

Court File No. CV-18-610236-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.

)

THURSDAY, THE 6th

JUSTICE HAINEY

)

DAY OF DECEMBER, 2018

)



IN THE MATTER OF THE RECEIVERSHIP OF
2423402 ONTARIO INC.

BANK OF MONTREAL

Applicant

- and -

2423402 ONTARIO INC.

Respondent

ORDER
(Appointing Receiver)

THIS APPLICATION made by the Applicant for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "**CJA**") appointing Alvarez & Marsal Canada Inc. ("**A&M**") as receiver (in such capacity, the "**Receiver**") without security, of all of the assets, undertakings and properties of 2423402 Ontario Inc. (the "**Debtor**") acquired for, or used in relation to a business carried on by the Debtor, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Eden Orbach sworn December 5, 2018 and the Exhibits thereto (collectively, the "**Affidavit**") and on hearing the submissions of counsel for each of the Applicant, A&M, Cambridge Memorial Hospital ("**CMH**"), Infrastructure Ontario ("**IO**"), Zurich Insurance Company Ltd. (the "**Surety**"), and the Debtor, and on reading the consent of A&M to act as the Receiver,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application is hereby abridged and validated so that this application is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. THIS COURT ORDERS that pursuant to section 243(1) of the BIA and section 101 of the CJA, A&M is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (the "**Property**") for the sole purpose of carrying out the terms of this Order and without taking possession or control of such Property.

RECEIVER'S POWERS

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property without taking possession or control of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized, but not obligated, to do any of the following where the Receiver considers it necessary or desirable:

- (a) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;
- (b) with the consent of the Applicant in consultation with CMH and IO, to enter into any agreements for and on behalf of the Debtor or cease to perform, repudiate or disclaim any contracts of the Debtor; and
- (c) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. THIS COURT ORDERS that (i) the Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, (iii) Bondfield Construction Company Limited ("**Bondfield**"), and (iv) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, and shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

5. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure. The Receiver is authorized and empowered to access and make, retain and take away copies of the Records of the Debtor located at the offices of Bondfield and Bondfield shall cooperate and shall provide reasonable assistance to the Receiver with respect to such Records and information contained in such Records with respect to the Property, including the Project (as defined in the Affidavit).

6. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or

destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE RECEIVER

7. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

8. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court. Nothing in this Order shall limit or restrict the rights of the Applicant to take action against Bondfield or to enforce any security granted by Bondfield in favour of the Applicant.

NO EXERCISE OF RIGHTS OR REMEDIES

9. THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, (iv) prevent the registration of a claim for lien; or (v) prevent Cambridge Memorial Hospital from asserting set-off rights against the Debtor arising under the Project Agreement, if any.

NO INTERFERENCE WITH THE RECEIVER

10. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

11. THIS COURT ORDERS that all Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Debtor.

EMPLOYEES

12. THIS COURT ORDERS that all employees of the Debtor shall remain the employees of the Debtor and not of the Receiver. The Receiver shall not be liable for any employee-related responsibilities or liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA.

LIMITATION ON ENVIRONMENTAL LIABILITIES

13. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in

pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

14. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, and it shall have no obligations or liability (i) under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*, the *Construction Act* (Ontario) or any other applicable legislation, or (ii) in respect of any of the Debtor's obligations or Property, including, without limitation, the Construction Agreement attached as Exhibit "F" to the Affidavit or the Project Agreement attached as Exhibit "G" to the Affidavit. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation. Unless further ordered by the Court, the Receiver will not be and shall not be deemed to be, in possession and control of any Property, including, without limitation, for the purposes of the BIA, the *Wage Earner Protection Program Act*, the *Construction Act* (Ontario) or any other applicable legislation.

RECEIVER'S ACCOUNTS

15. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to the benefit of and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

16. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

17. THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its

fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

18. THIS COURT ORDERS that the Receiver be at liberty and it is hereby empowered to: (a) with the consent of the Applicant to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed \$200,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order; and (b) open one or more new accounts to hold any amounts borrowed pursuant to foregoing paragraph (a). The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the **"Receiver's Borrowings Charge"**) as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, construction liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

19. THIS COURT ORDERS that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

20. THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the **"Receiver's Certificates"**) for any amount borrowed by it pursuant to this Order.

21. THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

SERVICE AND NOTICE

22. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "Protocol") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/eservice-commercial/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL 'https://www.alvarezandmarsal.com/CMH'.

23. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, electronic or facsimile transmission to the Debtor's creditors or other interested parties and their advisors at their respective addresses as last shown on the records of the Debtor and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or juridical obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS).

GENERAL

24. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

25. THIS COURT ORDERS that nothing in this Order shall:

- (a) prevent the Receiver from acting as a trustee in bankruptcy of the Debtor;

- (b) constitute or be deemed to constitute an exercise of "step-in rights" by the Applicant under Section 7 of the Lender's Direct Agreement (as such term is defined in the Affidavit); or
- (c) prevent the Applicant from appointing the Receiver as its Appointed Representative (as such term is defined in the Lender's Direct Agreement) or taking steps pursuant to the Lender's Direct Agreement.

26. THIS COURT ORDERS that nothing in this Order shall affect the Debtor's ability to perform its obligations under the Construction Contract or alter, amend or otherwise affect the liability of the Surety to any Person pursuant to Performance Bond No. 6342957 (the "**Performance Bond**"), Labour and Materials Payment Bond No. 6342957 or Demand Bond No. 6342958 (collectively, the "**Contractor Bonds**") issued by the Surety.

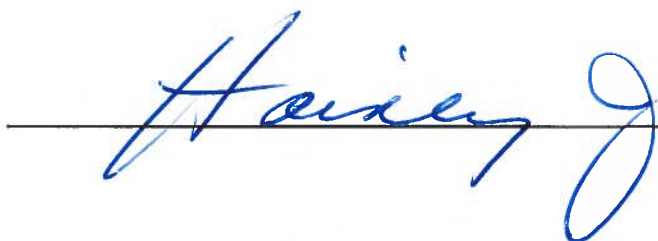
27. THIS COURT ORDERS that the Receiver shall make a demand under the Performance Bond for and on behalf of the Debtor as soon as reasonably practical and shall be empowered and authorized to execute, issue and endorse any agreements or documentation for and on behalf of the Debtor as the Receiver considers necessary or advisable to facilitate making such demand. The Receiver shall not take or consent to any actions that would compromise recovery under the Contractor Bonds without written consent of the Applicant.

28. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

29. THIS COURT ORDERS that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

30. THIS COURT ORDERS that the Applicant shall have its costs of this application, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis to be paid from the Debtor's estate with such priority and at such time as this Court may determine.

31. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.



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

DEC 06 2018

PER / PAR:



SCHEDULE "A"
RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT \$ _____

1. THIS IS TO CERTIFY that ALVAREZ & MARSAL CANADA INC., the receiver (in such capacity and not in its personal or corporate capacity, the "**Receiver**") of the assets, undertakings and properties 2423402 ONTARIO INC. acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (collectively, the "**Property**") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated the 6th day of December, 2018 (the "**Order**") made in an action having Court file number ____-CL-_____, has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of \$ _____, being part of the total principal sum of \$ _____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [**daily**][**monthly not in advance on the _____ day of each month**] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 20__.

ALVAREZ & MARSAL CANADA INC., solely in
its capacity as Receiver of the Property, and not
in its personal or corporate capacity

Per: _____

Name:

Title:

IN THE MATTER OF THE RECEIVERSHIP OF 2423402 ONTARIO INC.

Court File No. CV-18-610236-00CL

BANK OF MONTREAL and **2423402 ONTARIO INC.**
Applicant Respondent

Ontario SUPERIOR COURT OF JUSTICE COMMERCIAL LIST	
Proceedings commenced in Toronto	
ORDER (Appointing Receiver)	
McCarthy Tétrault LLP Suite 5300, TD Bank Tower Toronto Dominion Centre 66 Wellington Street West Toronto, ON M5K 1E6	
Heather L. Meredith LSUC#48354R Tel: 416-601-8342 Fax: 416- 868-0673 Email: hmeredith@mccarthy.ca	
Geoff R. Hall LSUC#347010 Tel: 416-601-7856 Fax: 416-868-0673 Email: ghall@mccarthy.ca	
Trevor Courtis LSUC#67715A Tel: 416-601-7643 Fax: 416-868-0673 Email: tcourtis@mccarthy.ca Lawyers for the applicant, Bank of Montreal	

Tab P

This is **Exhibit "P"** referred to in the
affidavit of **EDEN ORBACH**
sworn before me this
6th day of May, 2019

A handwritten signature in blue ink, consisting of several fluid, overlapping strokes, positioned above a horizontal line.

A Commissioner for taking affidavits

December 7, 2018

CONFIDENTIAL

VIA COURIER

Zurich Insurance Company Ltd.

Surety Department
First Canadian Place,
100 King Street West Suite 5500, P.O. Box 290
Toronto, ON M5X 1C9

Attention: Karen Ramsey, Attorney-in-fact

Re: Demand Upon Performance Bond No. #6342957 dated August 28, 2014, together with the Multiple Obligee Rider thereto (collectively, the "Bond")

Reference is made to the Bond. Capitalized terms not otherwise defined herein shall have the respective meanings assigned to them in the Bond.

Appointment as Receiver

As you are aware, pursuant to an order of the Honourable Mr. Justice Hainey of the Ontario Superior Court of Justice (Commercial List) dated December 6, 2018 (as may be amended, restated or modified from time to time, the "**Appointment Order**"), Alvarez & Marsal Canada Inc. was appointed receiver (in such capacity, the "**Receiver**"), without security, of all of the assets, undertakings and properties of 2423402 Ontario Inc. ("**Project Co**") acquired for, or used in relation to a business carried on by Project Co (the "**Property**") for the sole purpose of carrying out the terms of the Appointment Order and without taking possession or control of the Property. A copy of the Appointment Order is enclosed with this letter.

Contractor Performance Bond

As you are further aware, Project Co is an Obligee under the Bond. Pursuant to paragraph 27 of the Appointment Order, the Receiver was ordered to make a demand under the Bond for and on behalf of Project Co as soon as reasonably practicable and is empowered and authorized to execute, issue and endorse any agreements or documentation for and on behalf of Project Co as the Receiver considers necessary or advisable to facilitate making such demand.

Please find enclosed a copy of a letter dated December 7, 2018 from the Receiver to the Principal, pursuant to which the Receiver notified the Principal of the occurrence of numerous events of default under the Construction Contract including, without limitation, failure to remove numerous encumbrances registered against title to the Site (as defined in the Construction Contract). The occurrence of each such event of default constitutes a Contractor Event of Default under the Bond.

The Principal is, and has been declared by the Obligee to be, in default in respect of its obligations to the Obligee under the Construction Contract, and the Obligee has duly performed all of its obligations thereunder. Accordingly, we hereby demand that the Surety promptly remedy the above-referenced Contractor Event of Default and all other Contractor Events of Default set out in the attached letter, or promptly select and carry out one of the other specified options available to the Surety pursuant to the Bond.

Yours very truly,

ALVAREZ & MARSAL CANADA INC., solely in its capacity as receiver, without security, of all of the assets, undertakings and properties of 2423402 Ontario Inc., and not in its personal or corporate capacity

By: 

Name: Stephen Ferguson

Title: Senior Vice President

cc: Rocco Sebastiano (counsel to Bondfield Construction Company Limited)
Brendan Bissell (counsel to Zurich Insurance Company Ltd.)
Heather Meredith (counsel to Bank of Montreal, in its capacity as administrative agent)
Kyla Mahar (counsel to Cambridge Memorial Hospital)

Court File No. CV-18-610236-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.

