Court File No. CV-25-00748510-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 1001387025 ONTARIO INC.

Applicant

REPLY FACTUM OF THE MOVING PARTY,
2386843 ONTARIO INC. o/a PHANTOM DISPOSAL
(Returnable July 28, 2026)

Date: July 26, 2026

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TO: **SERVICE LIST**

REPLY

1. This Reply responds to the facta filed by the Monitor and New QM. Capitalized terms not defined here have the meanings given in Phantom's factum. The central dispute concerns the effect of the ARVO in relation to the Phantom Lien Action: the Monitor relies on paragraph 6, while New QM relies on paragraphs 19 and 20. To the extent either seeks an order striking or barring any part of the Phantom Lien Action, that relief is improperly sought through submissions in a responding factum, without a motion or cross-motion. Phantom addresses those arguments, so far as possible, within the five-page limit for this Reply.

I. Paragraph 6 of the ARVO does not apply to causes of action directed at third parties

2. The Monitor relies on paragraph 6 of the ARVO, which it calls the order's "core reverse vesting relief," to argue that QM's rights in the Continuing Projects were transferred "free and clear" of Phantom's lien claim.[1] That argument confuses QM's assets with the property against which Phantom's lien operates. The ARVO clears Claims and Encumbrances from assets owned by QM. Phantom's lien is instead a statutory claim against the owner's property or the security posted in its place. Neither belonged to QM, and neither could be transferred free and clear under paragraph 6 of the ARVO.

3. A subcontractor's lien claim against an owner is a distinct "substantive claim" that is "not co-extensive with the subcontractor's claim […] for breach of subcontract."[2] It is a statutory direct right of action against a party "with whom it does not have privity of contract." A claimant may therefore enforce its lien without also pursuing a contractual claim against its counterparty. Consistent with that distinction, the *Construction Act* "does not require" the contractual

[1] Monitor's Factum at paras 8–9, 26, 29–31.
[2] *HMI Construction Inc v Index Energy Mill Road Corp*, 2017 ONSC 4075 (Div Ct) at paras 8–11.

counterparty to be named as a defendant in the lien action.[3]

4. The corresponding holdback is likewise not the debtor's property while lien claims remain outstanding. New QM's own counsel has acknowledged that principle. Writing about construction liens in a *CCAA* proceeding, Mr. Bissell stated that the holdback is "specifically not the property of the debtor […] until there are no lien claims."[4] Citing Ontario case law, the Prince Edward Island Supreme Court explained in *PriceWaterHouse v. Southport*:

> "In brief, while the contractor may show the holdback as an account receivable, that "debt" is not realizable or collectable in whole or in part until the contractor/builder has, at least, discharged any liens against the property, and only at that point, aside from any other default, does the account receivable become a realizable chose in action, asset or property of the contractor. In the event that the contractor/builder does not discharge any liens that may arise, then the realizable value of the outstanding balance is limited to the difference between the amount of money retained by the owner and the amount of money the owner pays to vacate the liens." [5]

5. QM was a subcontractor, not the owner. Although paragraph 6 of the ARVO includes "liens" within the Claims and Encumbrances it clears, those are lien claims against QM's own property—for example, a lien against land owned by QM. Phantom's lien instead attaches to the owner's interest and, after being vacated under s. 44 of the *Construction Act*, to Eastern's bond. Neither is a Retained Asset. Paragraph 6 of the ARVO therefore could not extinguish Phantom's lien. That required the separate relief in paragraphs 19 and 20 of the ARVO specifically directed

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[3] *Aztec Electrical Supply Inc v Corporation of the Township of Sandwich West*, 2015 ONSC 4863 at paras 6–8.

