Bankruptcy Rules* deals with the extension of time in these circumstances. The relevant portion of the Rule states:

9006 (b)(1) ... when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

The key phrase in this section is “excusable neglect”. In *Pioneer Investment Services Company v. Brunswick Associates v. Brunswick Associates Limited Partnership et al.* 507 U.S. 380, 113 S.Ct. 1489 (1993) the U.S. Supreme Court dealt with the interpretation of this phrase. In *Pioneer*, the creditor’s attorney, due to disruptions in his legal practice and confusion over the form of notice, failed to file a Notice of Claim in time. The U.S. Supreme Court noted that excusable neglect may extend to “inadvertent delays” (at pg 391) and went on to identify the relevant considerations when determining whether or not a delay is excusable. The Court said at 395:

Because Congress has provided no other guideposts for determining what sorts of neglect will be considered “excusable”, we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission. These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

The American authorities also seem to reflect that the burden of meeting all of these elements, including showing the absence of prejudice, lies with the party seeking to file the late claim: e.g. *In re Specialty Equipment Companies Inc.*, 159 B.R. 236 (1993).

[13] The Canadian approach under the *BIA* has been somewhat different. Canadian courts have been willing to allow the filing of late or amended claims under the *BIA* when the claims are delayed due to inadvertence, (which would include negligence or neglect), or incomplete information being available to the creditors, see: *Re Mount Jamie Mines (Quebec) Ltd.* (1980),

110 D.L.R. (3<sup>rd</sup>) 80 (Ont. S.C.). The Canadian standard under the *BIA* is, therefore, less arduous than that applied under the *U.S. Bankruptcy Rules*.

[14] I accept that some guidance can be gained from the *BIA* approach to these types of cases but I find that some concerns remain. An inadvertence standard by itself might imply that there need be almost no explanation whatever for the failure to file a claim in time. In my view inadvertence could be an appropriate element of the standard if parties are able to show, in addition, that they acted in good faith and were not simply trying to delay or avoid participation in *CCAA* proceedings. But I also take some guidance from the *U.S. Bankruptcy Rules* standard because I agree that the length of delay and the potential prejudice to other parties must be considered. To this extent, I accept a blended approach, taking into consideration both the *BIA* and *U.S. Bankruptcy Rules* approaches, bolstered by the application of some of the concepts included in other areas, such as late reporting in insurance claims, and delay in the prosecution of a civil action.

[15] In *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C.S.C.), the applicant was an unsecured creditor of Alberta Pacific Terminals Ltd. ("APCL"). Transtec Canada Ltd. was indebted to the applicant and APCL had guaranteed the obligation. APCL sought protection under the *CCAA*. Through oversight, the applicant Lindsay was not sent the relevant *CCAA* materials by APCL and was not included in the *CCAA* proceedings. He did not, therefore, have the opportunity to vote on the plan of arrangement. It is clear, however, that Lindsay at some point during the *CCAA* proceedings became aware of them, and at various stages had his lawyers contact APCL's lawyers to inquire about the process. Despite this knowledge he did not pursue the matter. Lindsay then came to the court seeking permission to sue APCL as a guarantor, potentially recovering considerably more than those creditors who participated in the *CCAA* process.

[16] After reviewing all of the facts, Huddart, J. found that "Lindsay (or solicitors on his behalf) made considered, deliberate, decisions not to notify Alberta-Pacific of his claim until after the approval order and then not until after the closing of the share purchase agreement" (para 19). She then went on to conclude that Lindsay preferred not to participate in the *CCAA* process and chose to take his chances later on.

[17] In deciding how to exercise her discretion, Huddart, J. applied the following factors: "the extent of the creditor's actual knowledge and understanding of the proceedings; the economic effect on the creditor and debtor company; fairness to other creditors; the scheme and purpose of the *CCAA* and the terms of the plan" (para 56). On these criteria, Huddart, J. found that it would not be equitable to allow Lindsay to pursue a claim as he was well aware of what was going on in the *CCAA* proceedings, chose not to participate, and his late action would cause serious prejudice both to the debtor company and to the other creditors.

[18] While *Lindsay* is clearly distinguishable on its facts from the within appeal, the case does highlight the issues of the conduct of the late claimants and the potential prejudice to other creditors and the debtor. Lindsay was the classic creditor “lying in the weeds”, waiting for the appropriate moment to pounce. He did not act in good faith and his conduct was potentially prejudicial to other creditors and the debtor company. By avoiding the *CCAA* proceedings, Lindsay was attempting to gain an advantage not available to other creditors.