)

THURSDAY, THE 6th

JUSTICE HAINEY

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DAY OF DECEMBER, 2018

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IN THE MATTER OF THE RECEIVERSHIP OF
2423402 ONTARIO INC.

BANK OF MONTREAL

Applicant

- and -

2423402 ONTARIO INC.

Respondent

ORDER
(Appointing Receiver)

THIS APPLICATION made by the Applicant for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "**CJA**") appointing Alvarez & Marsal Canada Inc. ("**A&M**") as receiver (in such capacity, the "**Receiver**") without security, of all of the assets, undertakings and properties of 2423402 Ontario Inc. (the "**Debtor**") acquired for, or used in relation to a business carried on by the Debtor, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Eden Orbach sworn December 5, 2018 and the Exhibits thereto (collectively, the "**Affidavit**") and on hearing the submissions of counsel for each of the Applicant, A&M, Cambridge Memorial Hospital ("**CMH**"), Infrastructure Ontario ("**IO**"), Zurich Insurance Company Ltd. (the "**Surety**"), and the Debtor, and on reading the consent of A&M to act as the Receiver,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application is hereby abridged and validated so that this application is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. THIS COURT ORDERS that pursuant to section 243(1) of the BIA and section 101 of the CJA, A&M is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (the "**Property**") for the sole purpose of carrying out the terms of this Order and without taking possession or control of such Property.

RECEIVER'S POWERS

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property without taking possession or control of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized, but not obligated, to do any of the following where the Receiver considers it necessary or desirable:

- (a) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;
- (b) with the consent of the Applicant in consultation with CMH and IO, to enter into any agreements for and on behalf of the Debtor or cease to perform, repudiate or disclaim any contracts of the Debtor; and
- (c) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. THIS COURT ORDERS that (i) the Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, (iii) Bondfield Construction Company Limited ("**Bondfield**"), and (iv) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, and shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

5. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure. The Receiver is authorized and empowered to access and make, retain and take away copies of the Records of the Debtor located at the offices of Bondfield and Bondfield shall cooperate and shall provide reasonable assistance to the Receiver with respect to such Records and information contained in such Records with respect to the Property, including the Project (as defined in the Affidavit).

6. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or

destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE RECEIVER

7. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

8. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court. Nothing in this Order shall limit or restrict the rights of the Applicant to take action against Bondfield or to enforce any security granted by Bondfield in favour of the Applicant.

NO EXERCISE OF RIGHTS OR REMEDIES

9. THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, (iv) prevent the registration of a claim for lien; or (v) prevent Cambridge Memorial Hospital from asserting set-off rights against the Debtor arising under the Project Agreement, if any.

NO INTERFERENCE WITH THE RECEIVER

10. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

11. THIS COURT ORDERS that all Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Debtor.

EMPLOYEES

12. THIS COURT ORDERS that all employees of the Debtor shall remain the employees of the Debtor and not of the Receiver. The Receiver shall not be liable for any employee-related responsibilities or liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA.

LIMITATION ON ENVIRONMENTAL LIABILITIES

13. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in

pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

14. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, and it shall have no obligations or liability (i) under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*, the *Construction Act* (Ontario) or any other applicable legislation, or (ii) in respect of any of the Debtor's obligations or Property, including, without limitation, the Construction Agreement attached as Exhibit "F" to the Affidavit or the Project Agreement attached as Exhibit "G" to the Affidavit. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation. Unless further ordered by the Court, the Receiver will not be and shall not be deemed to be, in possession and control of any Property, including, without limitation, for the purposes of the BIA, the *Wage Earner Protection Program Act*, the *Construction Act* (Ontario) or any other applicable legislation.

RECEIVER'S ACCOUNTS

15. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to the benefit of and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

16. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

17. THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its

fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

18. THIS COURT ORDERS that the Receiver be at liberty and it is hereby empowered to: (a) with the consent of the Applicant to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed \$200,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order; and (b) open one or more new accounts to hold any amounts borrowed pursuant to foregoing paragraph (a). The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the **"Receiver's Borrowings Charge"**) as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, construction liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

19. THIS COURT ORDERS that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

20. THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the **"Receiver's Certificates"**) for any amount borrowed by it pursuant to this Order.

21. THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

SERVICE AND NOTICE

22. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "Protocol") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/eservice-commercial/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL 'https://www.alvarezandmarsal.com/CMH'.

23. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, electronic or facsimile transmission to the Debtor's creditors or other interested parties and their advisors at their respective addresses as last shown on the records of the Debtor and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or juridical obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS).

GENERAL

24. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

25. THIS COURT ORDERS that nothing in this Order shall:

- (a) prevent the Receiver from acting as a trustee in bankruptcy of the Debtor;

- (b) constitute or be deemed to constitute an exercise of "step-in rights" by the Applicant under Section 7 of the Lender's Direct Agreement (as such term is defined in the Affidavit); or
- (c) prevent the Applicant from appointing the Receiver as its Appointed Representative (as such term is defined in the Lender's Direct Agreement) or taking steps pursuant to the Lender's Direct Agreement.

26. THIS COURT ORDERS that nothing in this Order shall affect the Debtor's ability to perform its obligations under the Construction Contract or alter, amend or otherwise affect the liability of the Surety to any Person pursuant to Performance Bond No. 6342957 (the "**Performance Bond**"), Labour and Materials Payment Bond No. 6342957 or Demand Bond No. 6342958 (collectively, the "**Contractor Bonds**") issued by the Surety.

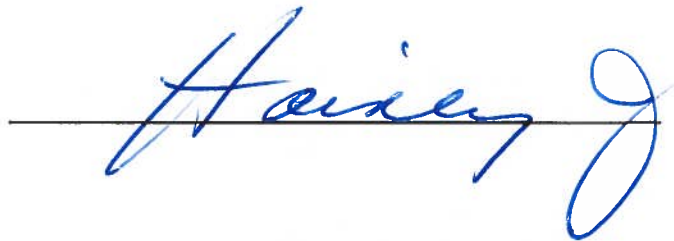
27. THIS COURT ORDERS that the Receiver shall make a demand under the Performance Bond for and on behalf of the Debtor as soon as reasonably practical and shall be empowered and authorized to execute, issue and endorse any agreements or documentation for and on behalf of the Debtor as the Receiver considers necessary or advisable to facilitate making such demand. The Receiver shall not take or consent to any actions that would compromise recovery under the Contractor Bonds without written consent of the Applicant.

28. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

29. THIS COURT ORDERS that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

30. THIS COURT ORDERS that the Applicant shall have its costs of this application, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis to be paid from the Debtor's estate with such priority and at such time as this Court may determine.

31. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.



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

DEC 06 2018

PER / PAR: 

SCHEDULE "A"
RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT \$ _____

1. THIS IS TO CERTIFY that ALVAREZ & MARSAL CANADA INC., the receiver (in such capacity and not in its personal or corporate capacity, the "**Receiver**") of the assets, undertakings and properties 2423402 ONTARIO INC. acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (collectively, the "**Property**") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated the 6th day of December, 2018 (the "**Order**") made in an action having Court file number ____-CL-_____, has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of \$ _____, being part of the total principal sum of \$ _____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [**daily**][**monthly not in advance on the _____ day of each month**] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 20__.

ALVAREZ & MARSAL CANADA INC., solely in
its capacity as Receiver of the Property, and not
in its personal or corporate capacity

Per: _____

Name:

Title:

IN THE MATTER OF THE RECEIVERSHIP OF 2423402 ONTARIO INC.

Court File No. CV-18-610236-00CL

BANK OF MONTREAL and **2423402 ONTARIO INC.**
Applicant Respondent

	<p>Ontario</p> <p>SUPERIOR COURT OF JUSTICE COMMERCIAL LIST</p> <p>Proceedings commenced in Toronto</p> <hr/> <p>ORDER (Appointing Receiver)</p> <hr/> <p>McCarthy Tétrault LLP Suite 5300, TD Bank Tower Toronto Dominion Centre 66 Wellington Street West Toronto, ON M5K 1E6</p> <p>Heather L. Meredith LSUC#48354R Tel: 416-601-8342 Fax: 416- 868-0673 Email: hmeredith@mccarthy.ca</p> <p>Geoff R. Hall LSUC#347010 Tel: 416-601-7856 Fax: 416-868-0673 Email: ghall@mccarthy.ca</p> <p>Trevor Courtis LSUC#67715A Tel: 416-601-7643 Fax: 416-868-0673 Email: tcourtis@mccarthy.ca Lawyers for the applicant, Bank of Montreal</p>
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December 7, 2018

CONFIDENTIAL

Via Facsimile

Bondfield Construction Company Limited
407 Basaltic Road
Concord, ON L4K 4W8
Fax No.: 416-667-8462

Attention: Mr. John Aquino

Attention: Mr. Steven Aquino, Vice President

Re: Construction Contract dated as of August 28, 2014, between 2423402 Ontario Inc. ("Project Co") and Bondfield Construction Company Limited (the "Construction Contractor"), as such Construction Contract is amended, amended and restated, renewed, extended, supplemented, replaced or otherwise modified from time to time (the "Construction Contract")

Dear Mr. Aquino:

Reference is made to the Construction Contract. Capitalized terms not otherwise defined herein shall have the respective meanings assigned to them in the Construction Contract.

Appointment as Receiver

As you are aware, pursuant to an order of the Honourable Mr. Justice Hainey of the Ontario Superior Court of Justice (Commercial List) dated December 6, 2018 (as may be amended, restated or modified from time to time, the "**Appointment Order**"), Alvarez & Marsal Canada Inc. was appointed receiver (in such capacity, the "**Receiver**"), without security, of all of the assets, undertakings and properties of Project Co acquired for, or used in relation to a business carried on by Project Co (the "**Property**") for the sole purpose of carrying out the terms of the Appointment Order and without taking possession or control of the Property. A copy of the Appointment Order is enclosed with this letter.

Contractor Performance Bond

As you are further aware, Project Co is an Obligee under Performance Bond No. 6342957 dated August 28, 2014 between the Construction Contractor, as Principal, Zurich Insurance Company Ltd. (the "**Surety**"), as surety (the "**Contractor Performance Bond**"). The Contractor Performance Bond has been provided in support of the Construction Contractor's obligations under the Construction Contract. Pursuant to the terms of the Contractor Performance Bond, whenever the Principal shall be, and declared by the Obligee to be in default in respect of its obligations under the Construction Contract, the Surety has agreed to promptly perform certain obligations set out in the Contractor Performance Bond.

Pursuant to paragraph 27 of the Appointment Order, the Receiver was ordered to make a demand under the Contractor Performance Bond for and on behalf of Project Co as soon as reasonably practicable and is empowered and authorized to execute, issue and endorse any agreements or documentation for and on behalf of Project Co as the Receiver considers necessary or advisable to facilitate making such demand.

