

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF THE RECEIVERSHIP OF
2423402 ONTARIO INC.**

BETWEEN:

BANK OF MONTREAL

Applicant

- and -

2423402 ONTARIO INC.

Respondent

REPLY MOTION RECORD

June 7, 2019

McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto, ON M5K 1E6
Fax: 416-868-0673

Heather L. Meredith LSO#: 48354R
Tel: 416-601-8342
Email: hmeredith@mccarthy.ca

Geoff R. Hall LSO#: 347100
Tel: 416-601-7856
E-mail: ghall@mccarthy.ca

Trevor Courtis LSO#: 76615A
Tel: 416-601-7643
E-mail: tcourtis@mccarthy.ca

Lawyers for the applicant, Bank of
Montreal, in its capacity as Administrative
Agent under the Credit Agreement

TO: THE SERVICE LIST

INDEX

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF THE RECEIVERSHIP OF
2423402 ONTARIO INC.**

BETWEEN:

BANK OF MONTREAL

Applicant

- and -

2423402 ONTARIO INC.

Respondent

REPLY MOTION RECORD

INDEX

TAB DOCUMENT

1. Affidavit of Eden Orbach, sworn June 7, 2019
- A. Exhibit "A" – Letter dated August 13, 2018 from CMH to the Administrative Agent
- B. Exhibit "B" – Letter dated November 16, 2018 from the Administrative Agent to Project Co
- C. Exhibit "C" – Statement of Claim of CMH against 2423402 Ontario Inc. and Bondfield
- D. Exhibit "D" – Letter dated February 7, 2019 from CMH to Bondfield
- E. Exhibit "E" – Letter dated May 10, 2019 from CMH to Perini Management Services, Inc.

TAB 1

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF THE RECEIVERSHIP OF
2423402 ONTARIO INC.**

BETWEEN:

BANK OF MONTREAL

Applicant

- and -

2423402 ONTARIO INC.

Respondent

**AFFIDAVIT OF EDEN ORBACH
(Sworn on June 7, 2019)**

I, Eden Orbach, of the City of Toronto, in the Province of Ontario, SWEAR AND SAY
THAT:

1. I am a Senior Manager with the Bank of Montreal (the “**Administrative Agent**”). I have been directly involved in the Administrative Agent’s dealings with 2423402 Ontario Inc. (“**Project Co**”), Bondfield Construction Company Limited (the “**Construction Contractor**” or “**Bondfield**”) and Zurich Insurance Company Ltd. (“**Zurich**”) and have had responsibility for managing the senior secured credit facility (the “**Credit Facility**”) provided to Project Co pursuant to the credit agreement between Project Co, as borrower, each of the financial institutions and other entities from time to time parties thereto (the “**Lenders**”), as lenders, and the Administrative Agent, as administrative agent, made as of August 28, 2014, as amended (the “**Credit Agreement**”).
2. I have personal knowledge of the matters and facts sworn to in this affidavit, except where stated to be based on information and belief, in which case, I believe the same to be true.

3. I swore an affidavit on December 5, 2018 in support of an application by the Administrative Agent to appoint Alvarez & Marsal Inc. as 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 “**Receiver**”) and an affidavit on May 6, 2019 in support of the within motion by the Lenders for relief with respect of Zurich (the “**May Affidavit**”). Capitalized terms used herein and not otherwise defined have the meaning ascribed to them in my May Affidavit.

Undisclosed Release

4. I have reviewed the affidavit of Adrian Braganza, sworn May 31, 2019 in relation to this motion (the “**Braganza Affidavit**”). I was astounded to read at paragraph 71 of the Braganza Affidavit that Project Co granted Bondfield a release of “a number of potential claims by Project Co. relating to delay in the Construction Contract, Direct Losses, Indirect Losses or Liquidated Damages under the Construction Contract, any failure to achieve the Substantial Performance Date or the Final Completion Date and any claim by CMH against Project Co.” Mr. Braganza attaches the release at Exhibit “J” to his affidavit (the “**Undisclosed Release**”).

5. At no time prior to receiving the Braganza Affidavit was I, or to my knowledge any Lender, aware of the Undisclosed Release; the Administrative Agent had not been advised of the Undisclosed Release by Zurich, Project Co, Bondfield or any other party.

6. Project Co providing the Undisclosed Release to Bondfield without prior written consent of the Lenders breached both the Contractor Direct Agreement and the Credit Agreement:

(a) Section 9.2 of the Credit Agreement provides as follows:

9.2 Negative Covenants of the Borrower

While any amount owing under this Agreement or any of the other Loan Documents remains unpaid, or the Administrative Agent or the Lenders have any obligations under this Agreement or any of the other Loan Documents, the Borrower covenants with the Administrative Agent and each Lender that it shall not without the prior consent of the Required Lenders:

(16) ***Modifications of Material Project Documents.*** Without the prior written consent of the Lenders, acting reasonably, and subject to Section 9.1(15), (a) terminate, repudiate, vary, alter, amend, supplement, surrender, revise or modify any Material Project Document other than as permitted pursuant to the Lenders' Direct Agreement, (b) waive any default or breach under any Material Project Document [including the Construction Contract], (c) take any other action in connection with any Material Project Document that could reasonably be expected to have a Material Adverse Effect or (d) permit the Contractor to do or consent to any of the foregoing; provided that the Borrower or the Contractor may waive any default or breach under a Material Subcontract provided such waiver could not reasonably be expected to have a Material Adverse Effect;

(19) ***Settlement of Claims.*** After the occurrence and during the continuance of a Default or Event of Default, agree or permit the Contractor to agree to any settlement in respect of liquidated damages, warranty claims or other claims relating to the Work without the prior written consent of the Lenders, acting reasonably, unless such claims are to be funded by proceeds of Insurance, CMH or the Contractor. [emphasis added]

(b) Section 5.1 of the Contractor Direct Agreement provides:

5.1 Covenants of the Contractor

The Contractor covenants with the Administrative Agent and Lenders as follows:

(1) ***Credit Agreement Covenants.*** The Contractor shall comply with, and duly perform all obligations in respect of those covenants set out in Section 9 of the Credit Agreement in which Project Co has undertaken to cause the Contractor to comply and perform, in each case in accordance with their terms, and shall ensure that all amounts received or receivable by the Contractor from CMH are, where applicable, applied in accordance with the relevant provisions of the Credit Agreement, the Irrevocable Direction and the Material Project Documents. [emphasis added]

Moreover, in section 3.5 of the Contractor Direct Agreement, Bondfield agrees that "it will not, without prior written consent of the Administrative Agent, agree to amend, modify or waive any material provision of any Relevant Project Document" and at section 3.6 Bondfield acknowledges receipt of a fully executed copy of the Credit Agreement.