[19] There is further support for a blended approach in several other areas of the law where courts have had to deal with the impact of delays and late filings. In particular, I have considered the courts’ treatment of delays in the prosecution of actions and the late filing of notices of claim to insurers.

[20] In *Lethbridge Motors Co. v. American Motors (Can.) Ltd.* (1987), 53 Alta. L.R. (2d) 326 (C.A.) the court had to decide whether or not to allow an action to continue where no steps had been taken by the plaintiff for five years. In deciding that the action could continue, Laycraft, C.J.A. relied on the following test from the English Court of Appeal in *Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] 1 All E.R. 543 where Salmon L.J. said at 561:

In order for the application to succeed the defendant must show:

(i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs.

(ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.

(iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

Relying on this test, as well as additional refinements, the Court found that the fundamental rule was that it was “necessary for a defendant to show serious prejudice before the court will exercise its jurisdiction to strike out an action for want of prosecution” (at pg. 331). The onus of showing serious prejudice has now been substantially altered as the result of amendments to the Alberta Rules of Court in 1994. Rule 244(4) now states that proof of inordinate and inexcusable

delay constitutes *prima facie* evidence of serious prejudice: *Kuziw v. Kucheran Estate*, 2000 ABCA 226 (Online: Alberta Courts).

[21] Similar questions can arise in an insurance context where an insured is required to file a proof of loss or other notice of claim within a certain time period under a contract of insurance. For example, s. 205 of the *Insurance Act* R.S.A. 1980, c. I-5 states:

205 [w]here there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss and the consequent forfeiture or avoidance of the insurance in whole or in part and the Court considers it inequitable that the insurance should be forfeited or avoided on that ground, the Court may relieve against forfeiture or avoidance on such terms as it considers just.

[22] Similar wording is also found in ss. 211 and 385 of the *Insurance Act* and similar legislation exists throughout the common law provinces.

[23] When deciding whether to grant relief from forfeiture in an insurance context the Alberta courts have generally adopted a two part test, see: *Hogan v. Kolisnyk* (1983), 25 Alta L.R. (2d) 17 (Q.B.). In *Hogan* the court found it appropriate to look first at the conduct of the insured to determine whether the insured is guilty of fraud or wilful misconduct. Second, the court considered whether the insurer had been seriously prejudiced by the imperfect compliance with the statutory provision (at 35). The “noncomplying” party can show that there was no prejudice by showing that the innocent party had actual knowledge of the events in question and was thereby able to investigate the situation.

[24] Considering whether the insurer has suffered any prejudice, the court in *Hogan* quoted from a decision of Stevenson, D.C.J. in *Schoeler (W.) Trucking Ltd. v. Market Ins. Co. of Can.* (1980), 9 Alta L.R. (2d) 232 at 237 where Stevenson, D.C.J. said “[t]he root of the question is whether or not it (the insurer) would have acted any differently if it had been given notice of the loss when it should have been given notice”. In *312630 British Columbia Ltd. v. Alta. Surety Co.* (1995), 10 B.C.L.R. (3d) 84 (C.A) the B.C. Court of Appeal set out a more recent formulation of the test, namely whether the insurer by reason of the late notice had lost a realistic opportunity to do anything that it might otherwise have done.

[25] These authorities arise in a clearly different context from that which I am dealing with in this case, but they demonstrate that there is a somewhat consistent approach in a variety of areas of the law when dealing with the impact of late notice or delays in particular processes.

[26] Therefore, the appropriate criteria to apply to the late claimants is as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

[27] In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional. I will deal with the conduct of each of the respondents in turn below and then turn to a discussion of potential prejudice suffered by the appellants.

**National-Oilwell Canada Ltd. ("National")**

[28] National, and National as the successor in interest to Dosco Supply, a division of Westburne Industrial Enterprises Ltd. ("Dosco") indicate that their claims were filed late due to the unexpected illness and resulting lengthy absence of their credit manager who was in charge of the Blue Range accounts receivable. National submitted the National and Dosco notices of claims on June 7, 1999 (AB V, pgs 538 and 542). National's claim is \$58,211.00 and Dosco's claim is \$390,369.13. National and Dosco clearly acted in good faith and provided the Notices of Claim as soon as the relevant personnel became aware of the situation.

**Campbell's Industrial Supply Ltd. ("Campbell's")**

[29] Campbell's initial claim in the amount of \$14,595.22 was filed prior to the date in the relevant claims bar order. Campbell's then amended its claim on June 25, 1999 and again on July 8, 1999 to \$23,318.88. The claim was amended after the relevant date as a result of a representative from Blue Range informing Campbell's that its claim should include invoices sent to Trans Canada Midstream, Berkley Petroleum, Big Bear Exploration and Blue Range Resources Corporation (A.B. 495-496). In addition, there appears to have been some delay due to the Notices of Claim not being sent to the correct Campbell's office. Campbell's acted in good faith throughout and it is in fact arguable that any delay in the proper filing of its claims was actually due to errors on the part of Blue Range rather than its own doing.