As set out in letters to the Construction Contractor and to Project Co dated November 5, 2018 and November 16, 2018 from Bank of Montreal, in its capacity as administrative agent (the “**Agent**”) in relation to a Credit Agreement dated as of August 28, 2014 between Project Co, the Agent and certain lenders (the “**Lenders**”), and in the letter by Cambridge Memorial Hospital (“**CMH**”) to Project Co dated August 10, 2018, copies of which were in each case provided to you, numerous events have occurred and continue to occur which constitute Contractor Events of Default under the Construction Contract. These include that the Construction Contractor has:

- failed to pay Liquidated Damages when due under the Contractor Support Agreement, dated as of August 28, 2014, which constitutes an event of default pursuant to Section 12 of the Construction Contract and a Liquidated Damages Default under Demand Bond 6342958 dated August 28, 2014;
- failed to remove numerous encumbrances registered against title to the Site within the time periods required under the Project Agreement, which constitutes a Project Co Construction Event of Default pursuant to Section 26.1(a)(viii) of the Project Agreement and an event of default pursuant to Section 7 of the Construction Contract; and
- failed to maintain the Project schedule and achieve schedule milestones and is consequently unable to achieve Substantial Completion by the Longstop Date, which has had a material adverse effect on CMH and its ability to operate the Facility, which constitutes a Project Co Construction Event of Default pursuant to Section 26.1(a)(iv) of the Project Agreement and an event of default pursuant to Section 7 of the Construction Contract.

In addition, we also understand that there are now few workers on Site on a daily basis, and that construction activity on the Site has decreased such that the Construction Contractor has ceased performing the Work as required under the Construction Contract.

We hereby confirm and declare on behalf of Project Co that the Construction Contractor is in default of its obligations under the Construction Contract. As an Obligee under the Contractor Performance Bond, Project Co is entitled to make demand on the Surety under the Contractor Performance Bond and will be doing so concurrently with this letter.

Project Co expressly reserves all of its other rights, powers, privileges and remedies under the Construction Contract, applicable law or otherwise. The failure of Project Co to exercise any such rights, powers, privileges and remedies is not intended, and shall not be construed, to be a waiver of any such rights or remedies pursuant to the Construction Contract or otherwise and nothing in this letter or any delay by Project Co in exercising any rights, powers, privileges and remedies under the Construction Contract or applicable law shall be construed as a waiver or modification of such rights, powers, privileges and remedies. This letter is not, and shall not be deemed to be, a waiver of, or a consent to, any default noncompliance, or otherwise now existing or hereafter arising under the Construction Contract.

The holding of any discussions between or among any or all of the Agent, the Lenders, the Construction Contractor, Project Co, the Surety, CMH or Infrastructure Ontario regarding the Project or proposals regarding amendments to, or modifications or restructurings of the Construction Contract shall not constitute any waiver of any breach, default or Contractor Event of Default or the obligations of the Construction Contractor under the Construction Contract or applicable law, nor shall it be construed as an undertaking by Project Co to continue such discussions or to enter into any such amendments, modifications or restructurings.

Yours very truly,

ALVAREZ & MARSAL CANADA INC., solely in its capacity as receiver, without security, of all of the assets, undertakings and properties of 2423402 Ontario Inc., and not in its personal or corporate capacity

By: 

Name: Stephen Ferguson

Title: Senior Vice President

cc: Brendan Bissell (counsel to Zurich Insurance Company Ltd.)
Heather Meredith (counsel to Bank of Montreal, in its capacity as administrative agent)
Kyla Mahar (counsel to Cambridge Memorial Hospital)

Tab Q

This is **Exhibit "Q"** referred to in the
affidavit of **EDEN ORBACH**
sworn before me this
6th day of May, 2019

A handwritten signature in blue ink, appearing to be 'R. D.', is written above a horizontal line.

A Commissioner for taking affidavits

McCarthy Tétrault LLP
 PO Box 48, Suite 5300
 Toronto-Dominion Bank Tower
 Toronto ON M5K 1E6
 Canada
 Tel: 416-362-1812
 Fax: 416-868-0673



Heather L. Meredith
 Direct Line: (416) 601-8342
 Direct Fax: (416) 868-0673
 Email: hmeredith@mccarthy.ca

December 7, 2018

Via Email (bissell@gsnh.com & forte@gsnh.com)

Mr. Brendan Bissell
 Partner
 Goldman, Sloan, Nash & Haber LLP
 480 University Avenue
 Suite 1600
 Toronto ON M5G 1V2

Mario J. Forte
 Counsel
 Goldman, Sloan, Nash & Haber LLP
 480 University Avenue
 Suite 1600
 Toronto ON M5G 1V2

Dear Sirs:

Re: Next Steps following demand under Performance Bond No. #6342957 dated August 28, 2014, together with the Multiple Obligee Rider thereto (collectively, the "Bond") by Alvarez & Marsal Canada Inc. as receiver (in such capacity, the "Receiver") appointed by order dated December 6, 2018 (the "Appointment Order") of the Property (as defined therein) of 2423402 Ontario Inc. ("Project Co") for the sole purpose of carrying out the terms of the Appointment Order

As you know, we are counsel for Bank of Montreal, as administrative agent (the "**Agent**"), and each of the financial institutions and other entities from time to time parties as lenders (the "**Lenders**") to the Credit Agreement made as of August 28, 2014 among 2423402 Ontario Inc. ("**Project Co**") and the Lenders. We write to you further to the appointment of the Receiver yesterday.

We understand that the Receiver, on behalf of Project Co, will be making a call on Bond today. In anticipation of Zurich's prompt response to that demand - which deals with the allegation previously raised by your client, Zurich Insurance Company Limited ("**Zurich**"), regarding the demand on the Bond made by the Lenders on November 16, 2018 - we would like to move forward to meet with you to discuss next steps and develop a path forward as quickly and efficiently as possible.

To that end, can you please advise if you are available on Monday, December 10, 2018 for a meeting among counsel at our offices? We would then propose a meeting with clients for later in the week. Please let us know if you and your client would be available for such a discussion on Thursday, December 13, 2018.

Also, as we appreciate that you are new to this matter, please do not hesitate to reach out in advance of Monday with any questions that you may have with respect to the documents, the issues previously raised between Zurich and the Lenders and/or the manner in which the Lenders have proposed to move forward.

All in all, we are looking forward to beginning productive discussions as soon as possible to bring this matter to a resolution that will see construction resume at Cambridge Memorial Hospital.

Yours truly,



Heather L. Meredith

HLM/sa

Tab R

This is **Exhibit "R"** referred to in the
affidavit of **EDEN ORBACH**
sworn before me this
6th day of May, 2019

A handwritten signature in blue ink, consisting of stylized, overlapping loops and strokes, positioned above a horizontal line.

A Commissioner for taking affidavits

McCarthy Tétrault LLP
 PO Box 48, Suite 5300
 Toronto-Dominion Bank Tower
 Toronto ON M5K 1E6
 Canada
 Tel: 416-362-1812
 Fax: 416-868-0673

**mccarthy
tétrault**

Heather L. Meredith
 Partner
 Direct Line: (416) 601-8342
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 Email: hmeredith@mccarthy.ca

Assistant: Fick, Kaitlin
Direct Line: (416) 601-8200 x542050
Email: kfick@mccarthy.ca

December 10, 2018

Via Email (bissell@gsnh.com and forte@gsnh.com)

Mr. Brendan Bissell
 Partner
 Goldman, Sloan, Nash & Haber LLP
 480 University Avenue
 Suite 1600
 Toronto ON M5G 1V2

Mario J. Forte
 Counsel
 Goldman, Sloan, Nash & Haber LLP
 480 University Avenue
 Suite 1600
 Toronto ON M5G 1V2

Dear Sirs:

Re: Performance Bond No. 6342957 dated August 28, 2014 between Bondfield Construction Company Limited ("Bondfield") and Zurich Insurance Company Ltd. ("Zurich"), together with the Multiple Obligee Rider thereto naming Cambridge Memorial ("CMH") and Bank of Montreal (the "Agent") as Additional Named Obligees (collectively the "Performance Bond")

We are counsel for the Agent and each of the financial institutions and other entities from time to time parties as lenders (the "**Lenders**") to the Credit Agreement made as of August 28, 2014 among 2423402 Ontario Inc. ("**Project Co**") and the Lenders. We write further to our letter of December 7, 2018 and your response late Friday that your client instructed you to advise that the meeting we proposed for today is "premature" such that you will not be in attendance. It is difficult to fathom how a meeting on between counsel for the Lenders and counsel for Zurich is premature at this stage in all of the circumstances and we remain deeply concerned that Zurich is failing to comply with its obligations under the Bonds and its duty to act in good faith.

Background: Discussions with Zurich and Call on the Bond

As you know, the Lenders and Zurich first engaged in discussions regarding the situation at CMH a number of months ago after CMH wrote to the Lenders on August 13, 2018 to provide a copy of a letter from CMH to Project Co dated August 10, 2018 outlining numerous Events of Default. Following a meeting on October 10, 2018, the Lenders wrote to CMH, Infrastructure Ontario and Zurich to thank each party for a constructive meeting and to set out a non-exhaustive list of issues that the Lenders identified as "critical issues to be addressed from the

Lenders' perspective in connection with any replacement of Project Co and any engagement of EllisDon to complete the Project."

Following the October 10, 2018 meeting, Zurich's former counsel responded. Instead of providing substantive responses, he raised a number of technical disputes including alleging that the Performance Bond only covers "sticks and bricks". He also provided a draft Completion Contract and Mitigation Funding Agreement that Zurich alleged would have to be signed by the party calling on the Performance Bond.

The Lenders met with Zurich promptly following receipt of Zurich's response and further wrote to Zurich on October 22, 2018 to set out serious points of concern with the proposed agreements and positions taken by Zurich.

The Lenders then engaged with Zurich and its counsel to seek to resolve the substantive points of disagreement and to find a path forward. A high-level meeting took place between Zurich's representative, Adrian Braganza, and BMO representatives on November 5, 2018. We are advised that, at that meeting, the parties tentatively scheduled a further meeting for November 8, 2018 but unfortunately, Mr. Braganza advised he could not attend that meeting. We are further advised that, despite follow-up from BMO and offers from BMO to meet or discuss on the weekend, Mr. Braganza was not able to meet for some time thereafter and that meeting was not rescheduled.

Accordingly, in a further effort to move matters forward, the Lenders took the step of calling on the Performance Bond on November 16, 2018. On November 21, 2018, after prodding Zurich for a response, Zurich's former counsel responded alleging that the party making a claim under the Performance Bond had to "insert itself into the construction contract in order to enforce the remedies in the construction contract including calling on the performance bond" and asking for comments on the Mitigation Funding Agreement and Completion Contract.

The Lenders strongly disagree that the Lenders were required to "insert" themselves by exercising step-in rights under the Lender Direct Agreement (a contract to which Zurich is not a party) in order to call on the Performance Bond. The Performance Bond, through the attached Multiple Obligor Rider, provides the Lenders with the ability to call on the Performance Bond. First, Bondfield is plainly in default under the Construction Contract – a fact that Bondfield itself has not disputed. Second, Bondfield has been declared to be in default in respect of its obligations to the Obligor under the Construction Contract. The letter sent by the Lenders to Bondfield on November 16, 2018 confirms and declares the default and, pursuant to the Multiple Obligor Rider, the Lenders are Additional Named Obligors, entitled to enforce the obligations of Bondfield and Zurich under the Performance Bond.

Accordingly, the Lenders made a demand under the Performance Bond, as they were entitled to do, on November 16, 2018. Zurich was required to "promptly select and carry out" one of the four options under the Performance Bond. It has failed to do so.