[4] Brendan Bissell, "Construction Lien Rights in a CCAA ('We're Not in Kansas Anymore')" (Goldman Sloan Nash & Haber LLP, 10 April 2014) (MPBOA, p A5690), citing *PCL Constructors Westcoast Inc v Norex Civil Contractors Inc*, 2009 BCSC 95. *PriceWaterhouse v Southport*, 2000 PESCTD 104 at paras 34, 49. See also *Guarantee Company of North America v Royal Bank of Canada*, 2019 ONCA 9 [*Guarantee Co*] at paras 32, 64; *Wormald Fire Systems Inc v Coopers & Lybrand Ltd*, 1985 CanLII 1943 (ON Dist Ct); *D & K Horizontal Drilling (1998) Ltd (Trustee of) v Alliance Pipeline Ltd*, 2002 SKCA 145 at para 33.

[5] *PriceWaterhouse v Southport*, 2000 PESCTD 104 at paras 34–35, citing this passage in *Rideau Aluminum & Steels Ltd v McKechnie*, 1964 CanLII 171 (ON CA): "In this [the trial judge] was correct for liens once filed took precedence over any claim by the contractor against the owner and, to the extent to which the liens were allowed, **the contractor never had money owing to him by the owner after such filing**" [emphasis added].

at those third parties.[6]

II. Paragraphs 19 and 20 of the ARVO cleared only "Pre-Filing Lien Claims" as defined

6. Paragraphs 19 and 20 of the ARVO—not paragraph 6—did the heavy lifting required to partially unlock QM's Continuing Project receivables and holdbacks from lien claims covered under the LRO. They displaced the trades' statutory rights against owners, payors, and holdbacks and redirected their claims to ResidualCo. As it turns out, that relief produced the very mischief the *Construction Act* prohibits: it allowed QM to realize project funds that would otherwise remain protected for the trades and to apply approximately $35 million toward the BNS debt facility that had previously been used, in part, to finance shareholder distributions to WeShall.[7] As *Guarantee Company of North America* confirms, the statutory scheme exists to prevent this type of unjust enrichment.[8] The provisions that displaced those rights must therefore be confined strictly to their terms.

7. Those terms do not reach Phantom's lien. Paragraphs 19 and 20 apply only to "Pre-Filing Lien Claims," defined by reference to Lien Claims under the LRO "on any Continuing Projects." The Monitor accepts that the defined term "does not include Phantom's lien claim in respect of the Disclaimed Project." The lien-clearing provisions therefore did not clear Phantom's lien.[9]

III. No Abuse of Process, Collateral Attack, or Issue Estoppel

8. Phantom does not challenge the legality or force of the ARVO. It does not ask the Court

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[6] *Construction Act*, RSO 1990, c C.30, ss 14(1), 44(6); ARVO, para 6 (MPMR, p A4750) (definition of Retained Assets).

[7] ARVO, paras 19–20 (MPMR, p A4757). The Bank of Nova Scotia facility was satisfied through the transaction as the first prescribed closing step, paid in cash: ARVO, para 6(a) (MPMR, p A4750); Grégoire Affidavit sworn October 17, 2025, paras 45, 48 (MPSMR, pp A5156–A5157). The BNS facility had been drawn in part "**to finance a distribution payable to WeShall and 253 Ontario**" [emphasis added]: Affidavit of Agnieszka Barrett sworn July 28, 2025, para 89(b) (MPSMR, p A5031).

[8] *Guarantee Company of North America v Royal Bank of Canada*, 2019 ONCA 9 at para 32.

[9] ARVO, para 19 (MPMR, p A4757) (defining "Pre-Filing Lien Claims"); Monitor's Factum, para 28 (the defined term "does not include Phantom's lien claim in respect of the Disclaimed Project"); Fifth Report of the Monitor dated May 13, 2026, s 4.3 (MPSMR, p A5612) (Project 218031 is not a Continuing Project).

to set aside, vary, or disregard any provision. It asks only that the ARVO be interpreted according to its text, context, and purpose.[10] That is not an abuse of process, collateral attack, or issue estoppel. As the Supreme Court recently confirmed in *Resler v. Anglin*, a claimant who "does not seek to undo what was done" and whose claim "is not a contest about whether that decision has legal force" does not attack the order.[11] Recounting the context and application of the ARVO is an unavoidable and essential part of interpreting an Order of this Court.