**TransAlta Utilities Corporation ("TransAlta")**

[30] TransAlta did not comply with the dates in the claims bar orders. It contends that it did not receive the claims package prior to the relevant dates. It is apparent from the evidence that the claims package was sent to TransAlta at its accounts receivable office, rather than the registered office for service (A.B.432-434). TransAlta was permitted to file its total claim of \$120,731.00 by order of the chambers judge dated September 7, 1999. There is no evidence that TransAlta was attempting to circumvent the CCAA process. On the contrary, as soon as the

appropriate personnel became aware of the situation, TransAlta took the necessary steps to have its Notice of Claim filed.

#### **Petro-Canada Oil and Gas ("PCOG")**

[31] PCOG filed extensive claims material with the Monitor prior to the relevant dates showing several unsecured claims. The Monitor's draft third interim report indicated that four of PCOG's claims should properly have been classified as secured. The mistake by PCOG was the result of a misapprehension of how operator's liens functioned under the CAPL Operating Procedures incorporated into the contracts giving rise to the claims. PCOG then sought to amend its claims and have them changed from unsecured to secured status (A.B. 554), on July 7, 1999. The change in status would result in claims of \$137,981.30 being amended from unsecured to secured. There was no lack of good faith.

#### **Barrington Petroleum Ltd. ("Barrington")**

[32] Barrington was acquired by Sunoma Energy Corp ("Sunoma") in about September, 1998. An affidavit filed by Sunoma's controller indicates that the financial records of Barrington were found to have been in complete disarray. Barrington's initial Notice of Claim in the amount of \$223,940.06 was submitted prior to the relevant date. Barrington received a Notice of Dispute of Claim which approved the claim to the extent of \$57,809.37, but disputed the remainder. On reviewing the issue, Barrington's controller determined that Blue Range was correct, but at the same time she identified additional invoices of which she had been unaware (A.B.549-551). On discovering the additional invoices, Barrington then submitted an amended Notice of Claim on July 22, 1999 and an objection to the Notice of Dispute of Claim. Barrington acted in good faith.

#### **Rigel Oil & Gas Ltd. ("Rigel")**

[33] The full amount of Rigel's Notice of Claim was \$146,429.68. This Claim was filed prior to the relevant date and the amount was approved by Blue Range. After the relevant date, on August 12, 1999, Rigel moved to amend and to allege that, despite Blue Range's claims to the contrary, its claim was secured, rather than unsecured. The only issue for Rigel on appeal is if their claim is properly secured can it be accepted because it was not claimed as secured until August 12, 1999.

#### **Halliburton Group Canada Inc. ("Halliburton")**

[34] Halliburton was in the process of attempting to collect on accounts receivable owed by Big Bear Exploration Ltd. through May and June, 1999. They subsequently became aware, after the relevant date, that a claim in the amount of \$11,309.90 was in fact against Blue Range, and should properly have been filed as a Notice of Claim in the CCAA proceedings (A.B. 497-499). On making this discovery, Halliburton wrote to the Monitor on July 14, and July 26, 1999 requesting that its claim be included in the CCAA proceeding. The Monitor disputed this claim as having been filed too late (A.B. 498). It appears that Halliburton acted in good faith.

#### **Founders Energy Ltd. ("Founders")**



[35] Founders filed its claim prior to the relevant date, but, due to an oversight, claimed as an unsecured rather than a secured creditor. After filing its initial Notice of Claim, Founders received a Notice of Dispute from Blue Range. Within the 15 day appeal period, but outside the claims bar date, Founders then filed an amended Notice of Claim claiming a secured interest in the sum of \$365,472.39, on July 26, 1999.

### **Prejudice**

[36] The timing of these proceedings is a key element in determining whether any prejudice will be suffered by either the debtor corporation or other creditors if the late and late amended claims are allowed. The total of all late and amended claims of the late claimants, secured and unsecured, is approximately \$1,175,000. As set out above, in the initial claims bar order, the relevant date was 5:00 p.m. May 7, 1999. This date was extended for joint venture partners to 5:00 p.m. on June 15, 1999. The Plan of Arrangement, sponsored by Canadian Natural Resources Ltd. ("CNRL"), was voted on and passed on July 23, 1999. Status as a creditor, the classification as secured or unsecured, and the amount of a creditor's claim, are relevant to voting: s.6 CCAA.