Notwithstanding the Lenders' position that a proper call has been made on the Performance Bond and that Zurich has failed to properly respond – and without prejudice to any arguments the Lenders may have as against Zurich in relation thereto – the Lenders continued to seek a path forward with Zurich. In particular, the Lenders:

1. Sent revised drafts of the Mitigation Funding Agreement and Completion Contract to Zurich's former counsel on November 23, 2018 and asked to engage in discussions with Zurich as soon as possible. Again, after prodding from BMO, Zurich's former counsel ultimately responded to suggest comments would be provided a week later. When it was pointed out such a delay – so close to the 120 deadline after which CMH would be entitled to terminate the Project Agreement between CMH and Project Co – Zurich's former counsel erroneously suggested that BMO had the draft documents "without comment" for 6 weeks. We responded that such a suggestion was incorrect and misleading given the meetings and discussions that had occurred and BMO's efforts to advance discussions with Zurich, with Zurich cancelling meetings or failing to respond; and,
2. Appointed a Receiver over Project Co on December 6, 2018 to take the step of calling on the Performance Bond on behalf of Project Co to obviate Zurich's allegation that the call on the Performance Bond by the Lenders was insufficient.

Current Status: Continued Delay Unacceptable

A demand on the Performance Bond by the Receiver on behalf of Project Co was delivered on December 7, 2018. There is now no question that a proper demand on the Performance Bond has been made. After engaging with Zurich for months to attempt to move this matter forward and receiving only alleged technical impediments – strongly disputed by the Lenders – or delays, it is now time to meet to resolve these matters.

With this goal in mind, we wrote on Friday to suggest a meeting today among counsel, with a client meeting later in the week. To then receive a response that a meeting is "premature" is confounding. The only changes that have occurred are:

1. There is now a Receiver appointed over Project Co – in a form consistent with requests made by Zurich – which has called on the Performance Bond on behalf of Project Co. This is not a step that slows down the process or makes further meetings "premature". Instead, it removes the alleged obstacle raised by Zurich; and
2. Zurich has new counsel. However, such new counsel – who are very experienced in matters such as this - have now been engaged for almost a week and, with time of the essence, this is no reason to delay a without prejudice meeting.

The Lenders are concerned that Zurich is not acting in good faith and its continued delay and unproductive responses are threatening to seriously prejudice the Lenders in this matter. The Lenders have been told that some of this delay results from the fact that Mr. Braganza is apparently the only contact for this matter at Zurich. If that is the case, it is either not prudent/appropriate or is a tactic to delay. In either event, it is not acceptable.

At this stage, two calls have been made upon the Performance Bond. Zurich failed to respond promptly to the first demand on the Performance Bond by the Lenders. There is now no debate but that a proper demand has been made on the Performance Bond by Project Co. We expect a "prompt" response to that demand as required by the Performance Bond.

If such a prompt response is not received, the Lenders will take appropriate steps in response, which may include seeking directions from the Court, seeking a remedy for Zurich's bad faith, and proceeding to confirm EllisDon as the replacement contractor and holding Zurich responsible for all costs and damages relating thereto.

The Lenders remain committed to completing the Project and would prefer a cooperative approach consistent with the cooperation the Lenders showed Zurich in agreeing to a reduction of the powers of the Receiver at Zurich's request.

Time is plainly of the essence. We ask you to please confirm when counsel and/or Zurich will be available to meet this week.

Yours truly,



Heather L. Meredith

HLM/kf

- c. Steve Furlan, McCarthy Tétrault LLP
Geoff Hall, McCarthy Tétrault LLP

Tab S

This is **Exhibit "S"** referred to in the
affidavit of **EDEN ORBACH**
sworn before me this
6th day of May, 2019

A handwritten signature in blue ink, consisting of stylized, overlapping loops and strokes, positioned above a horizontal line.

A Commissioner for taking affidavits



dedicated to your success

R. BRENDAN BISSELL
Direct Dial **416-597-6489**
Email **bissell@gsnh.com**
Our File No.: **100989.0001**

December 11, 2018

DELIVERED BY EMAIL

Stephen Ferguson
Senior Vice President
Alvarez & Marsal Canada Inc.,
Royal Bank Plaza, South Tower
200 Bay Street, Suite 2900
Toronto, ON M5J 2J1

Dear Mr. Ferguson:

RE: Demand Upon Performance Bond No. 6342957 dated August 28, 2014 together with the Multiple Obligee Rider thereto (the "Bond") issued by Zurich Insurance Company Ltd. ("Zurich") by Alvarez & Marsal Canada Inc. (the "Receiver") in its capacity as the court appointed receiver of 2423402 Ontario Inc. ("Projectco")

We act for Zurich. On behalf of our client, we hereby acknowledge receipt of the Receiver's demand dated December 7, 2018 on the Bond. Our client reserves its position, including all of its rights and defences, respecting the Bond.

As a preliminary matter, by copy of this letter to counsel for Bank of Montreal we request confirmation that the existing loan facility in favour of Projectco for which that bank is administrative agent remains in place and is available to Projectco for the project in question and we ask that we be advised how much remains available on that facility (inclusive of statutory holdback obligations, which we understand are disputed as to whether they reduce Zurich's obligations under the Bond).

We are reviewing this matter with our client and will respond more fully shortly.

Yours truly,

GOLDMAN SLOAN NASH & HABER LLP

Per:

R. Brendan Bissell

RBB:kj

- 2 -

c.c. Linc Rogers (counsel for the Receiver)
Heather Meredith (counsel for Bank of Montreal)
Kyla Mahar (counsel for Cambridge Memorial Hospital)
Rocco Sebastiano (counsel to Bondfield Construction Company Limited)
Adrian Braganza (Zurich Insurance Company Ltd.)
Mario Forte

Tab T

This is **Exhibit "T"** referred to in the
affidavit of **EDEN ORBACH**
sworn before me this
6th day of May, 2019

A handwritten signature in blue ink, consisting of stylized, overlapping loops and strokes, positioned above a horizontal line.

A Commissioner for taking affidavits

McCarthy Tétrault LLP
 PO Box 48, Suite 5300
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 Tel: 416-362-1812
 Fax: 416-868-0673

**mccarthy
tétrault**

Heather L. Meredith
 Partner
 Direct Line: (416) 601-8342
 Direct Fax: (416) 868-0673
 Email: hmeredith@mccarthy.ca

*Assistant: Kaitlin Fick
 Email: kffick@mccarthy.ca*

December 12, 2018

Via Email (bissell@gsnh.com and forte@gsnh.com)

Mr. Brendan Bissell
 Counsel
 Goldman, Sloan, Nash & Haber LLP
 480 University Avenue
 Suite 1600
 Toronto ON M5G 1V2

Mr. Mario J. Forte
 Counsel
 Goldman, Sloan, Nash & Haber LLP
 480 University Avenue
 Suite 1600
 Toronto ON M5G 1V2

Dear Sirs:

Re: Demand Upon Performance Bond No. 6342957 dated August 28, 2014 together with the Multiple Obligee Rider thereto (the "Bond") issued by Zurich Insurance Company Ltd. ("Zurich") by Alvarez & Marsal Canada Inc. (the "Receiver") in its capacity as the court appointed receiver of 2423402 Ontario Inc. ("Project Co")

We are in receipt of your letter to Stephen Ferguson of the Receiver dated December 11, 2018, copied to us as counsel to The Bank of Montreal in its capacity as agent (the "**Agent**") under the Credit Agreement dated August 28, 2014 (the "**Credit Agreement**") between Project Co, the Agent and each of the financial institutions and other entities from time to time parties thereto (collectively, the "**Lenders**").

Credit Facility

With respect to your question regarding the credit facility pursuant to the Credit Agreement (the "**Credit Facility**"), we can confirm as follows:

1. The Credit Facility presently has \$2,377,076.20 of remaining availability, subject to the terms of the Credit Agreement. Total principal of \$122,214,177.80 has been advanced out of a total commitment of \$124,591,254;
2. Upon receipt of the \$65,000,000 interim completion from CMH and payment of such amount to the Lenders, an additional \$45,051,514 becomes available under the Credit

Facility pursuant and subject to the terms of the Credit Agreement, with the Credit Facility designed to revolve back up to \$104,642,768 in accordance with the Credit Agreement; and

3. The Legislative Holdback pursuant to the Construction Act, totalling \$17,475,450, becomes payable by CMH to Project Co within 45 days after substantial completion in accordance with and subject to the Construction Act and Project Agreement dated August 28, 2014. This amount is not funded through the Credit Facility.

The Credit Facility remains in place. Provided that a path forward is agreed with Zurich and the events of default under the Credit Agreement are remedied or addressed through agreement, the Lenders are willing to make funding available to Project Co pursuant to the Credit Facility in accordance with its terms.

Call on the Bond and Next Steps

We appreciate your acknowledgement of the Receiver's December 7, 2018 demand on the Bond. Given the discussions that have taken place to date with EllisDon, we understand that Zurich has selected option #3 under the Bond and is in the process of coordinating with EllisDon as a replacement construction contractor. We would like Zurich's formal written confirmation that this is the option it has chosen to pursue under the Bond. To move the discussions with EllisDon forward, we have arranged a meeting with EllisDon at our offices on Monday, December 17, 2018. It would be most useful if you and your client are able to attend that meeting and if we can discuss the path forward in advance of that meeting.

Finally, we understand that you are in the process of preparing an outline of Zurich's view of next steps. We would be pleased to discuss that with you and provide our views on that at your earliest convenience.

Yours truly,
McCarthy Tétrault LLP



Heather L. Meredith

HLM

- c. Stephen Furlan, McCarthy Tétrault LLP
Geoff Hall, McCarthy Tétrault LLP
Stanley Julien, BMO
Eden Orbach, BMO
Linc Rogers, Blake, Cassels & Graydon LLP
Kyla Mahar, Miller Thomson LLP
Rocco Sebastiano, Osler, Hoskin, and Harcourt LLP
Adrian Braganza, Zurich Insurance Company Ltd.
Stephen Ferguson, Alvarez and Marsal

Tab U

This is **Exhibit "U"** referred to in the
affidavit of **EDEN ORBACH**
sworn before me this
6th day of May, 2019

A handwritten signature in blue ink, consisting of a stylized 'Z' followed by a series of loops and a final flourish.

A Commissioner for taking affidavits



dedicated to your success

R. BRENDAN BISSELL
Direct Dial 416-597-6489
Email bissell@gsnh.com
Our File No.: 100989.0001

March 5, 2019

DELIVERED BY EMAIL

Heather Meredith
McCarthy Tétrault LLP
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Dear Ms. Meredith:

RE: Cambridge Memorial Hospital Redevelopment Project (the "Project")

As you know, we act for Zurich Insurance Company Ltd. ("**Zurich**").

A call has been made by 2423402 Ontario Inc. under Performance Bond No. 6342957 (the "**Bond**") issued by Zurich in respect of the contract entered into between that company and Bondfield Construction Company Limited ("**Bondfield**").

Discussions have been ongoing for some time regarding the terms under which, among others, Zurich and the bank syndicate for which Bank of Montreal is administrative agent might agree to complete the Project.

While those discussions have been going on, Zurich has been spending funds as if the call on the Bond is in force and as if acceptable arrangements for completion of the Project have been agreed upon. As of today's date, the amounts spent by Zurich, including amounts paid by Bondfield and funded by Zurich, exceed \$18.1 million.

There are amounts that are currently owing to Bondfield in respect of its work on the Project, which we are advised amount to \$2.5 million on account of the base contract, inclusive of the progress billing to January 31, 2019, but exclusive of extra work. These amounts have not been paid notwithstanding that all liens that would otherwise have prevented further advances have been removed. Zurich's expenditures under the Bond would be offset by those amounts in the ordinary course.

While we recognize that all parties seem to be attempting to move forward in good faith, the effect of this state of affairs is that Zurich is spending funds before having an agreement in place and without getting the benefit of the amounts that should already have been paid to Bondfield in order to reduce its obligations. In our view, it is unfair that Zurich be put in that position.