7. Numerous Events of Default under the Credit Agreement had occurred and were continuing at the date of the Undisclosed Release:
 - (a) Attached hereto as **Exhibit "A"** is a copy of the letter dated August 13, 2018 from CMH to the Administrative Agent providing a copy of the Project Co Default Notice that it had sent to Project Co dated August 10, 2018, triggering a default under the Construction Contract, which also constituted a default under the Credit Agreement. Such defaults were ongoing as at October 19, 2018; and
 - (b) Various defaults were summarized in a letter from the Administrative Agent to Project Co dated November 16, 2018, which is attached hereto as **Exhibit "B"**. Among other things, certain construction liens were registered against the Project Site as early as April 25, 2018.
8. The effect of the Undisclosed Release is to relieve Bondfield of a specific risk that it assumed under the Construction Contract as a part of the structure of the CMH Project, and also thereby purport to relieve Zurich of its obligation as bonder of that risk, to the detriment of the Lenders:
 - (a) CMH has advised that they will exercise their entitlement under the Project Agreement to set off certain damages they have sustained against the Substantial Completion Payment owing to Project Co. Attached hereto as **Exhibit "C"** is a copy of the Statement of Claim of CMH against 2423402 Ontario Inc. and Bondfield seeking, among other things, damages in the amount of \$14 million. We understand that CMH intends to set off such damages to the extent permitted under the Project Agreement (which has a \$10 million cap for such set-off subject to limited exceptions);
 - (b) In the design of the IO model, and in the CMH Project, this risk of set off is borne by the contractor (Bondfield) by way of back-to-back set off under the Construction Contract. This risk allocation structure is important because the actions or inactions by the contractor (not actions by the contractor-controlled Project Co) are the most likely cause of losses to be set-off under the Project

Agreement and the contractor is in the best position to control such risks. Consistent with the risk allocation structure, on the CMH project, Bondfield's actions and inactions as Contractor have led to CMH losses;

- (c) For the Lenders to Project Co., ensuring that the risk of set off by CMH under the Project Agreement is contractually backstopped by Bondfield under the Construction Contract (and in turn by the Performance Bond) was a primary reason that any waiver or release of claims (such as the one in the Undisclosed Release) was expressly prohibited under the Credit Agreement and the Contractor Direct Agreement. The Lenders would never have consented to Project Co and Bondfield entering into the Undisclosed Release.

Bondfield Receipts

- 9. At paragraph 96 of the Braganza Affidavit, he references the Zurich allegation that \$2.5 million is due and owing to Bondfield but not paid. Attached as Appendix "C" to the Report of Ernst & Young Inc. in its capacity as court-appointed monitor of Bondfield Construction Company Limited, among others (the "**Monitor**"), re: the Cambridge Memorial Hospital Capital Development Project dated May 31, 2019 (the "**Monitor's Report**") is a schedule that sets out the "Outstanding Billing Amount (CDN\$) (incl. HST)" for Bondfield ("**Appendix C**") in support of the \$2.5 million figure.
- 10. The Lenders do not agree with the assessment of outstanding amounts in Appendix C and dispute the statements in the Monitor's Report at paragraph 13 and in Appendix "B" at "Note (a)" to the effect that Bondfield did not receive any payments from Project Co after October 2017. As such, after receiving the Monitor's Report, Lender's counsel and I provided additional information to the Monitor (summarized below) with respect to Bondfield receipts. While key information in this regard had previously been relayed to Zurich (including as reflected in the email at Exhibit "W" to the Braganza Affidavit), it appears that such information had not previously been relayed to the Monitor by Bondfield or Zurich. Having now just recently received this information, we understand that the Monitor is in the process of reviewing it.

11. Based on this information, and as described further below, I believe that Appendix C does not reflect all payments to or at the direction of Bondfield by Project Co. It appears to consider only payments received in Bondfield's main account at National Bank and thereby significantly overestimates amounts that are certified but unpaid to Bondfield. In addition, it does not reflect set-off by CMH against the "extra billings."

Payment Applications

12. Bondfield billing applications numbers 1-43 – applications certified by the Lender's technical advisor Pelican Woodcliff Inc. (the "LTA") before the first construction lien was filed on the Site - total \$129,727,692.07, inclusive of HST. Of note, the certification dates listed in Appendix C reflect only certification by the CMH certifier and not the LTA. Certification by the LTA occurs after certification by the CMH certifier. Significantly, only billing applications #1-43 were certified by the LTA prior to the defaults caused by the registration of the first construction lien on April 25, 2018.
13. I have reviewed the Project Co account at the Bank of Montreal into which the Lenders advanced funds pursuant to the Credit Agreement and from which Project Co made payments to and at the direction of Bondfield. Based on that review:
 - (a) **Advances to Project Co:** the Lenders advanced \$122,214,177.80 to Project Co pursuant to the Credit Agreement. According to Report #49 on the Status of the Project at November 30, 2018 prepared by Pelican Woodcliff Inc., the Lenders' technical advisor, Project Co also received HST input tax credits totalling \$14,898,793.00 as of April 30, 2018. After deducting amounts paid by Project Co to the Lenders in respect of the financing, Project Co received \$129,612,723.80 inclusive of HST input tax credits, which was available for payment to Bondfield. This does not include the legislative holdback, which is being held back by CMH, or any amounts in respect of change orders, which are discussed further below;
 - (b) **Advances from Project Co to Bondfield:** a total of \$129,415,377.12 was advanced from Project Co to Bondfield or as directed by Bondfield principals as follows:

- (i) Project Co paid \$126,883,684.73 to the Bondfield account at National Bank;
 - (ii) Project Co also paid \$2,531,692.39 at the direction of the Bondfield principals to or on behalf of Bondfield as follows:
 - A. \$1,196,877.11 deposited to the Italian Canadian Savings and Credit Union via cheques made out to 2304288 Ontario Inc. (April 9, 2015 - \$400,000; July 6, 2015 - \$200,000; August 19, 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 (the “**BMO Accounts**”) 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).
14. The difference between the amount billed in Bondfield billing applications #1-43, on the one hand, and the amount advanced by the Lenders to Project Co plus HST input tax credits (as of April 30, 2018) less amounts paid by Project Co to the Lenders in respect of the financing, on the other hand, is only \$114,968.27. Of note, there may have been additional HST input tax credits received after April 30, 2018.
15. The difference between the amount billed in Bondfield billing applications #1-43 and the amount advanced from Project Co to Bondfield or as directed by Bondfield principals is only \$312,314.95. This does not include any HST input tax credits received directly by Bondfield in respect of the CMH project.
16. The remaining Bondfield billing applications (numbers 44-55) were certified by the LTA after April 25, 2018 – after the defaults arose under the Credit Facility, with construction liens registered on the Site. According to Appendix C such billing applications total \$340,302.00.

Post-October 2017 Payments

17. The following chart indicates the amounts advanced by Project Co to Bondfield after October 2017 according to the Project Co banking records (contrary to the “Bondfield records” reflected in the Monitor’s Report):

	Payment from Project Co to Bondfield Account at National Bank	Payment from Project Co to Bondfield BMO Accounts
Nov 7, 2017	\$1,225,000	
Dec 6, 2017	\$440,000	
Dec 29, 2017	\$525,000	
Feb 6, 2018		\$617,000
Feb 14, 2018		\$117,815.28
Apr 25, 2018		\$600,000
Total	\$2,190,000	\$1,334,815


Change Orders or "Extra Billings"

18. Appendix "C" to the Monitor's Report also lists "Extra billings" X-009 to X-026 totaling \$1,243,844 that the Monitor indicates are outstanding to Bondfield. Attached hereto as **Exhibit "D"** is a copy of a letter dated February 7, 2019 from CMH to Bondfield advising that, as of February 1, 2019, amounts due to CMH by Project Co on account of unpaid utilities and parking charges aggregated to \$1,089,252.64 (including HST and Payment Compensation Amount) and that CMH was setting off as against certificates for payment numbers 9-22, which totaled \$1,072,133.73 (including HST).

19. In the February 7, 2019 letter, CMH also notes that, pursuant to the Project Agreement, "CMH hereby sets off against all Additional CMH Payments currently due or which may hereafter become payable to Project Co, the Amounts Due to CMH as such may increase with the passage of time. As a result of such set off, no payment on account of the Additional CMH Payments will be made to Project Co."

“As of March 31, 2019, CMH is owed \$1,365,125 from [Project Co] for electricity, water, steam, parking and fire watch costs related to the Capital Redevelopment Project. CMH has offset \$1,152,235 against this amount owing, leaving a net amount that is still owed [to CMH from Project Co] of \$212,894 as of the end of March (please note that the \$1,152,235 amount represents the sum of Change Order Applications #9 through #25)...”

22. I swear this affidavit in support of the motion by the Lenders for relief as against Zurich and for no other or improper purpose.


Eden Orbach

TAB A




700 Coronation Blvd.
Cambridge, ON
N1R 3G2
www.cmh.org

Ref# CRP18_0145

August 13, 2018

Sent via Fax and Email

Mr. James Di Giacomo
Managing Director, Underwriting and Syndications
Corporate Finance Division
BMO Bank of Montreal
11th Floor, 100 King Street West
Toronto, Ontario, M5X 1A1

This is Exhibit "A" referred to in the
affidavit of Eden Drbach
sworn before me, this 7th
day of June, 2019.

COMMISSIONER FOR TAKING AFFIDAVITS

Dear Mr. Di Giacomo:

Re: Cambridge Memorial Hospital ("CMH") Capital Redevelopment Project (the "Project")
Re: Project Agreement dated August 28, 2014 between CMH and 2423402 Ontario Inc. ("Project Co")
Re: Lender's Direct Agreement dated August 28, 2014 ("LDA") among CMH, Bank of Montreal, and Project Co
Re: Notice of Project Co Events of Default

This letter constitutes the Project Co Default Notice referred to in Section 6.1 of the LDA.

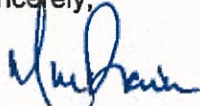
Attached to this letter is a copy of the notice of Project Co Events of Default delivered to Project Co on August 10, 2018 in accordance with Section 26.3(a) of the Project Agreement.

The attached notice sets out the nature of the alleged default as required by Section 6.2(a) of the LDA. In addition to the information contained in the attached notice, we can advise that this morning (approximately 9:05am) there were only 11 workers on Site.

CMH reserves all of its rights and remedies under the LDA and the Project Agreement, and looks forward to hearing from you regarding the Agent's exercise of the options available under the LDA regarding this Project Co Default Notice.

Capitalized terms not defined in this letter shall have the meanings given to them in the LDA.

Sincerely,



Mike Preciw
Vice President, Finance and Corporate Services, CFO and CIO

Attachment

- c. Denise McNally
Infrastructure Ontario
- c. Danny Polny
Infrastructure Ontario
- c. John Aquino
2423402 Ontario Inc.