[37] Enron and the Creditor's Committee claim that they would be prejudiced if the late claims were allowed because, had they known late claims might be permitted without rigorous criteria for allowance, they might have voted differently on the Plan of Arrangement. Enron in particular submits that it would have voted against the CNRL Plan of Arrangement, thus effectively vetoing the plan, if it had known that late claims would be allowed. This bald assertion after the fact was not sufficient to compel the chambers judge to find this would in fact have been Enron's response. Nowhere else in the evidence is there any indication that late claimants being allowed would have impacted the voting on the different proposed Plans of Arrangement. In addition, materiality is relevant to the issue of prejudice. The relationship of \$1,175,000 (which is the total of late claims) to \$270,000,000 (which is the total of claims filed within time) is .435 per cent.

[38] Also, the contrary is indicated in the Third Interim Report of the Monitor where it is shown in Schedule D-1 (A.B.269) that \$2 million was held as an estimate of unsecured disputed claims. Therefore, when considering which Plan of Arrangement to vote for, Enron, and all of the creditors, would have been aware that \$2 million could still be legitimately allowed as unsecured claims, and would have been able to assess that potential effect on the amount available for distribution.

[39] Further, the late claimants were well known to the Monitor and all of the other creditors. The evidence discloses that officials at Enron received an e-mail from the Monitor on May 18, 1999 indicating that there were several creditors who had filed late, after the first deadline of May 7, and the Monitor thought that even though they were late the court would likely allow them (A.B.1040). Finally, all of the late claimants were on the distribution list as having potential claims. (A.B. 9-148). It cannot be said that these late claimants were lying in the weeds

waiting to pounce. On the contrary, all parties were fully aware of who had potential claims, especially Enron and the Creditors Committee.

[40] In a *CCAA* context, as in a *BIA* context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the *CCAA* involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: *Re Cohen* (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31. Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal in *312630 British Columbia Ltd.* It is: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Enron and the other creditors were fully informed about the potential for late claims being permitted, and were specifically aware of the existence of the late claimants as creditors. I find, therefore, that Enron and the Creditors will not suffer any relevant prejudice should the late claims be permitted.

#### Summary of Criteria

[41] In considering claims filed or amended after a claims bar date in a claims bar order, a *CCAA* supervising judge should proceed as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

#### Conclusion

[42] Applying the criteria established, I find that the conclusion reached by the chambers judge ought not to be disturbed, and the late claims filed by the respondents should be permitted under the *CCAA* proceedings. The appeal is dismissed.

APPEAL HEARD on June 15, 2000

REASONS FILED at Calgary, Alberta,  
this 24<sup>th</sup> day of October, 2000

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WITTMANN J.A.

I concur:

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RUSSELL J.A.

I concur:

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SULATYCKY J.A.

**TAB F**

# Court of Queen's Bench of Alberta

Citation: Royal Bank of Canada v. Cow Harbour Construction Ltd., 2011 ABQB 223

Date: 20110405  
Docket: 1003 11241, 1003 05560  
Registry: Edmonton

Between:

**Royal Bank of Canada**

Plaintiff

- and -

**Cow Harbour Construction Ltd. and 1134252 Alberta Ltd.**

Defendant's

And Between:

Docket: 1003 05560  
BKCY Action No: 24-115359

**In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended**

**In the Matter of 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 Cow Harbour  
Construction Ltd.**

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**Memorandum of Decision  
of the  
Honourable Mr. Justice K.D. Yamauchi**

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**I. Introduction**

[1] Cow Harbour Construction Ltd. ("Cow Harbour") sought relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). By an order dated April 7, 2010, as amended by further order dated July 6, 2010 (collectively, the "Initial Order"), this Court granted Cow Harbour the relief it was seeking. The Initial Order appointed Deloitte & Touche Inc. as monitor with respect to those proceedings (the "Monitor").

[2] Matthews Equipment Limited, operating as Hertz Equipment Rental ("Hertz") is one of Cow Harbour's creditors. Hertz has applied to this Court seeking an order granting it leave to file a proof of claim in a critical suppliers' claims process that this Court established by way of court order. Hertz missed the court-ordered deadline for filing its proof of claim.

[3] PricewaterhouseCoopers Inc., in its capacity as Cow Harbour's court-appointed receiver, along with other creditors, oppose Hertz's application.

## II. Facts

[4] The Initial Order imposed a stay of proceedings on all of Cow Harbour's creditors. Specifically, the Initial Order prohibited creditors, defined by the Initial Order to be "Critical Suppliers," from filing builders' liens against lands on which Cow Harbour did work or furnished materials in respect of improvements. Were it not for the Initial Order, these Critical Suppliers would have been entitled to file valid and enforceable builders' liens. To protect the Critical Suppliers' claims, the Initial Order granted them a charge over Cow Harbour's property, not to exceed \$8,000,000 (the "CS Charge").