We note that the amounts already owing to Bondfield are a subset of a larger issue, which is that Zurich's obligations under the Bond are premised on the Balance of the Construction Contract Price being made available to Zurich. This has not taken place, but nonetheless Zurich has incurred significant expense as if the Bond had been validly called.

We accordingly ask that, consistent with Zurich's good faith funding of the Project before final arrangements have been agreed upon, Bank of Montreal and its associated syndicate members pay the funds attributable to the approved amounts on account of the base amount of the contract.

We would like to make arrangements to have the above-noted amounts brought current as soon as possible.

Yours truly,

GOLDMAN SLOAN NASH & HABER LLP

Per:



R. Brendan Bissell

RBB:ac

c.c. Kyla Mahar, *Miller Thomson*
David Ward, *Cassels Brock*
Adrian Braganza, *Zurich*
Sam Poteet, *Manier & Herod*
Mario Forte
Jennifer Stam

Tab V

This is **Exhibit "V"** referred to in the
affidavit of **EDEN ORBACH**
sworn before me this
6th day of May, 2019

A handwritten signature in blue ink, consisting of stylized, overlapping loops and strokes, positioned above a horizontal line.

A Commissioner for taking affidavits

From: Brendan Bissell <bissell@gsnh.com>
Sent: Friday, March 08, 2019 10:10 AM
To: Meredith, Heather L.
Cc: Mario Forte; Troke, Morgan; Furlan, Stephen
Subject: RE: CMH "Gap"

Thanks for the details, Heather. Until I can get this reviewed and commented upon by the appropriate people on our side, I won't be able to say whether this addresses the gap in payments issue or not. If there is something different to consider, we will of course bring it to your attention.

Regards,
 Brendan

R. Brendan Bissell



Suite 1600 | 480 University Avenue | Toronto ON | M5G 1V2

Direct [416 597 6489](tel:4165976489) | Fax [416 597 3370](tel:4165973370) | Mobile: [416 992 4979](tel:4169924979) | www.gsnh.com

Assistant | Karen Jones | [416 597 9922 ext. 101](tel:4165979922) | jones@gsnh.com

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From: Meredith, Heather L. <HMEREDITH@MCCARTHY.CA>
Sent: Friday, March 08, 2019 10:08 AM
To: Brendan Bissell <bissell@gsnh.com>
Cc: Mario Forte <forte@gsnh.com>; Troke, Morgan <mtroke@mccarthy.ca>; Furlan, Stephen <SFURLAN@MCCARTHY.CA>
Subject: CMH "Gap"

Hi Brendan,

I am writing on the issue of the \$2.3 million that EY thought was missing from their review of the Bondfield account. I know you have been looking for someone we can speak with about this and I also told you I would send you some information about what we have found so far from our review of the numbers.

Our preliminary review shows that:

1. ProjectCo received in its account more than the Progress Payments less current holdback plus HST.
2. ProjectCo paid \$126,883,684.73 to the Bondfield account at National Bank and an additional \$2,531,692.39 (slightly more than the \$2,331,531.87 "gap" identified by EY) was directed by the Bondfield principals from the ProjectCo account to:
 - a. the Italian Canadian Savings and Credit Union in the aggregate amount of \$1,196,877.11 via cheques made out to 2304288 Ontario Inc. (April 9, 2015 - \$400,000, July 6, 2015 - \$200,000, August 20, 2015 -

- \$200,000, January 8, 2016 - \$200,000) and a cheque made out to Bondfield Construction (August 17, 2017 - \$196,877.11); and
- b. Bondfield accounts 0002-1791-147 and 0002-1791-163 at BMO via transfers in the aggregate amount of \$1,334,815.28 (\$617,000 on February 6, 2018, \$117,815.28 on February 14, 2018 and \$600,000 on April 25, 2018).

We trust this addresses the issue of an alleged gap but if your client continues to have questions, please let us know.

Best,

Heather



Heather Meredith

Partner | Associée

Bankruptcy and Restructuring | Faillite et restructuration

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Tab W

This is **Exhibit "W"** referred to in the
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sworn before me this
6th day of May, 2019

A handwritten signature in blue ink, consisting of stylized, overlapping loops and strokes.

A Commissioner for taking affidavits



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Heather L. Meredith
Partner
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Email: hmeredith@mccarthy.ca

Assistant: Fick, Kaitlin
Direct Line: (416) 601-8200 x542050
Email: kfick@mccarthy.ca

March 19, 2019

Via Email (bissell@gsnh.com)

Mr. Brendan Bissell
Partner
Goldman, Sloan, Nash & Haber LLP
480 University Avenue
Suite 1600
Toronto ON M5G 1V2

Dear Mr. Bissell

Re: Performance Bond No. 6342957 dated August 28, 2014 between Bondfield Construction Company Limited ("Bondfield") and Zurich Insurance Company Ltd. ("Zurich"), together with the Multiple Obligee Rider thereto naming Cambridge Memorial Hospital ("CMH") and Bank of Montreal (the "Agent") as Additional Named Obligees (collectively the "Performance Bond")

And Re: Credit Agreement dated as of August 28, 2014, between 2423402 Ontario Inc. (the "Borrower"), the Agent, and certain lenders (the "Lenders"), as such Credit Agreement is amended, amended and restated, renewed, extended, supplemented, replaced or otherwise modified from time to time (the "Credit Agreement")

We write in respect of your letter dated March 5, 2019 and the request therein for the Lenders to advance amounts to Project Co on an interim basis.

As you know, the Credit Agreement is currently in default and the Lenders issued a payment demand to Project Co and appointed a receiver. Notwithstanding the removal of construction liens, there continue to be defaults that have not been cured under the Credit Agreement and Project Co continues to be in default. We note that there are also additional defaults under the Project Agreement (and therefore the Construction Contract) referred to in the letter from Cambridge Memorial Hospital to Project Co dated August 13, 2018 that have not been cured.

We have been in discussions with you to seek a resolution that will see the credit facility restored and funding under the Credit Agreement resume. At your request, we have been negotiating a form of Mitigation Funding Agreement, which we had understood as being your desired way to document the resumption of funds flow. We provided a revised draft Mitigation Funding Agreement to you and suggest that your client focus on providing comments on that agreement and working towards a resolution if it wishes to see funds flowing from the Lenders.

In that regard, we note that, while Zurich appears to have incurred costs in relation to the CMH project to date:

- (a) Zurich has still not agreed to fulfil its obligations under the Performance Bond as it was required to do (expeditiously) after a call on the Performance Bond;
- (b) it is our understanding that there remains less than \$1.2 million of work to be performed under the Construction Contract to achieve Interim Completion. This is the only amount that would have been payable under the original contract with Bondfield prior to Interim Completion; all other amounts necessary to achieve Interim Completion are the responsibility of Zurich pursuant to the Performance Bond; and
- (c) in your letter you reference that Zurich says it has expended \$18.1 million in relation to the CMH project. We are extremely surprised by this figure given the limited progress made on the project to date and that Interim Completion has yet to be achieved. We would appreciate if you would provide further details to support this figure. In particular, we would be interested in a breakdown in amounts spent under the performance bond, the L&M bond and the demand bond as presumably the \$18.1 million amount you reference is an aggregate spend under all three bonds.

We look forward to your feedback on the Mitigation Funding Agreement.

Yours truly,



Heather L. Meredith

HLM/kf

- c. Steve Furlan, McCarthy Tétrault LLP
Geoff Hall, McCarthy Tétrault LLP

Tab X

This is **Exhibit "X"** referred to in the
affidavit of **EDEN ORBACH**
sworn before me this
6th day of May, 2019

A handwritten signature in blue ink, consisting of stylized, overlapping loops and strokes, positioned above a horizontal line.

A Commissioner for taking affidavits

From: Meredith, Heather L.
Sent: Wednesday, March 20, 2019 1:33 PM
To: Mario Forte; Brendan Bissell; stam@gsnh.com; 'Kyla Mahar (kmahar@millerthomson.com)'; 'Bulat, Dražen'; malter@casselsbrock.com; 'David Ward (dward@casselsbrock.com)'; Robert.Pattison@infrastructureontario.ca
Cc: Furlan, Stephen; Hall, Geoff R.; Troke, Morgan
Subject: RE: Cambridge - Mitigation Funding Agreement

All,

We understand that each of you continues to be in the process of reviewing the draft Mitigation Funding Agreement that we provided to you on March 7th. We also understand a meeting has been scheduled by Infrastructure Ontario for March 27, 2019. In our view, that meeting will only be productive if we have received comments from each of you on the draft Mitigation Funding Agreement. We would appreciate receiving comments from you prior to that date and are available to discuss if there are any issues or questions that can be resolved in advance.

We are looking forward to continuing to work together to resolve this matter.

Sincerely,



Heather Meredith

Partner | Associée
 Bankruptcy and Restructuring | Faillite et restructuration
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Please, think of the environment before printing this message.



From: Troke, Morgan
Sent: Thursday, March 07, 2019 3:35 PM
To: Brendan Bissell
Cc: Mario Forte; stam@gsnh.com; 'Kyla Mahar (kmahar@millerthomson.com)'; 'Bulat, Dražen'; 'Todd Robinson (trobinson@casselsbrock.com)'; malter@casselsbrock.com; 'David Ward (dward@casselsbrock.com)'; Robert.Pattison@infrastructureontario.ca; Furlan, Stephen; Meredith, Heather L.; Hall, Geoff R.
Subject: RE: Cambridge - Mitigation Funding Agreement

Brendan,

Further to the discussion with us last week, please see attached for a revised draft of the Mitigation Funding Agreement. As with the previous version, this remains entirely subject to review and comment by the Lenders, and is also again being circulated concurrently to CMH's counsel (and so this version has not yet been discussed with them).

We look forward to discussing with you again once you have had an opportunity to review.

Morgan



Morgan Troke

Partner | Associé

Business Law

T: 604-643-7974

F: 604-622-5750

E: mtroke@mccarthy.ca

McCarthy Tétrault LLP

Suite 2400

745 Thurlow Street

Vancouver BC V6E 0C5

From: Troke, Morgan

Sent: Tuesday, February 26, 2019 10:37 AM

To: 'Brendan Bissell'

Cc: Mario Forte; 'stam@gsnh.com'; 'Kyla Mahar (kmahar@millerthomson.com)'; 'Bulat, Dražen'; 'Todd Robinson (trobinson@casselsbrock.com)'; 'malter@casselsbrock.com'; 'David Ward (dward@casselsbrock.com)'; 'Robert.Pattison@infrastructureontario.ca'; Furlan, Stephen; Meredith, Heather L.; Hall, Geoff R.

Subject: Cambridge - Mitigation Funding Agreement

Brendan,

Further to your discussion with Heather today, please see attached for the draft Mitigation Funding Agreement with our revisions. Please note that this remains entirely subject to review and comment by the Lenders, and this version is also being circulated concurrently to CMH's counsel (cc'd here), and so remains subject to their review and comment as well.

We look forward to discussing with you once you have had a chance to review.

Morgan



Morgan Troke

Partner | Associé

Business Law

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E: mtroke@mccarthy.ca

McCarthy Tétrault LLP

Suite 2400

745 Thurlow Street

Vancouver BC V6E 0C5

Tab Y

This is **Exhibit "Y"** referred to in the
affidavit of **EDEN ORBACH**
sworn before me this
6th day of May, 2019

A handwritten signature in blue ink, consisting of stylized, overlapping loops and strokes, positioned above a horizontal line.