Ref# CRP18_143

August 10, 2018

Sent Via Fax and E-Mail; Original sent by Regular Mail

2423402 Ontario Inc.
407 Basaltic Road
Concord, ON L4K 4W8

Attention: John Aquino

Dear Mr. Aquino:

Re: Cambridge Memorial Hospital ("CMH") Capital Redevelopment Project (the "Project")

Re: Project Agreement dated August 28, 2014 (the "Project Agreement") between CMH and 2423402 Ontario Inc. ("Project Co")

Re: Notice of Events of Default

This letter constitutes notice of several separate and distinct Project Co Events of Default and is being delivered pursuant to Section 26.3(a) of the Project Agreement. This letter is in addition to and in no way overrides or supplants any of CMH's prior written notices of prior Project Co Events of Default.

CMH provides notice of the following:

1. A Project Co Event of Default pursuant to Section 26.1(a)(ii) of the Project Agreement, in that Project Co will fail to achieve Substantial Completion by the Longstop Date.

Project Co has not yet achieved Interim Completion and the Project is now 20 months beyond the Scheduled Interim Completion Date of November 30, 2016. Project Co's latest schedule dated July 5, 2018 estimates that Interim Completion will be achieved on September 7, 2018 and that Substantial Completion will be achieved February 17, 2021.

The Scheduled Substantial Completion Date is March 31, 2019 and the Longstop Date is September 27, 2019. By Project Co's own schedule, it has acknowledged that it cannot achieve Substantial Completion until more than 16 months after the Longstop Date.

Given the amount of work still required to achieve Interim Completion, and the current overall state of the Project, it is evident that Substantial Completion is not achievable and will not be achieved by the Longstop Date, as acknowledged by Project Co in its most recent schedule.

2. A Project Co Event of Default pursuant to Section 26.1(a)(i)(B) of the Project Agreement, in that Project Co has ceased or suspended performing a substantial portion of its business, which has and continues to have a material adverse effect on Project Co's ability to perform its obligations under the Project Agreement.

Project Co was incorporated as a single purpose entity and has been represented in the Project Agreement to be wholly owned by Bondfield Construction Company Limited (the

Contractor under the Project Agreement). Project Co's sole business is carrying out its obligations under the Project Agreement and completing the Project. As confirmed in Section 11.4(a) of the Project Agreement, Project Co was selected to perform the Work, in part, because of its covenant to achieve all key milestone dates, including Interim Completion and Substantial Completion, which were, as set out in Section 11.4(a), "critical to CMH."

Based on Project Co's recent progress draws and CMH's observations, it is clear the Work has effectively ground to a halt. As an example, set out below is a table which contrasts the level of Project Co activity that was projected for the 6 months preceding the Scheduled Interim Completion Date (based on the projected costs of construction for those months shown in Schedule 8 to the Project Agreement), and the value of the actual amounts certified for payment for the past 6 months:

Projected Construction Costs for the 6 Months Prior to Scheduled Interim Completion		Actual Amounts Certified for Payment in the Past 6 Months		Actual vs Projected (as %)
Month	Amount	Month	Amt Cert'd	
June 2016	\$3,610,494	February 2018	\$184,687	5.11%
July 2016	\$2,860,326	March 2018	\$27,241	0.95%
August 2016	\$2,071,656	April 2018	\$45,225	2.18%
September 2016	\$1,254,420	May 2018	\$59,083	4.71%
October 2016	\$1,169,796	June 2018	\$45,354	3.88%
November 2016	\$1,135,200	July 2018	\$22,000 (est)	1.94%
TOTAL	\$12,101,892	TOTAL	\$383,590	3.17%

With Project Co not yet having achieved Interim Completion, and given the amount of remaining work, working at levels noted above is an effective work stoppage by Project Co, and amounts to either cessation or suspension of a substantial portion of Project Co's sole business. Whether voluntary or involuntary, such cessation or suspension of work has and continues to have a material adverse effect on Project Co's ability to perform its obligations under the Project Agreement, which is evidenced by the extensive delays on the Project. In addition, and without limitation, Project Co's effective work stoppage has materially and adversely impacted its ability to meet the general responsibilities and Contract Time requirements set out in Sections 11.1 and 11.2 of the Project Agreement, such as achieving milestone dates and occupancy of the Project as required, performing and completing all Work in a timely and professional manner, not impairing ongoing operation of the Existing Facility, maintaining complete control of the Work, and directing, supervising and coordinating all Work.

3. A Project Co Event of Default pursuant to Section 26.1(a)(iii) of the Project Agreement, in that Project Co made a representation or warranty that was false or misleading when made, and that has or will have a material adverse effect on the performance of the Work.

In Section 7.1(a)(xiv) of the Project Agreement, Project Co represented and warranted to CMH that the Scheduled Substantial Completion Date was a realistic date and was achievable by Project Co performing the Work in accordance with the Project Agreement. Further, in Section 7.1(a)(xv) of

the Project Agreement, Project Co represented and warranted to CMH that Project Co and the Project Co Parties, collectively, had "extensive experience in the construction of health facilities and other public buildings" and had the "necessary high degree of expertise and experience to perform the services required by the Contract Documents, to review and interpret the Contract Documents and to complete the Work in accordance with the standard of care set out in Section 11.2(a)(viii)." That standard includes that Project Co "exercise the standard of care, skill and diligence that would normally be provided by an experienced and prudent contractor supplying similar services for similar hospital projects, in a timely, good and workmanlike manner" [emphasis added].

The Project is critically delayed. Both of the above representations and warranties were apparently false or misleading, in that Project Co knew or ought to have known it was incapable of achieving the key milestone dates and did not have the requisite high degree of expertise and experience in construction of health facilities and other public buildings to complete all requisite Work in a diligent and timely manner. The substantial and ongoing delays in the Project, including the current effective cessation or suspension of the Work, have had and continue to have a material adverse effect on the performance of the Work, as outlined above and below in this letter, and continue to compromise the reputation and integrity of CMH and the Province's health care system, as well as public confidence in that system.

4. A Project Co Event of Default pursuant to Section 26.1(a)(ix) of the Project Agreement, in that Project Co failed to pay the undisputed sum of \$512,078 due to CMH under the Project Agreement (as of June 30, 2018).