[5] Hertz rented to Cow Harbour various equipment including heaters, loaders, light towers and generators. Hertz issued invoices to Cow Harbour for those rentals between December 23, 2009 and April 1, 2010. As at April 1, 2010, Cow Harbour owed Hertz \$178,598.47, representing rental arrears for that period (the "Debt"). The Debt was unsecured.

[6] On May 19, 2010, the Monitor circulated its Fifth Report to the Court (the "Monitor's Fifth Report") among Cow Harbour's creditors. The Monitor's Fifth Report contained, among other things, a list of those creditors that the Monitor classified to be the holders of true leases with Cow Harbour, as opposed to capital, or financing, leases. Hertz was among those creditors that the Monitor classified as holding a true lease.

[7] The Monitor's Fifth Report also recommended that this Court establish a formal claims process pursuant to which those creditors claiming to be Critical Suppliers could assert their claims. By an order dated May 21, 2010 (the "May 21 Order"), this Court established a process by which the Monitor's counsel would circulate a proof of claim form to those claimants who wanted to establish themselves as a Critical Supplier (a "Proof of Claim"). The Monitor's counsel would send the Proof of Claim form to Cow Harbour's equipment lessors and persons to whom Cow Harbour owed money as at April 1, 2010. All recipients had to complete and deliver

the Proof of Claim to the Monitor by June 16, 2010 ("Claims Bar Date"). The May 21 Order paras. 11(c) and 11(d) said:

- (c) any lessor or claimant of a payable failing to deliver to the Monitor by [the Claims Bar Date], a completed Proof of Claim, shall be disqualified as a Critical Supplier and not entitled to the benefit of the [CS Charge], unless otherwise ordered by the Court; and
- (d) so soon as practical following [the Claims Bar Date], the Monitor shall report to this Honourable Court, with respect to the Proofs of Claim received and other matters relating to claimants under the [CS Charge].

[8] Hertz retained Parlee McLaws LLP ("Parlee McLaws") in or about April, 2010, to act as its legal counsel in Cow Harbour's *CCAA* proceedings. Marilyn Ann White, Credit Manager for Hertz ("Ms. White"), was the "sole point of contact" between Hertz and Parlee McLaws. All of Hertz's communications with Parlee McLaws ultimately went through Ms. White. Ms. White filed an affidavit and a supplementary affidavit in support of Hertz's application and subjected herself to questioning on her affidavit. Ms. White's supplemental affidavit specifically responded to the matters arising out of her questioning

[9] Ms. White stated that as a "routine matter," Parlee McLaws forwarded to her emails and court documents that were filed and which Parlee McLaws received from the Monitor with respect to the Cow Harbour's *CCAA* proceedings.

[10] On May 28, 2010, the Monitor's counsel sent, via email (the "May 28 Email"), a copy of the May 21 Order, to the service list, which included Bryan Maruyama, Dean Hitesman, and Jerry Hockin, all of Parlee McLaws.

[11] On June 1, 2010, the Monitor's counsel sent to Bryan Maruyama, Dean Hitesman, and Jerry Hockin, all of Parlee McLaws, via email (the "June 1 Email"), a copy of the Proof of Claim "package" that claimants would use if they wanted to make a claim as a Critical Supplier, and setting out the Claims Bar Date.

[12] Ms. White does not recall whether she received the May 28 Email or the June 1 Email. She has reviewed her email archives and has found no record of the May 28 Email or the June 1 Email. As well, Hertz's systems department informed Ms. White that once an email received by anyone at Hertz has been deleted, it cannot be retrieved.

[13] There was nothing that prevented Ms. White from asking Parlee McLaws to check their "sent items" to see whether (contrary to their "routine" practice) they failed to forward either the May 28 Email or the June 1 Email to Hertz or to Ms. White. She did not make that inquiry.

[14] Hertz did not file a Proof of Claim with the Monitor by the Claims Bar Date.

[15] On August 25, 2010, this Court granted an order in which it appointed PricewaterhouseCoopers Inc. as receiver (the "Receiver") of all of Cow Harbour's and 1134252 Alberta Ltd.'s current and future assets, undertakings and properties (the "Receivership Order"). This Court granted the Receivership Order pursuant to the *Judicature Act*, RSA 2002, c. J-2, s. 13(2) and the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, s. 243(1) ("BIA").

[16] Parlee McLaws provided Hertz's Proof of Claim to the Receiver on January 12, 2011, together with the supporting invoices.