A Commissioner for taking affidavits



R. BRENDAN BISSELL
 Direct Dial 416-597-6489
 Email bissell@gsnh.com
 Our File No.: 100989.0001

March 27, 2019

DELIVERED BY EMAIL

Heather Meredith
 McCarthy Tétrault LLP
 Box 48, Suite 5300
 Toronto Dominion Bank Tower
 Toronto, ON M5K 1E6

RE: Cambridge Memorial Hospital Redevelopment Project

The March 7 draft of the Mitigation Funding Agreement that was provided was extensively revised from the form that we provided on behalf of Zurich on January 25. In the interests of attempting to narrow the issues under discussion, we have attempted to work within those revisions where possible and are preparing a set of comments with Zurich to send.

There remain, however, several points of concern and which must be addressed in order to finalize this agreement.

Most significant among them is what in our view amounts to an attempt by the Lenders to achieve a substantive benefit in respect of their claims under the Performance Bond for more than “sticks and bricks”. To that end, the Lenders in the March 7 draft sought to deduct the same amounts that will be so claimed against the Balance on the Construction Contract Price that is supposed to be devoted to completing the Project under the Performance Bond. To be clear, in order for Zurich to respond to a default by Bondfield, the entire Balance of Contract Price, which is described in the Performance Bond as being “the total amount of the Guaranteed Price payable to the Principal under the Construction Contract, less the amount properly paid by the Obligor to the Principle under the Construction Contract”, needs to be made available to complete the project.

The entire premise of the draft Agreement has been to establish a commercially reasonable way to complete this Project within this particular P3 set of circumstances but without altering the substantive rights of the parties. Reducing the Balance of Contract Price for any reason is inappropriate.

There are also questions that arose out of the March 7 draft about the obligation of the Lenders to fund under the Credit Agreement and to fund for any inability by ProjectCo to pay the Balance of the Construction Contract Price.

On the former point, the Lenders had previously advised that, subject to this Agreement, the remaining amounts available under the Credit Agreement will be advanced notwithstanding the existing defaults, so we will revise the draft to make that clear.

On the latter point, the Lenders had previously advised that they would prefer to fund any gap in ProjectCo's ability to pay the Balance of the Construction Contract Price rather than have Zurich do so as we had previously proposed. We will again revise the draft to make that obligation explicit. If, however, the Lenders are not prepared to so commit, then the provisions previously proposed by Zurich on that issue should be reinserted.

The Agreement is expressly without prejudice to the positions of the parties for any discussions or adjudication that will logically follow after completion of the Project, so there cannot be any equivocation on the funding obligations that are being undertaken in this Agreement to get the Project completed. Any interruption on payment will only increase costs and delay to the detriment of all parties.

Yours truly,

GOLDMAN SLOAN NASH & HABER LLP

Per:



R. Brendan Bissell

RBB:kj

Encl.

c.c. Kyla Mahar, *Miller Thomson*
David Ward, *Cassels Brock*
Adrian Braganza, *Zurich*
Sam Poteet, *Manier & Herod*
Mario Forte
Jennifer Stam

Tab Z

This is **Exhibit "Z"** referred to in the
affidavit of **EDEN ORBACH**
sworn before me this
6th day of May, 2019

A handwritten signature in blue ink, consisting of stylized, overlapping loops and strokes, positioned above a horizontal line.

A Commissioner for taking affidavits



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Assistant: Fick, Kaitlin
Direct Line: (416) 601-8200 x542050
Email: klick@mccarthy.ca

April 4, 2019

WITH PREJUDICE

Via Email (bissell@gsnh.com)

Mr. Brendan Bissell
Partner
Goldman, Sloan, Nash & Haber LLP
480 University Avenue
Suite 1600
Toronto ON M5G 1V2

Dear Mr. Bissell

Re: Performance Bond No. 6342957 dated August 28, 2014 between Bondfield Construction Company Limited ("Bondfield") and Zurich Insurance Company Ltd. ("Zurich"), together with the Multiple Obligee Rider thereto naming Cambridge Memorial Hospital ("CMH") and Bank of Montreal (the "Agent") as Additional Named Obligees (collectively the "Performance Bond")

And Re: Credit Agreement dated as of August 28, 2014, between 2423402 Ontario Inc. (the "Borrower"), the Agent, and certain lenders (the "Lenders"), as such Credit Agreement is amended, amended and restated, renewed, extended, supplemented, replaced or otherwise modified from time to time (the "Credit Agreement")

We write in respect of your letter dated March 27, 2019. We disagree with your characterization therein and are unclear why a with prejudice letter was sent attempting to characterize, in a manner unduly favourable to Zurich, ongoing without prejudice discussions in which we have been participating. Contrary to the assertions in your letter:

1. The Lenders are not attempting to achieve a substantive benefit in relation to the "sticks and bricks" argument. As held by the Ontario Court of Appeal, the obligations of Zurich under the Performance Bond are not limited to "sticks and bricks."¹ The Lenders proposed simply to hold Zurich to its obligations under the Performance Bond, with which it has, so far, been unwilling to comply in exchange for a concession from the Lenders with respect to the escrow funds.

¹ *Whitby Landmark Developments Inc. v. Mollenhauer Construction Ltd.*, 2003 CarswellOnt 3968 (SCJ).

2. With respect to the statement in your letter 'to be clear' about the Balance of the Construction Contract Price, we note that the Lenders have been equally clear that they dispute Zurich's calculation of that amount. In the Lenders' view, Zurich is demanding more than receipt of the "Balance of the Construction Contract Price as defined in the Performance Bond", it is instead asking to have a specific amount paid by it that exceeds the Balance of the Construction Contract Price as calculated by the Lenders. Zurich's calculation relies on a tenuous argument that, notwithstanding the existing defaults, it should be able to receive more than the Construction Contractor would have received under the Construction Contract simply based on an argument relating to the timing of payment under the Project Agreement.
3. The Lenders are committed to finding a commercially reasonable way to complete the project. However, Zurich has been attempting to alter the substantive rights of the parties, including by seeking to have the Lenders agree to fund amounts that they never committed to fund.
4. With respect to funding of any "gap", we continue to await a substantive response from Zurich to the Lenders' figures that show that there is no anticipated gap. Moreover, when you refer to Zurich's previous proposal to fund a "gap", it is important to note that Zurich's proposal sought to obtain a priority charge for such funding. In a closed system where there appears to be a shortfall, this would ultimately produce a shortfall for the Lenders so was not a realistic option.
5. The Lenders provided their revised draft Mitigation Funding Agreement on March 7, 2019, nearly one month ago. The draft was revised in a manner to seek to address the various issues between our clients. In your letter you indicated that you were still preparing comments on that draft. Please let us know when we can expect to see those comments. We agree that continued delay and the resulting costs to the parties should be avoided and, therefore, look forward to hearing from you promptly.

Yours truly,



Heather L. Meredith

HLM/kf

- c. Steve Furlan, McCarthy Tétrault LLP
Geoff Hall, McCarthy Tétrault LLP

Tab AA

This is **Exhibit “AA”** referred to in the
affidavit of **EDEN ORBACH**
sworn before me this
6th day of May, 2019

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke, positioned above a horizontal line.

A Commissioner for taking affidavits

From: Troke, Morgan
Sent: Thursday, April 11, 2019 10:54 PM
To: Robinson, Odette; McNally, Denise (IO); Polny, Danny (IO); Pattison, Robert; von dem Hagen, Agnes; Traianopoulos, John; Killer, Chris (IO); pgaskin@cmh.org; Adrian Braganza; Mike Prociw; Mahar, Kyla; Paul Bordieri; Brendan Bissell; Mario Forte; Bulat, Dražen; Jennifer Stam; Currie, Carolyn (IO); Ward, David; Alter, Matthew; Sebastiano, Rocco
Cc: Julien, Stanley; Sutherland, Murray; ORBACH, EDEN; Meredith, Heather L.; Furlan, Stephen
Subject: Cambridge Memorial Hospital - Meeting with IO, Cambridge, BMO and Zurich
Attachments: DOCS-#18819247-v5-Cambridge_Mitigation_Funding_Agreement_(McCarthy_Comme....docx; DOCS-#18819247-vpdf-Cambridge_Mitigation_Funding_Agreement_(McCarthy_Com....pdf

All,

We write further to the in-person meeting held between Cambridge Memorial Hospital, Zurich, Infrastructure Ontario and Bank of Montreal, and their respective counsels, on March 27, 2019, and in advance of the subsequent meeting between those parties scheduled to be held this Monday, April 15, 2019.

It has been over two weeks since the last meeting, and the Lenders have not yet received comments from Zurich on the draft Mitigation Funding Agreement circulated on March 7, 2019, nor have they received the figure for “Estimated CMH Losses” that we understand CMH and IO were preparing. In an effort to move the discussions forward, we have taken the initiative to revise the draft Mitigation Funding Agreement to reflect comments and discussions on a separate project, and attach a copy of that draft along with a blackline to our prior March 7, 2019 draft. Please note that this continues to remain entirely subject to ongoing review and comment by the Lenders, and will also still require review by the Receiver.

We remain available to meet as planned on Monday, however given that the Lenders have not received any information or documentation from the other parties since the last meeting, proceeding with the meeting on Monday would not appear to be useful and, instead, we propose the parties review the attached draft and provide comments and the requested information as soon as possible so that this matter can move forward.



Morgan Troke

Partner | Associé
 Business Law
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 F: 604-622-5750
 E: mtroke@mccarthy.ca

McCarthy Tétrault LLP

Suite 2400
 745 Thurlow Street
 Vancouver BC V6E 0C5

Tab BB

This is **Exhibit “BB”** referred to in the
affidavit of **EDEN ORBACH**
sworn before me this
6th day of May, 2019

A handwritten signature in blue ink, consisting of stylized, overlapping loops and strokes, positioned above a horizontal line.

A Commissioner for taking affidavits

From: Courtis, Trevor
Sent: Wednesday, April 24, 2019 9:51 AM
To: 'kmahar@millerthomson.com'; 'trobinson@casselsbrock.com';
'ecraddock@casselsbrock.com'; 'Ward, David'; 'rsebastiano@osler.com';
'mdelellis@osler.com'; 'bissell@gsnh.com'; 'forte@gsnh.com'; 'linc.rogers@blakes.com';
'aryo.shalviri@blakes.com'; 'catherine.doyle@blakes.com';
'sferguson@alvarezandmarsal.com'; 'mmackenzie@alvarezandmarsal.com'
Cc: Meredith, Heather L.; Hall, Geoff R.; Furlan, Stephen; Troke, Morgan
Subject: In the Matter of the Receivership of 2423402 Ontario Inc. (Court File No. CV-18-610233-00CL)
Attachments: CMH - Notice of Motion (Bond Compliance and Determination of Issues) - April 24, 2019.pdf

Good morning,

Please find attached the Notice of Motion of Bank of Montreal, in its capacity as Administrative Agent, which is hereby served on you. A chambers appearance has been scheduled for April 30, 2019 at 9:30 a.m. before Justice Hainey to schedule the hearing of the motion.

Regards,



Trevor Courtis

Associate | Sociétaire

Litigation | Litige

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E: tcourtis@mccarthy.ca

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TD Bank Tower

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Toronto ON M5K 1E6

Please, think of the environment before printing this message.



Tab CC

This is **Exhibit “CC”** referred to in the
affidavit of **EDEN ORBACH**
sworn before me this
6th day of May, 2019

A handwritten signature in blue ink, appearing to be 'J. B. ...', written over a horizontal line.