Section 11.2(a)(vii) of the Project Agreement requires that Project Co provide all water, heat, light, power, transportation and other facilities and services required for the performance and completion of the Work. Project Co has failed to pay CMH for charges incurred for electricity, water, steam and parking which, as of June 30, 2018, total \$512,078.

5. A continuing Project Co Event of Default pursuant to Section 26.1(a)(viii) of the Project Agreement, in that Project Co failed to remove construction liens registered against the title to the Site.

CMH's Notice of Project Co Event of Default dated May 31, 2018 was issued after Project Co failed to remove two construction liens registered against title to the Site. Project Co responded to that notice by letter dated June 11, 2018, to which CMH replied by letter dated June 29, 2018. In an ongoing breach of Project Co's obligation to remove them, the construction liens of Roque Roofing Inc. and P.J. Daly Contracting Ltd. remain registered against title.

In addition, three new construction liens have been registered, and remain registered against the title to the Site, as follows:

- a. on July 25, 2018 a construction lien in the amount of \$57,399.74 was registered against title to the Site by Ashland Paving Ltd., one of the Project Co Parties, as instrument no. WR1127117;
- b. on August 3, 2018 a construction lien in the amount of \$118,458.44 was registered against title to the Site by Duron Ontario Ltd., one of the Project Co Parties, as instrument no. WR1129621; and
- c. on August 8, 2018 a construction lien in the amount of \$361,600 was registered against title to the Site by Arjo Canada Inc., one of the Project Co Parties, as instrument no. WR1130256.

The failure to remove these three construction liens within, at most, 30 days of their registration will constitute a further Project Co Event of Default pursuant to Section 26.1(a)(viii).

- 6. A pending Project Co Event of Default pursuant to Section 26.1(a)(iv) of the Project Agreement, in that Project Co has breached its obligations under the Project Agreement which have had and will have a material adverse effect on CMH or the ability of CMH to operate the Facility.

Project Co is in breach of its obligations under the Project Agreement in that, among other things, Project Co:

- i. failed to ensure that the initial baseline Construction Schedule has been consistently maintained, subject only to approved extensions in Contract Time, contrary to Sections 12.1(a)(iv)-(ix) of the Project Agreement;
- ii. failed to comply with CMH's repeated requests to increase efforts on the Project, contrary to Section 12.3 of the Project Agreement;
- iii. failed to achieve Interim Completion by the Scheduled Interim Completion Date, contrary to Sections 11.1(a)(i)(B) and 11.12(c) of the Project Agreement;
- iv. will not and cannot achieve Substantial Completion by the Scheduled Substantial Completion Date, as acknowledged in Project Co's most recent schedule, contrary to Sections 11.1(a)(i)(C) and 11.12(c) of the Project Agreement;
- v. will not and cannot achieve Substantial Completion by the Longstop Date, as acknowledged in Project Co's most recent schedule, contrary to Section 26.1(a)(ii) of the Project Agreement;
- vi. failed to obtain CMH's written approval to changes in the critical path, contrary to Section 12.2(a) of the Project Agreement;
- vii. failed to remove liens registered against the title to the Site, contrary to Sections 11.22(a) and (c) and 26.1(a)(viii) of the Project Agreement;
- viii. failed to correct defective work, contrary to Sections 11.16(a) and 36.2 of the Project Agreement.

The above breaches of the Project Agreement have had and will have a material adverse effect on CMH and on CMH's ability to operate the Facility. In particular, and without being exhaustive:

- a. Ongoing operations of the hospital have been negatively impacted. Notably, CMH has been forced to operate with a divided Emergency Department (Triage in one

area and the remaining Emergency Department in another). This has significantly extended patient wait times to unacceptable lengths, has caused significant increased costs of operation in the Triage area, and had severe negative impacts on patient and staff satisfaction and CMH's ability to effectively and expeditiously treat emergency patients;

- b. CMH has been required to provide intensive care unit (ICU) services in a temporary, poorly designed space for an unduly extended period of time. It has had similar detrimental impacts on costs of operation, patient treatment, and patient and staff satisfaction;
- c. The clinical expansion and increased patient capacity expected by the Ministry of Health and Long-Term Care and the local community continues to be significantly delayed, impacting CMH's ability to meet public needs and expectations, as well as financially impacting necessary funding tied to available beds that would permit CMH to better serve the health needs of the community;
- d. CMH has been unable to install state of the art equipment and new technology as intended, since space where such new equipment and technology is to be installed has not been completed. This restricts CMH's ability to provide better treatment to patients, which is a core objective of having undertaken the Project;
- e. CMH has incurred significant increased capital costs as a result of the extended duration of the construction, such as increased project management staff and contract administration costs;
- f. Project Co's unreliable schedules and *ad hoc* cancellation of planned activities have severely impacted CMH's organizational planning for the Existing Facility and the Facility;
- g. Because of Project Co's delays, delivery of CMH's purchased diagnostic imaging equipment has preceded the completion of renovations. This will result in added and increased costs to CMH, because this equipment will have to be relocated once the Project is complete.

In accordance with Section 26.1(a)(iv)(A) of the Project Agreement, CMH requires Project Co to immediately commence and thereafter continue to remedy each breach of the Project Agreement and to put forward, within 5 Business Days of receipt of this letter, a reasonable plan and schedule for diligently remedying each breach. Project Co's failure to do so will result in a Project Co Event of Default.

Also, in accordance with Section 12.3 of the Project Agreement, CMH requires that Project Co promptly increase efforts on the Project, including adding more personnel during regular times and during periods of time for which overtime may be required to comply with the approved construction schedule. Such increased efforts should be included in the plan and schedule for remedying the above breaches as required by Section 26.1(a)(iv)(A)(II) of the Project Agreement.

7. A pending Project Co Event of Default pursuant to Section 26.1(a)(v) of the Project Agreement, in that Project Co has effectively abandoned the Work.