[17] On January 12, 2011, this Court granted a further order (the "January 12 Order"), in which it ordered, among other things, that in accordance with the May 21 Order, any creditor who did not file a Proof of Claim by June 16, 2010, shall, unless otherwise ordered, be conclusively deemed not to be a Critical Supplier.

[18] Hertz now requests this Court to grant it leave to file its Proof of Claim, even though it failed to file it on or before the Claims Bar Date.

### III. Issue

[19] Whether this Court should grant Hertz leave to file its Proof of Claim subsequent to the Claims Bar Date.

### IV. Discussion

[20] *Blue Range Resource Corp. (Re)*, 2000 ABCA 285 at para. 26, held that courts, in a CCAA proceeding, respond to the following questions when they are determining whether they will permit a claimant to file its claim after the expiry of a deadline for filing claims:

- (a) Was the delay caused by inadvertence and if so, did the claimant act in good faith?
- (b) What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
- (c) If relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing?
- (d) If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?



1. *Inadvertence and Good Faith*

[21] *Blue Range* held that "inadvertent" includes carelessness, negligence, accident, and is unintentional (para. 27).

[22] Hertz argues that the inadvertence in this case is attributable to Parlee McLaws failing to advise Hertz to file its Proof of Claim in advance of the Claims Bar Date. In fact, Hertz argues that it did not receive the Proof of Claim at all and did not recognize the need to file its Proof of Claim until Parlee McLaws advised it to do so on January 12, 2011. Hertz completed its Proof of Claim and had Parlee McLaws submit it to the Receiver on the day that Parlee McLaws brought this requirement to its attention. Finally, Hertz argues that its failure to file its Proof of Claim was not the result of any deliberate act attributable to Hertz.

[23] The Receiver argues that while "inadvertence" sets a seemingly low standard, it is not sufficient for a party to claim inadvertence if there is no explanation for its failure to file its claim on time. In the absence of conduct evidencing "inadvertence," a period of inadvertence will have "ceased to run" when a claimant's solicitor is given specific notice of a claims bar date.

[24] The Receiver further argues that Hertz has not provided sufficient or any evidence of conduct amounting to inadvertence, whether on Hertz's behalf, or on behalf of Parlee McLaws. In fact, it argues, there is no evidence to indicate why Hertz did not file its Proof of Claim in a timely manner. While Hertz argues that this was a result of Parlee McLaws' inadvertent failure to provide the documents to Hertz, there is no evidence to support this assertion. This is so, despite the fact that Ms. White was specifically asked this question during questioning and subsequently filed a supplemental affidavit.

[25] The Receiver argues that this Court may provide the relief Hertz seeks only if Hertz proves "exceptional circumstances." This term comes from *Ivorylane Corp. v. Country Style Realty Ltd.*, 2004 CarswellOnt 2567 at para. 47. The court, in that case, cites *Blue Range* for this proposition. This Court does not agree that *Blue Range* made this a part of the test. Instead, it requires this Court to examine the facts before it in the light of the 4 questions it posed. Whether the result of that analysis is exceptional or unexceptional matters not.

[26] The description of "inadvertent" in *Blue Range*, says that the action is "unintentional." It is difficult to imagine a situation where carelessness, negligence or accident could be "intentional" and still be inadvertent, unless the court in that case was envisaging a situation where a claimant is wilfully blind or procrastinating. Nonetheless, to determine inadvertence, one must look at the circumstances in which the claimant found itself. For example, was there an advantage to Hertz "lying in the weeds" until the Claims Bar Date passed? Although we must examine this question, as well, when deciding whether any prejudice flows, it is important to answer that question at this stage.

[27] Hertz's statement that it was not lying in the weeds is not sufficient. Further, the Receiver argues that there is no evidence before this Court to indicate why Hertz did not file its Proof of

Claim in a timely manner. While this Court agrees with the Receiver that it is Hertz's onus to show why it requires an extension, Romaine J. in *BA Energy Inc. (Re)*, 2010 ABQB 507, 70 C.B.R. (5<sup>th</sup>) 24, tells us that "the question of whether a late claim should be accepted is an equitable consideration, taking into account the specific circumstances of each case" (para. 34).

[28] In *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C.S.C.), the court would not grant the claimant leave to pursue his claim after the creditors had approved a plan of arrangement and the court sanctioned it. He became aware of the *CCAA* proceedings at some point during the proceedings and at various stages throughout the proceedings, his solicitors contacted the debtor's solicitors to inquire about the process. He, however, did not pursue his claim until a point where he could recover potentially more than the debtor's other creditors. The court in *Blue Range* said of the *Lindsay* case:

18 ... [T]he case does highlight the issues of the conduct of the late claimants and the potential prejudice to other creditors and the debtor. Lindsay was the classic creditor "lying in the weeds", waiting for the appropriate moment to pounce. He did not act in good faith and his conduct was potentially prejudicial to other creditors and the debtor company. By avoiding the *CCAA* proceedings, Lindsay was attempting to gain an advantage not available to other creditors.