A Commissioner for taking affidavits



dedicated to your success

R. BRENDAN BISSELL
Direct Dial 416-597-6489
Email bissell@gsnh.com
Our File No.: 100989.0001

April 26, 2019

DELIVERED BY EMAIL

Heather Meredith
McCarthy Tétrault LLP
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

David Ward
Cassels, Brock & Blackwell LLP
Scotia Plaza, 40 King St. W., Suite 2100
Toronto, ON M5H 3C2

Kyla Mahar
Miller Thomson LLP
Scotia Plaza, 40 King St. W., Suite 5800
Toronto, ON M5H 3S1

Dear Ms. Meredith, Mr. Ward and Ms. Mahar:

RE: Cambridge Memorial Hospital Redevelopment Project (the "Project")

As you know, we act for Zurich Insurance Company Ltd. ("Zurich").

2423402 Ontario Inc. ("Project Co") by its receiver made a claim on December 7, 2018 under Performance Bond No. 6342957 (the "Bond") issued by Zurich in respect of the contract entered into between Project Co and Bondfield Construction Company Limited ("Bondfield").

Zurich has been expending funds under a reservation of rights in order progress the work under that contract. Zurich had in fact been doing so even prior to the formal call on the bond on December 7, and has continued to do so while attempts have been underway to reach an agreement among Zurich, Project Co, the banks and the hospital about arrangements to complete the project. There have been numerous meetings, phone calls and written correspondence amongst the parties on that matter, both before and after the claim on December 7, 2018.

As of today's date, the amounts spent by Zurich, including amounts paid by Bondfield and funded by Zurich, exceed \$21.6 million.

The discussions among Zurich, the banks and the hospital about a possible agreement have been ongoing since the third week of December.

While those discussions have been taking place, no payments have been made in respect of the contract for which the Bond guarantees performance. This is despite the fact that amounts of approximately \$2.5 million are clearly owing to Bondfield under the contract with Project Co,

for which the failure to pay has compounded the financial harm to Zurich arising out of the duration of those discussions without a successful resolution.

It is Zurich's view that, despite the considerable efforts that have been made, a possible agreement among Zurich, the banks and the hospital is not feasible. The notice of motion served by the banks today only serves to illustrate that the banks are not prepared to recognize that the Bond has requirements that exist independently of the project structure and must be met. That is not a productive basis on which to proceed.

Zurich is therefore not prepared to indefinitely fund further work on this project under the Bond, even on a without prejudice basis, without an agreement in place and without the obligations under the Bond on Project Co as obligee being met.

Zurich has therefore prepared a more streamlined version of the proposed agreement solely between Zurich and Project Co, a copy of which is attached. It is Zurich's view that this form of agreement will provide the proper framework for this Project to go ahead and for a resolution of the issues that appear to have led to an impasse in the wider agreement that had been proposed.

Yours truly,

GOLDMAN SLOAN NASH & HABER LLP

Per:



R. Brendan Bissell

RBB:kj

Encl.

Adrian Braganza, *Zurich*
Sam Poteet, *Manier & Herod*
Mario Forte

Tab DD

This is **Exhibit “DD”** referred to in the
affidavit of **EDEN ORBACH**
sworn before me this
6th day of May, 2019

A handwritten signature in blue ink, consisting of stylized, cursive letters that appear to be 'JEO'.

A Commissioner for taking affidavits



McCarthy Tétrault LLP
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Assistant: *Fick, Kaitlin*
Direct Line: (416) 601-8200 x542050
Email: kfick@mccarthy.ca

May 6, 2019

Via Email (bissell@gsnh.com)

Mr. Brendan Bissell
Partner
Goldman, Sloan, Nash & Haber LLP
480 University Avenue
Suite 1600
Toronto ON M5G 1V2

Dear Mr. Bissell

Re: Performance Bond No. 6342957 dated August 28, 2014 between Bondfield Construction Company Limited ("Bondfield") and Zurich Insurance Company Ltd. ("Zurich"), together with the Multiple Obligee Rider thereto naming Cambridge Memorial Hospital ("CMH") and Bank of Montreal (the "Agent") as Additional Named Obligees (collectively the "Performance Bond")

And Re: Credit Agreement dated as of August 28, 2014, between 2423402 Ontario Inc. ("Project Co"), the Agent, and certain lenders (the "Lenders"), as such Credit Agreement is amended, amended and restated, renewed, extended, supplemented, replaced or otherwise modified from time to time (the "Credit Agreement") and Construction Contract between Bondfield and Project Co dated August 28, 2018 (the "Construction Contract")

We are counsel to the Agent and are in receipt of your letter dated April 26, 2019.

In that letter you assert that Zurich has spent amounts that exceed \$21.6 million, presumably in relation to the Cambridge Memorial Hospital Redevelopment Project (the "**Project**"). As a preliminary matter, when Zurich made similar assertions in earlier correspondence, we asked for details of such expenditures as they appear to be significantly disproportionate to the value of the work (which we understand was estimated to be \$1.2 million to interim completion). We once again request that information. Moreover, despite the alleged investment by Zurich, interim completion has still not been met and we understand from counsel to CMH that the dates set for interim completion have been missed on multiple occasions and it is expected that the latest proposed date will be missed as well.

Most significant, though, is that Zurich alleges that it is funding on a "reservation of rights" basis and that it is not prepared to do so without an agreement in place. In the view of the Agent, Zurich is obliged to advance such funds pursuant to the Performance Bond.

First, while Zurich alleges that Project Co is obliged to pay the Balance of the Construction Contract Price to Zurich (in the amount calculated by Zurich) as a condition of Zurich's funding of the Project, the reference to "Balance of the Construction Contract Price" is only contained in "option #3" of the Performance Bond and Zurich has not selected that option. Not only has Zurich refused to confirm which option it has selected but also it has not obtained a bid or bids and submitted those to Project Co as it is required to do under option #3. Rather, Zurich has continued to use Bondfield to complete construction work. This is more in line with the steps under option #1 "remedy and default" or option #2 "complete the Construction Contract in accordance with its terms and conditions". Such options do not require payment by Project Co as Zurich alleges. Rather, under such options Zurich is required to make payments of the very nature it claims it has been making.

Second, even pursuant to option #3, there is no requirement that funds be paid "up front" before Zurich is required to make a payment. Option #3 requires Zurich to make payments to complete Bondfield's obligations in accordance with the terms and conditions of the Construction Contract but simply notes that those payments are 'less the Balance of the Construction Contract Price'. Even if Zurich has made the payments it alleges in support of the Project, Zurich has not yet paid all amounts to complete Bondfield's obligations less the Balance of the Construction Contract Price.

Moreover, the Balance of the Construction Contract Price is defined in the Performance Bond as "the total amount of the Guaranteed Price payable to [Bondfield] under the Construction Contract, less the amount properly paid by [Project Co] to [Bondfield] under the Construction Contract." At this time, there is no amount properly "payable to [Bondfield] under the Construction Contract". Notwithstanding the removal of construction liens against the property, there continue to be multiple defaults that have not been waived or cured. While the Agent has been meeting with you regularly and working diligently to develop a solution that will see the remaining defaults cured or waived, until that occurs, the Credit Agreement continues to be in default and funding is not currently available to Project Co in such circumstances. Please see the attached letter to Bondfield dated May 1, 2019 clarifying that non-payment by Project Co in such circumstances does not constitute a default under the Construction Contract given the express terms thereof and the defaults by Bondfield.

In any event, even if funding was presently available under the credit facility contemplated in the Credit Agreement, it would only be in the amount of \$2,377,076.20 until interim completion is reached. Zurich's continuing refrain that it has spent significant sums on the Project belies the fact that in any circumstances it is responsible for all payments in excess of that amount to complete the work to interim completion.

Third, we have advised on a number of occasions that we are supportive of Project Co making available the "Balance of the Construction Contract Price" as defined in the Performance Bond. However, Zurich takes a different view as to how that figure is calculated, which has required the Agent to bring a motion for determination of such issues.

Finally, we received Zurich's most recent revised draft of the Mitigation Agreement in which the Lenders and CMH have been removed from the agreement and Zurich has added numerous conditions such as reserving all rights and continuing to assert that it has no liability under the Performance Bond or has been discharged of such liability. As you know, there is no provision

of the Performance Bond that requires a mitigation agreement. That is a request made by Zurich but is not a requirement of performance under the Performance Bond. While the Agent has been engaged trying to find a solution that will meet Zurich's demand for a mitigation agreement, the terms contained in the present draft (including the addition of 'full reservation of rights' language in the preamble and similar language in paragraphs 15, 18 and 19 as well as the removal of "subject to" language in paragraph 4 and addition of language at the end of that paragraph) are unworkable and inconsistent with Zurich's obligations to promptly select and perform an option under the Performance Bond.

Zurich's continued insistence on payments and documentation that are not contemplated in the Performance Bond when it has not selected an option under the Performance Bond and has not fulfilled its obligations thereunder have led to continued delays and failures to meet interim completion and is causing prejudice to the Project and the Lenders.

We remain hopeful that Zurich will be willing to live up to its obligations under the Performance Bond and the Agent is committed to finding a constructive solution. If Zurich has indeed spent the amounts set out in the April 26, 2019 letter in support of the Project, that is a helpful start in furtherance of Zurich's obligations under the Performance Bond. However, it is not appropriate to threaten to discontinue funding or that Zurich will take the position it is discharged from obligations under the Performance Bond. Such actions appear designed to force the parties to accede to Zurich's unreasonable requirements and/or to set up an argument that the Project was delayed when in fact it was Zurich's own unreasonable requirements that caused the delay. This is not a productive basis on which to negotiate. In all of the circumstances, we ask that Zurich reconsider its position in the latest Mitigation Funding agreement and, at minimum, remove the various additions seeking a broad reservation of rights and the expanded relief at the end of paragraph 4.

Yours truly,



Heather L. Meredith

HLM/kf

Attachment [May 1, 2019 letter]

- c. E. Orbach, Bank of Montreal, as administrative agent
S. Furlan, G. Hall & M. Troke, counsel to Bank of Montreal, as administrative agent
K. Mahar and D. Bulat, counsel to Cambridge Memorial Hospital
D. Ward, counsel to Infrastructure Ontario
M. Forte, S. Poteet & M. Lerner, counsel to Zurich Insurance Company Ltd.

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COPY

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Email: mtroke@mccarthy.ca

Assistant: Alyssa Toomer
Direct Line: (604) 643-7981
Email: atoomer@mccarthy.ca

May 1, 2019

VIA EMAIL

Bondfield Construction Company Limited
407 Basaltic Road
Concord, ON L4K 4W8

Attention: Mr. Steven Aquino
President

Re: Construction Contract dated as of August 28, 2014, between 2423402 Ontario Inc. ("Project Co") and Bondfield Construction Company Limited (the "Construction Contractor" or "Bondfield"), as such Construction Contract is amended, amended and restated, renewed, extended, supplemented, replaced or otherwise modified from time to time (the "Construction Contract")

Dear Mr. Aquino:

We are counsel to Bank of Montreal, in its capacity as administrative agent. We are in receipt of your letter to Project Co dated April 26, 2019 in which you allege that Project Co is in default of its payment obligations under the Construction Contract, and that if Project Co's payment default is not cured within a period of twenty (20) Business Days¹ from receipt of your letter, such default will constitute a Project Co Event of Default pursuant to Section 27.1(a)(i) of the Construction Contract.

As you know, the Construction Contract is in default as a result of numerous defaults committed by Bondfield, including significant delays by Bondfield. In addition, the defaults by Bondfield have given rise to defaults under the Lending Agreements between Project Co and its Lenders, which means that there is no funding currently available to Project Co. In circumstances in which the delay and defaults have been caused by Bondfield, the demand that Bondfield purports to make in your letter is unfounded and inappropriate.