Work currently progressing at the Site is *de minimis* (for example, on the morning of August 7, 2018 there were a total of 10 workers on Site). It is CMH's view that such *de minimis* Work constitutes abandonment of the Project by Project Co without justification.

Accordingly, CMH hereby makes written request pursuant to Section 26.1(a)(v) of the Project Agreement that Project Co return to the Site and continue all outstanding Work. Project Co's failure to do so within 3 Business Days will result in a Project Co Event of Default.

8. A Project Co Event of Default pursuant to Section 26.1(a)(xiv) of the Project Agreement, in that there is a default by a Project Co Party under one of the Implementing Agreements.

The Construction Contract includes parallel obligations on the Contractor, one of the Project Co Parties, to achieve the key Project milestones, including achieving Substantial Completion by the Longstop Date, and to remove liens registered against the title to the Site. For the reasons set out above, the Contractor is in breach of its obligations under the Construction Contract, one of the Implementing Agreements, which constitutes a Project Co Event of Default under Section 26.1(a)(xiv) of the Project Agreement.

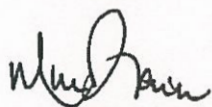
Be advised that, if Project Co does not promptly correct or cure the Project Co Events of Default, or otherwise promptly provide CMH with an acceptable plan and schedule to do so, CMH may exercise its remedies pursuant to Section 26.3 of the Project Agreement, without prejudice to any other right or remedy that CMH may have.

A copy of this letter is being directed to the Agent in accordance with Section 26.3(a) of the Project Agreement and the terms of the Lender's Direct Agreement.

Capitalized terms not defined in this letter have the meanings given to them in the Project Agreement.

CMH continues to reserve all of its rights and remedies under the Project Agreement.

Yours truly,



Mike Prociw
Vice President, Finance and Corporate Services, CFO and CIO

- c. Steven Aquino
Bondfield Construction Company Ltd.
- c. Denise McNally
Infrastructure Ontario
- c. James Di Giacomo
BMO Bank of Montreal

TAB B

November 16, 2018

CONFIDENTIAL

Via Facsimile

2423402 Ontario Inc.
407 Basaltic Road
Concord, ON L4K 4W8

**Attention: Mr. Steven Aquino
President**

This is Exhibit "B" referred to in the
affidavit of Eden Orbach
sworn before me, this 7th
day of June, 2019.

COMMISSIONER FOR TAKING AFFIDAVITS

Re: Credit Agreement dated as of August 28, 2014, between 2423402 Ontario Inc. (the "Borrower"), Bank of Montreal, as administrative agent (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")

Dear Mr. Aquino:

Reference is made to the Credit Agreement and the letter from Cambridge Memorial Hospital to the Agent, copying you, dated August 13, 2018 (the "CMH Letter"). Capitalized terms not otherwise defined herein shall have the respective meanings assigned to them in the Credit Agreement.

Construction Lien Event of Default

Claims for lien have been registered against the Site as follows:

- 1) Instrument No. WR1108973, registered April 25, 2018, being a construction lien in favour of Roque Roofing Inc. in the amount of \$290,544 and Instrument No. WR1119300, registered June 15, 2018, being a Certificate of Action respecting same;
- 2) Instrument No. WR1127117, registered July 25, 2018, being a construction lien in favour of Ashland Paving Ltd. in the amount of \$57,400 and Instrument No. WR1131980, registered August 16, 2018, being a Certificate of Action respecting same;
- 3) Instrument No. WR1129621, registered August 3, 2018, being a construction lien in favour of Duron Ontario Ltd. in the amount of \$118,458;
- 4) Instrument No. WR1130256, registered August 8, 2018, being a construction lien in favour of Arjo Canada Inc. in the amount of \$361,600 and Instrument No. WR1139102, registered September 17, 2018, being a Certificate of Action respecting same;
- 5) Instrument No. WR1131014, registered August 10, 2018, being a construction lien in favour of Paramount Painting & Decorating (London) Inc. in the amount of \$95,832 and Instrument No. WR1140283, registered September 21, 2018 being a Certificate of Action respecting same;

- 2 -

- 6) Instrument No. WR1133546, registered August 23, 2018, being a construction lien in favour of Stonhard (Stonhard Division, RPM Canada) in the amount of \$105,512 and Instrument No. WR1143833, registered October 9, 2018, being a Certificate of Action respecting same;
- 7) Instrument No. WR1134480, registered August 27, 2018, being a construction lien in favour of Toromont Industries Ltd. in the amount of \$7,332 and Instrument No. WR1149667, registered November 5, 2018, being a Certificate of Action respecting same;
- 8) Instrument No. WR1137206, registered September 7, 2018, being a construction lien in favour of DDK Marketing Inc. in the amount of \$23,000;
- 9) Instrument No. WR1140186, registered September 21, 2018, being a construction lien in favour of Riccardo Persi in the amount of \$63,159;
- 10) Instrument No. WR1140559, registered September 25, 2018, being a construction lien in favour of Swisslog Healthcare in the amount of \$77,109; and
- 11) Instrument No. WR1146157, registered October 19, 2018, being a construction lien in favour of Biggs and Narciso Constructions Services Inc. in the amount of \$187,072.

Failure to discharge these construction liens constitutes an Event of Default pursuant to Section 10.1(16) of the Credit Agreement.

Failure to Pay and Liquidated Damages Events of Default

As of the date hereof, a payment in the amount of \$451,916.92 is due and payable by the Borrower to the Agent on account of interest, standby fees, administrative agent fees and other Borrowing Costs and Transaction Expenses.

Failure by the Borrower to make when due any payment of interest or Fees when required under the Credit Agreement is an Event of Default pursuant to Section 10.1(1) of the Credit Agreement. In addition, the Contractor has failed to pay Liquidated Damages when due under the Contractor Support Agreement in the aggregate amount of \$451,916.92, dated as of August 28, 2014, which constitutes an Event of Default under Section 10.1(5) of the Credit Agreement.