IV. Conclusion

9. The ARVO did not clear or otherwise provide for Phantom's lien. Paragraph 20 of the ARVO expressly requires holdbacks to be released "in accordance with Provincial Lien Legislation." Under s. 22(1) of the *Construction Act*, the payer must retain the holdback until every lien that may be claimed against it has "expired or been satisfied, discharged or otherwise provided for under this Act."[12] Phantom's lien remains outstanding.

10. The CCAA and the *Construction Act* can operate together. The presumption of constitutionality favours that interpretation. No party has delivered a notice of constitutional question under s. 109 of the *Courts of Justice Act* or established the operational conflict or frustration of federal purpose required for paramountcy. As the Court of Appeal held in *Urbancorp Cumberland 2 GP Inc. (Re)*, provincial rights are displaced only "to the extent the doctrine of paramountcy requires."[13] As *Orphan Well Association v. Grant Thornton Ltd.* confirms, insolvency "is not a licence to ignore rules."[14]

11. No party disputes that Phantom could advance its lien claim before the *CCAA* proceeding

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[10] *Business Development Bank of Canada v 170 Willowdale Investments Corp*, 2025 ONCA 251 at paras 24, 27–28, applying *Urbancorp Cumberland 2 GP Inc (Re)*, 2020 ONCA 197 [*Urbancorp*] at para 72.
[11] *Resler v Anglin*, 2026 SCC 23 at paras 42–43.
[12] ARVO, para 20 (MPMR, p A4757); *Construction Act*, supra note 6, s 22.
[13] *Urbancorp*, supra note 10, at para 38.
[14] *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 at para 160.

and after the LRO. The ARVO did not clear or otherwise provide for that lien. The Stay should therefore be lifted so that the lien action may proceed. The Stay is temporary. As the Supreme Court explained in *Century Services*, "once it has been lifted, creditors regain their ability to fully exercise their rights and remedies."[15] Phantom should be permitted to fully pursue its rights under the Phantom Lien Action.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of July, 2026. We certify that we are satisfied as to the authenticity of every authority cited in this factum.

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[15] *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 50.

SCHEDULE A – LIST OF AUTHORITIES

Cases

No.	Authority	Cited at footnote(s)
1	*HMI Construction Inc v Index Energy Mill Road Corp*, 2017 ONSC 4075 (Div Ct)	2
2	*Aztec Electrical Supply Inc v Corporation of the Township of Sandwich West*, 2015 ONSC 4863	3
3	*PCL Constructors Westcoast Inc v Norex Civil Contractors Inc*, 2009 BCSC 95	4
4	*PriceWaterhouse v Southport*, 2000 PESCTD 104	4, 5
5	*Guarantee Company of North America v Royal Bank of Canada*, 2019 ONCA 9	4, 8
6	*Wormald Fire Systems Inc v Coopers & Lybrand Ltd*, 1985 CanLII 1943 (ON Dist Ct)	4
7	*D & K Horizontal Drilling (1998) Ltd (Trustee of) v Alliance Pipeline Ltd*, 2002 SKCA 145	4
8	*Rideau Aluminum & Steels Ltd v McKechnie*, 1964 CanLII 171 (ON CA)	5
9	*Business Development Bank of Canada v 170 Willowdale Investments Corp*, 2025 ONCA 251	10
10	*Urbancorp Cumberland 2 GP Inc (Re)*, 2020 ONCA 197	10, 13
11	*Resler v Anglin*, 2026 SCC 23	11
12	*Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5	14
13	*Century Services Inc v Canada (Attorney General)*, 2010 SCC 60	15

Secondary Sources

No.	Authority	Cited at footnote(s)
1	Brendan Bissell, "Construction Lien Rights in a CCAA ('We're Not in Kansas Anymore')" (Goldman Sloan Nash & Haber LLP, 10 April 2014) (MPBOA, p A5690)	4

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