[29] The Receiver forcefully argued that, on the evidence, we still do not know whether Parlee McLaws ever forwarded the May 28 Email or the June 1 Email to Hertz. Ms. White's supplemental affidavit says nothing more than that Hertz is unable to retrieve emails once they are deleted. That may be so, but this lack of evidence does not completely answer the question. We must look at "the specific circumstances of the case" to answer it. In this case, there would be no advantage for any creditor to simply lie in the weeds. They could lose their claim completely or they could be subject to a costs claim. The only advantage could be that they would not have to incur the cost of having to file a Proof of Claim. As well, there could be a practical advantage, such as the one outlined in *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C.S.C.). That situation does not apply in this case. This Court finds that there would be no advantage to Hertz by its lying in the weeds and the only explanation for it not filing its Proof of Claim was inadvertence on its part or on the part of Parlee McLaws.

[30] The Receiver rightly points out that service on a solicitor of record is service on the claimant. In fact the *Alberta Rules of Court*, Alta. Reg. 124/2010, rr. 11.16, 11.17 and 11.20 permit this. Does the *Blue Range* test of unintentional negligence, carelessness and accident apply equally to the claimant's solicitors, as well as the claimant itself? Or is the *Blue Range* test limited only to claimants? If it is the latter, then the claimant's remedy would be as against the Alberta Lawyers Insurance Association. With respect to the former, the court in *Air Canada (Re)* (2004), 49 C.B.R. (4th) 175 (Ont. S.C.J. [Commercial]), allowed the claimant to file its late notice when counsel had acknowledged that it was through its inadvertence that the notice had not been filed on time, and that corrective action was taken promptly and that the extension of time would not cause a hardship to any interested party or prejudice the debtor company's reorganization.

[31] This Court does not countenance solicitors' negligence, but in the unique circumstances of this case where there are 3 solicitors from the same firm dealing with numerous clients involved in a *CCAA* matter, one can see how the solicitors might be inadvertent. In fact, throughout this Court's involvement in this matter, Parlee McLaws has made submissions which, at the same time, support and contest a particular approach to a matter. One would have thought that solicitors with the experience of those involved in this matter would never allow something like this to happen.

[32] This Court must also assess whether Hertz was acting in good faith in these circumstances. A simple assertion that it was acting in good faith is not enough. This analysis can be done by answering what appears to be two sides of the same coin. Was Hertz acting in bad faith and was it acting in good faith? With respect to the former, the "lying in the weeds" analysis will answer that question. With respect to the latter, a court will find that a claimant is acting in good faith if it submits its claim as soon as it becomes aware of the situation. See *e.g. Blue Range* at paras. 28 and 30. In the case at bar, Hertz, through Parlee McLaws, provided its Proof of Claim to the Receiver immediately on being advised of the need so to do.

[33] This Court finds that Hertz's failure to file its Proof of Claim was the result of Parlee McLaws' "inadvertence." To this end, this Court chooses to follow the approach that the court took in *Air Canada*. In the alternative, if Hertz did receive the Proof of Claim, it failed to file the Proof of Claim through its own inadvertence. As well, Hertz, by providing the Receiver with its Proof of Claim immediately on being advised, or reminded, as the case may be, of its need to provide it, shows that it acted in good faith.

## 2. *Prejudice*

[34] Hertz argues that having this Court granting it leave to file its Proof of Claim after the Claims Bar Date, and the claim itself, would have a negligible impact on the Critical Supplier claims process. The Receiver has not yet (1) completed its review of the previously submitted Proofs of Claim; (2) completed the appeals process in respect of the Receiver's review of the previously submitted Proofs of Claim; or (3) made any distribution in respect of the CS Charge. Hertz has not been "lying in the weeds."

[35] It further argues that its claim was known to the Monitor and the other creditors. The Monitor categorized Hertz as a true lessor. The Monitor communicated that categorization to all creditors in the Monitor's Fifth Report. Hertz was also known to the Receiver and is listed as having an unsecured claim in the amount of \$196,966.29, in the Notice and Statement of Receiver dated August 31, 2010, that the Receiver circulated to all of Cow Harbour's creditors, pursuant to the *BIA*.