CMH Notice of Default

In the CMH Letter, CMH provided notice to the Agent of the following defaults by the Borrower under the Project Agreement:

- 1) The Borrower is unable to achieve Substantial Completion by the Longstop Date, which is a Project Co Event of Default under Section 26.1(a)(ii) of the Project Agreement;
- 2) The Borrower has ceased or suspended performing a substantial portion of its business, which has and continues to have a material adverse effect on the Borrower's ability to perform its obligations under the Project Agreement, which is a Project Co Event of Default under Section 26.1(a)(i)(B) of the Project Agreement;

- 3) The Borrower made a representation or warranty that was false or misleading when made, and that has or will have a material adverse effect on the performance of the Work, which is a Project Co Event of Default under Section 26.1(a)(iii) of the Project Agreement, namely:
- a. in section 7.1(a)(xiv) of the Project Agreement, the Borrower represented and warranted to CMH that the Scheduled Completion Date was a realistic date and was achievable by Project Co performing the Work in accordance with the Project Agreement; and
 - b. in section 7.1(a)(xv) of the Project Agreement, the Borrower represented and warranted to CMH that Project Co and the Project Co Parties, collectively, had "extensive experience in the construction of health facilities and other public buildings" and had the "necessary high degree of expertise and experience to perform the services required by the Contract Documents, to review and interpret the Contract Documents and to complete the Work in accordance with the standard of care set out in Section 11.2(a)(viii)."
- 4) The Borrower has failed to pay CMH for charges incurred for electricity, water, steam and parking in the amount of \$512,078 (as of June 30, 2018), which is a Project Co Event of Default pursuant to Section 26.1(a)(ix) of the Project Agreement;
- 5) The Borrower has failed to remove construction liens registered against title to the Site as noted above, which is a Project Co Event of Default under Section 26.1(a)(viii) of the Project Agreement;
- 6) The Borrower has breached certain obligations under the Project Agreement which has or will have a material adverse effect on CMH or the ability of CMH to operate the Facility; which is a Project Co Event of Default under Section 26.1(a)(iv) of the Project Agreement, namely:
- a. the Borrower failed to ensure that the initial baseline Construction Schedule has been consistently maintained, subject only to approved extensions in Contract Time, contrary to Sections 12.1(a)(iv)-(ix) of the Project Agreement;
 - b. the Borrower failed to comply with CMH's repeated requests to increase efforts on the Project, contrary to Section 12.3 of the Project Agreement;
 - c. the Borrower failed to achieve Interim Completion by the Scheduled Interim Completion Date, contrary to Sections 11.1(a)(i)(B) and 11.12(c) of the Project Agreement;
 - d. the Borrower will not and cannot achieve Substantial Completion by the Scheduled Substantial Completion Date, contrary to Sections 11.1(a)(i)(C) and 11.12(c) of the Project Agreement;
 - e. the Borrower will not and cannot achieve Substantial Completion by the Longstop Date, contrary to Section 26.1(a)(ii) of the Project Agreement;
 - f. the Borrower failed to obtain CMH's written approval to changes in the critical path, contrary to Section 12.2(a) of the Project Agreement;

- g. the Borrower failed to remove liens registered against the title to the Site, contrary to Sections 11.22(a) and (c) and 26.1(a)(viii) of the Project Agreement; and
 - h. the Borrower failed to correct defective work, contrary to Sections 11.16(a) and 36.2 of the Project Agreement;
- 7) The Borrower has effectively abandoned the Work, which is a Project Co Event of Default under Section 26.1(a)(v) of the Project Agreement; and
- 8) The Contractor will fail to achieve Substantial Completion by the Longstop Date and has failed to remove the construction liens that have been registered against the Site as noted above, which is in breach of its obligations under the Construction Contract and accordingly a Project Co Event of Default under Section 26.1(a)(xiv) of the Project Agreement.

The service by CMH of a Project Co Default Notice as provided for in section 6.1 of the Lenders' Direct Agreement constitutes an Event of Default under Section 10.1(32) of the Credit Agreement. Similarly, certain of these facts also constitute separate Events of Default under the Credit Agreement, including that there is an Event of Default under Section 10.1(22) for suspending, abandoning, cancelling or terminating the Work or any material part thereof other than in accordance with the terms of the Material Project Documents.

Performance Bond and Demand Bond

Notice is hereby given that separate Events of Default have occurred and are continuing pursuant to *inter alia* Sections 10.1(1), 10.1(5), 10.1(16), 10.1(22) and 10.1(32) of the Credit Agreement (the "**Specified Events of Default**").

As notified to you in our letter dated November 5, 2018, the Agent on behalf of the Lenders has made demand of Zurich Insurance Company Ltd. (the "**Surety**") under Demand Bond No. 6342958 dated August 28, 2014 (the "**Contractor Demand Bond**") in respect of the Contractor's failure to pay Liquidated Damages when due under the Contractor Support Agreement.

Be advised that the Agent on behalf of the Lenders will also be making a demand of the Surety under Performance Bond No. 6342957 dated August 28, 2014 for the Project (the "**Contractor Performance Bond**") in respect of the Specified Events of Default which constitute Contractor Events of Default under the Construction Contract.

No Further Loans, Demand for Payment and 244 Notice

As you know, pursuant to Section 8.2(1) of the Credit Agreement, it is a condition precedent to Loan funding that no Default or Event of Default shall have occurred and be continuing. Be advised that the Lenders will not consider any request to waive this condition precedent, and therefore no further Loans will be provided while the Events of Default continue.

Pursuant to section 10.3(1), upon the occurrence of an Event of Default of the nature of the Specified Events of Default and upon notice to you, the Administrative Agent may declare the entire principal amount of all Loans outstanding, all unpaid accrued interest and all fees and other amounts required to be paid by you under the Credit Agreement (including Break Costs

and any Swap Breakage Costs) (collectively, all "Indebtedness") to be immediately due and payable without the necessity of presentment for payment, notice of non-payment and of protest (all of which are expressly waived), together with taking various other actions including exercising rights under or in connection with the Contractor Bonds.