This very situation is specifically addressed in the Construction Contract. We refer you to Section 27.1(a) of the Construction Contract, which makes clear that non-payment by Project Co is **not** a Project Co Event of Default in the circumstances of this case in which both the Interim Completion Date and Substantial Completion Date are delayed and there is neither funding available to Project Co under the Lending Agreements due to such delay nor compensation available from CMH. The provision in Section 27.1(a) states as follows:

¹ Capitalized terms not otherwise defined herein shall have the respective meanings assigned to them in the Construction Contract.

“...any non-payment by Project Co in circumstances where either the Substantial Completion Date or Interim Completion Date are delayed relative to the originally contemplated dates therefore and there is neither (A) funding available under the Lending Agreements due to such delay nor (B) compensation available from CMH under the Project Agreement in respect of such delay, in either case at the time the relevant Project Co payment is due and payable shall not constitute a Project Co Event of Default permitting Contractor to claim that Project Co is in default of Project Co’s contractual obligations...”

As you know, the original Scheduled Interim Completion Date was November 30, 2016, and the original Scheduled Substantial Completion Date was March 31, 2019. Neither Interim Completion nor Substantial Completion has been achieved. As you also know, as a result of these significant delays and the other reasons set out in the various notifications Project Co provided to you, Bondfield is in default of the Construction Contract and such Contractor Events of Default have caused an “Event of Default” under the Lending Agreements. Accordingly, as a result of Bondfield’s significant delays and other defaults, funding is currently unavailable under the Lending Agreements. There is also no compensation available from CMH under the Project Agreement in respect of these delays. As such, any non-payment by Project Co under the Construction Contract does not constitute a Project Co Event of Default and Bondfield is not permitted to claim that Project Co is in default of its contractual obligations.

In any event, as you also know, by the order of the Honourable Justice Hainey made December 6, 2018 (the “**Receivership Order**”), Alvarez & Marsal Canada Inc. was appointed receiver of Project Co (the “**Receiver**”). Pursuant to the Receivership Order, all rights and remedies against Project Co, including the rights and remedies you have proposed to exercise in your letter, have been stayed and suspended except with the written consent of the Receiver or leave of the Court. We trust that you will take no further steps in violation of the Receivership Order.

In the above circumstances, we trust that your letter alleging that Project Co is in default of its contractual obligations, which allegation is directly contrary to the express terms of the Construction Contract and the Receivership Order, will be withdrawn.

Yours truly,

McCarthy Tétrault LLP

Morgan Troke

MT/at

Cc:

S. Ferguson, *Alvarez & Marsal Inc., in its capacity as receiver*
L. Rogers & A. Shalviri, *counsel to Alvarez & Marsal Inc., in its capacity as receiver*
E. Orbach, *Bank of Montreal, as administrative agent*
H. Meredith, S. Furlan & G. Hall, *counsel to Bank of Montreal, as administrative agent*
K. Mahar, *counsel to Cambridge Memorial Hospital*
T. Robinson, *counsel to Infrastructure Ontario*

DOCS 19136712

A. Braganza, *Zurich Insurance Company Ltd.*
B. Bissell & M. Forte, *counsel to Zurich Insurance Company Ltd.*
M. Lerner, *counsel to Zurich Insurance Company Ltd.*
A. Morrison & A. Yao, *Ernst & Young Inc.*
A. Merskey & E. Cobb, *counsel to Ernst & Young Inc.*
P. Dipede, *Bondfield Construction Company Limited*
R. Sebastiano & M. De Lellis, *counsel to Bondfield Construction Company Limited*

Tab EE

This is **Exhibit “EE”** referred to in the
affidavit of **EDEN ORBACH**
sworn before me this
6th day of May, 2019

A handwritten signature in blue ink, consisting of stylized, cursive letters that appear to be 'NAD'.

A Commissioner for taking affidavits



Blake, Cassels & Graydon LLP
Barristers & Solicitors
Patent & Trade-mark Agents
199 Bay Street
Suite 4000, Commerce Court West
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Tel: 416-863-2400 Fax: 416-863-2653

Aryo Shalviri

Dir: 416-863-2962

aryo.shalviri@blakes.com

May 1, 2019

VIA EMAIL

Bondfield Construction Company Limited
407 Basaltic Road
Concord, ON L4K 4W8

Attention: Mr. Steven Aquino, President

Email: SAquino@bondfield.com

Re: Construction Contract dated as of August 28, 2014, between 2423402 Ontario Inc. ("Project Co") and Bondfield Construction Company, as such Construction Contract is amended, amended and restated, renewed, extended, supplemented, replaced or otherwise modified from time to time

Re: Letter dated April 26, 2019 from Steven Aquino of Bondfield Construction Company Limited ("Bondfield") to 2423402 Ontario Inc., c/o Alvarez & Marsal Canada Inc. (the "April 26 Letter")

Dear Mr. Aquino:

We are counsel to Alvarez & Marsal Canada Inc., in its capacity as receiver (but not receiver and manager) of Project Co (in such capacity, the "**Receiver**"). We are in receipt of your April 26 Letter and appreciate this opportunity to reply.

As you are aware, pursuant to an order of the Honourable Mr. Justice Hainey of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") granted on December 6, 2018 (the "**Appointment Order**"), Alvarez & Marsal Canada Inc. was appointed as Receiver, without security, of all of the assets, undertakings and properties of Project Co acquired for, or used in relation to the business carried on by Project Co (the "**Property**"), for the sole purpose of carrying out the terms of the Appointment Order and without taking possession or control of the Property.

The powers and authorizations granted to the Receiver pursuant to the Appointment Order are of a limited nature and do not include carrying out an independent investigation of the allegations made in the April 26 Letter and/or responding on behalf of Project Co. We would however note that the Appointment Order contains a broad stay of proceedings in favour of Project Co and the Property (the "**Stay**"). Pursuant to the Stay, among other things, all rights and remedies against Project Co or affecting the Property are stayed and suspended except with the written consent of the Receiver or leave of the Court. As at the date hereof, Bondfield has not sought the Receiver's consent to lift the Stay or brought a Motion for leave of the Court in respect of same.

We have forwarded your April 26 Letter to Bank of Montreal, in its capacity as administrative agent (in such capacity, the "**Agent**") under the Credit Agreement dated as of August 28, 2014 among the Agent, Project Co and certain lenders thereunder. We understand that the Agent will be responding to the substantive matters raised in your April 26 Letter.

We trust this letter clarifies matters.

Yours very truly,



Aryo Shalviri



Cc:

L. Rogers, & A. Shalviri, *counsel to the Receiver*
E. Orbach, *Agent*
H. Meredith, S. Furlan & G. Hall, *counsel to the Agent*
K. Mahar, *counsel to Cambridge Memorial Hospital*
T. Robinson, A. Braganza, *counsel to Infrastructure Ontario*
B. Bissell & M. Forte, *counsel to Zurich Insurance Company Ltd.*
M. Lerner, *counsel to Zurich Insurance Company Ltd.*
A. Morrison & A. Yao, *Ernst & Young Inc.*
A. Merskey & E. Cobb, *counsel to Ernst & Young Inc.*
R. Sebastiano & M. De Lellis, *counsel to Bondfield Construction Company Limited*

Tab FF

This is **Exhibit “FF”** referred to in the
affidavit of **EDEN ORBACH**
sworn before me this
6th day of May, 2019

A handwritten signature in blue ink, consisting of stylized, overlapping loops and strokes, positioned above a horizontal line.

A Commissioner for taking affidavits

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May 1, 2019

VIA EMAIL

Bondfield Construction Company Limited
407 Basaltic Road
Concord, ON L4K 4W8

Attention: Mr. Steven Aquino
President

Re: Construction Contract dated as of August 28, 2014, between 2423402 Ontario Inc. ("Project Co") and Bondfield Construction Company Limited (the "Construction Contractor" or "Bondfield"), as such Construction Contract is amended, amended and restated, renewed, extended, supplemented, replaced or otherwise modified from time to time (the "Construction Contract")

Dear Mr. Aquino:

We are counsel to Bank of Montreal, in its capacity as administrative agent. We are in receipt of your letter to Project Co dated April 26, 2019 in which you allege that Project Co is in default of its payment obligations under the Construction Contract, and that if Project Co's payment default is not cured within a period of twenty (20) Business Days¹ from receipt of your letter, such default will constitute a Project Co Event of Default pursuant to Section 27.1(a)(i) of the Construction Contract.

As you know, the Construction Contract is in default as a result of numerous defaults committed by Bondfield, including significant delays by Bondfield. In addition, the defaults by Bondfield have given rise to defaults under the Lending Agreements between Project Co and its Lenders, which means that there is no funding currently available to Project Co. In circumstances in which the delay and defaults have been caused by Bondfield, the demand that Bondfield purports to make in your letter is unfounded and inappropriate.

This very situation is specifically addressed in the Construction Contract. We refer you to Section 27.1(a) of the Construction Contract, which makes clear that non-payment by Project Co is **not** a Project Co Event of Default in the circumstances of this case in which both the Interim Completion Date and Substantial Completion Date are delayed and there is neither funding available to Project Co under the Lending Agreements due to such delay nor compensation available from CMH. The provision in Section 27.1(a) states as follows:

¹ Capitalized terms not otherwise defined herein shall have the respective meanings assigned to them in the Construction Contract.

“...any non-payment by Project Co in circumstances where either the Substantial Completion Date or Interim Completion Date are delayed relative to the originally contemplated dates therefore and there is neither (A) funding available under the Lending Agreements due to such delay nor (B) compensation available from CMH under the Project Agreement in respect of such delay, in either case at the time the relevant Project Co payment is due and payable shall not constitute a Project Co Event of Default permitting Contractor to claim that Project Co is in default of Project Co’s contractual obligations...”

As you know, the original Scheduled Interim Completion Date was November 30, 2016, and the original Scheduled Substantial Completion Date was March 31, 2019. Neither Interim Completion nor Substantial Completion has been achieved. As you also know, as a result of these significant delays and the other reasons set out in the various notifications Project Co provided to you, Bondfield is in default of the Construction Contract and such Contractor Events of Default have caused an “Event of Default” under the Lending Agreements. Accordingly, as a result of Bondfield’s significant delays and other defaults, funding is currently unavailable under the Lending Agreements. There is also no compensation available from CMH under the Project Agreement in respect of these delays. As such, any non-payment by Project Co under the Construction Contract does not constitute a Project Co Event of Default and Bondfield is not permitted to claim that Project Co is in default of its contractual obligations.

In any event, as you also know, by the order of the Honourable Justice Hainey made December 6, 2018 (the “**Receivership Order**”), Alvarez & Marsal Canada Inc. was appointed receiver of Project Co (the “**Receiver**”). Pursuant to the Receivership Order, all rights and remedies against Project Co, including the rights and remedies you have proposed to exercise in your letter, have been stayed and suspended except with the written consent of the Receiver or leave of the Court. We trust that you will take no further steps in violation of the Receivership Order.

In the above circumstances, we trust that your letter alleging that Project Co is in default of its contractual obligations, which allegation is directly contrary to the express terms of the Construction Contract and the Receivership Order, will be withdrawn.

Yours truly,

McCarthy Tétrault LLP



Morgan Troke

MT/at

Cc:

S. Ferguson, *Alvarez & Marsal Inc., in its capacity as receiver*
L. Rogers & A. Shalviri, *counsel to Alvarez & Marsal Inc., in its capacity as receiver*
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Ontario
**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceedings commenced in Toronto

**AFFIDAVIT OF EDEN ORBACH
(Sworn May 6, 2019)**

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**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

**MOTION RECORD
(Bond Compliance and Determination of Issues)
VOLUME II OF II**

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