[36] Furthermore, Cow Harbour's creditors were aware that there were other creditors who had filed late Proofs of Claim. This Court has not yet adjudicated on the validity of the other late-filed proofs of claim.

[37] Finally, Hertz argues that none of Cow Harbour's creditors will have lost a realistic opportunity to do anything that they otherwise might have done. Conversely, had Hertz submitted its Proof of Claim on time, each of the other creditors would have proceeded in exactly the same fashion as they did.

[38] The Receiver argues that in any consideration of prejudice, this Court should weigh the prejudice to the Receiver or a monitor in a CCAA proceeding on its ability carry out its duties and effect a level of predictability and finality in CCAA or receivership proceedings.

[39] *Blue Range* (para. 36) tells us that timing is a key element when determining whether Hertz or the other Critical Suppliers will suffer any prejudice if this Court were to grant Hertz leave to file its claim. What does this mean? Had the Receiver completed its analysis of the Critical Suppliers' issue and distributed funds then this Court might be less inclined to allow Hertz to file its Proof of Claim. As well, Cow Harbour's other creditors were aware of Hertz's potential claim through many of the Monitor's reports: *Blue Range* at para. 39. This Court has not adjudicated on the admissibility of any of the other late Proofs of Claim, as yet.

[40] *Blue Range* at para 37, also tells us that materiality is relevant to the issue of prejudice. Assuming that Hertz's claim is the agreed-upon amount of \$178,598.47, its claim, as against the total amount of the Proofs of Claim of \$49,962,687.68 is .357%. In *Blue Range*, the court found a .435% claim to be immaterial. Surely, .357% is even less material.

[41] Even if materiality is not *sine qua non* of this Court's analysis, the fact that the Critical Suppliers will receive less money, should this Court grant Hertz leave to file its Proof of Claim, is not something this Court need consider:

37 In a CCAA context ... the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the CCAA involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: *Cohen, Re* (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31.

[42] Because of the immateriality of Hertz's claim relative to the Proofs of Claim as a whole, Cow Harbour's other creditors' awareness of Hertz's potential claim, and the fact that nothing has been done concerning these claims to this point, this Court finds that neither the Critical Suppliers nor the Receiver will suffer any prejudice if this Court were to grant leave to Hertz to file its claim.

[43] Because this Court finds that there would be no "relevant prejudice" that flows as a result of its approving Hertz's late filing, this Court does not intend to deal with the third and fourth *Blue Range* questions.

**V. Conclusion**

[44] Proceedings under the *CCAA* are meant to deal with compromises and arrangements among a debtor company and its creditors. If a creditor fails to file its claim in those proceedings because of its solicitors' negligence or its own inadvertence, as defined in *Blue Range*, it should be permitted to argue that, nonetheless, a court should permit it to file its claim. That is the reason why *Blue Range* outlined the four questions and why this Court inserted the "unless otherwise ordered by the court" provision in the May 21 Order and the January 12 Order.

[45] The objective of a claims procedure order was set out by Romaine J. in *BA Energy* as follows:

41 The objective of a claims procedure order is to attempt to ensure that all legitimate creditors come forward on a timely basis. A claims procedure order provides the debtor and the Monitor with the information necessary to fashion a plan that may prove acceptable to the requisite majority of creditors given the financial circumstances of the debtor and that may be sanctioned by the court. The fact that accurate information relating to the amount and nature of claims is essential for the formulation of a successful plan requires that the specifics of a claims procedure order should generally be observed and enforced, and that the acceptance of a late claim should not be an automatic outcome. The applicant for such an order must provide some explanation for the late filing and the reviewing court must consider any prejudice caused by the delay.

42 The claims procedure process was developed to give creditors a level playing field with respect to their claims and to discourage tactics that would give some creditors an unjustified advantage. Situations that give rise to concerns of improper manipulation of the process by a creditor must be carefully considered.

[46] It is important to note that each case depends on its unique facts. This Court finds that Hertz was not attempting to seek an unjustified advantage by not filing its claim or that it was improperly manipulating the process. Its failure to file its claim was inadvertent. Accordingly, this Court grants Hertz leave to file its Proof of Claim subsequent to the June 16, 2010 deadline.

Heard on the 25<sup>th</sup> day of March, 2011.

**Dated** at the City of Edmonton, Alberta this 65th day of April, 2011.

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**K.D. Yamauchi**  
**J.C.Q.B.A.**

**Appearances:**

Bryan Maruyama

Parlee McLaws

for the Applicant Matthews Equipment Limited, operating as Hertz Equipment Rental

Randall S. Van de Mosselaar

Macleod Dixon

for the Respondent PricewaterhouseCoopers Inc., receiver of Cow Harbour Construction Ltd.