Accordingly, the Agent, on behalf of the Lenders, hereby declares all Indebtedness to be immediately due and payable and demands payment of all such Indebtedness by the date that is ten (10) days from the date hereof. Interest, fees, costs and other amounts will continue to accrue in accordance with the Credit Agreement until the Indebtedness is repaid in full. You should contact the Agent on the date of payment to ascertain the amount then-outstanding on account of the Indebtedness.

Please find enclosed a Notice of Intention to Enforce Security issued under and pursuant to section 244 of the *Bankruptcy and Insolvency Act* (Canada) (the "Notice") together with a consent to early enforcement, which you may execute and return to the undersigned. Unless arrangements satisfactory to the Lenders to repay the Indebtedness in accordance with the foregoing demand are made, the Lenders will take such actions as they deem appropriate, including enforcement of the Security (as defined in the Notice). The Lenders also reserve the right to take such interim steps to enforce, preserve or protect the Collateral as it determines is necessary or advisable under the circumstances prior to the expiration of the ten (10) day period, without further notice to you.

The Lenders expressly reserve all of their other rights, powers, privileges and remedies under the Credit Agreement, the other Loan Documents, applicable law or otherwise with respect to any Event of Default (including, without limitation, the Specified Events of Default) now existing or hereafter arising under the Credit Agreement or any of the other Loan Documents, including without limitation, the right to further call upon the Contractor Demand Bond and the Contractor Performance Bond. The failure of any Lender to exercise any such rights, powers, privileges and remedies is not intended, and shall not be construed, to be a waiver of any such Events of Default (including, without limitation, the Specified Events of Default). The Lenders may elect to exercise any or all of their rights, at their sole option, at any time hereafter, without the necessity of any further notice, demand or other action on the part of the Lenders.

Nothing contained in this letter or any delay by the Agent or any Lender in exercising any rights, powers, privileges and remedies under the Credit Agreement, any other Loan Document, or applicable law with respect to the Specified Events of Default or any other Default or Events of Default now existing or hereafter arising under the Credit Agreement or any of the other Loan Documents 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, Defaults (including, without limitation, the Specified Events of Default) now existing or hereafter arising under the Credit Agreement or any of the other Loan Documents.

The holding of any discussions between or among any or all of the Agent, the Lenders, the Borrower, the Surety, CMH or Infrastructure Ontario regarding the administration of the Loans or proposals regarding amendments to, or modifications or restructurings of the Credit Agreement or any Loan Document shall not constitute any waiver of any Default or Event of Default (including, without limitation, the Specified Events of Default), or an agreement to forbear from the exercise of the Agent's or any Lender's rights and remedies under the Credit Agreement or any other Loan Document, or applicable law, nor shall it be construed as an undertaking by the

- 6 -

Agent, or any Lender to continue such discussions or to enter into any such amendments, modifications or restructurings.

Yours very truly,

BANK OF MONTREAL, as Agent

By: 

Name:

Title:

Eden Orbach
Senior Manager

cc: Cambridge Memorial Hospital
Steven Aquino, Bondfield Construction Company Ltd.

FORM 86
Notice of Intention to Enforce Security
(Rule 124)

TO: 2423402 Ontario Inc. (the "Debtor"), an insolvent corporation

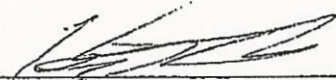
TAKE NOTICE THAT:

1. Bank of Montreal, not in its individual capacity but solely as administrative agent (the "Agent") for and on behalf of itself and the Secured Parties (as defined in the General Security Agreement made as of August 28, 2014 between the Debtor and the Agent (the "GSA")) (the "Lenders"), a secured creditor, intends to enforce its security on the Debtor's property, being all of the Debtor's present and after-acquired personal and real, movable and immovable, property and other assets, including without limitation all of the Collateral as defined in the GSA.
2. The security that is to be enforced is *inter alia* in the form of the GSA granted by the Debtor to and in favour of the Agent for the benefit of each Secured Party and all other Security Documents as defined in the Credit Agreement made as of August 28, 2014 between the Debtor, the Lenders and the Agent (collectively, the "Security").
3. The total amount of indebtedness secured by the Security, as of November 16, 2018, is CAD \$122,828,153.43 together with accrued interest and all other costs, charges and expenses, which continue to accrue.
4. The Agent will not have the right to enforce the Security until after the expiry of the 10-day period after this notice is sent, unless the Debtor consents to an earlier enforcement.

DATED at Toronto, Ontario, this 16th day of November, 2018.

BANK OF MONTREAL, as Agent

Per: _____



Eden Orbach
Senior Manager

CONSENT TO EARLY ENFORCEMENT

The undersigned, 2423402 Ontario Inc., being the Debtor referenced in the Notice of Intention to Enforce Security to which this consent is annexed (the "Notice"), does hereby consent, in accordance with Section 244(2) of the *Bankruptcy and Insolvency Act* (Canada), to the early enforcement by Bank of Montreal, not in its individual capacity but solely as administrative agent (the "Agent") for and on behalf of itself and the Secured Parties (as defined in the General Security Agreement made as of August 28, 2014 between the Debtor and the Agent), of all Security, as defined in the Notice, notwithstanding the fact that the requisite 10-day period, as prescribed by Section 244(2) of the *Bankruptcy and Insolvency Act* (Canada), has not yet elapsed.

DATED at _____, Ontario, this ____ day of _____, 2018.

2423402 ONTARIO INC.

Per: _____

Name: _____

Title: _____

TAB C

CV-18-00001459-0000

Court File No.:

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

CAMBRIDGE MEMORIAL HOSPITAL

Plaintiff

- and -

2423402 ONTARIO INC. and
BONDFIELD CONSTRUCTION COMPANY LIMITED

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$5,000 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400.00 for costs and have the costs assessed by the court.

This is Exhibit 11 referred to in the
affidavit of Eden Drbach
sworn before me, this 7th
day of June, 2019.

ACOMMISSIONER OF THE COURT

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: November 16, 2018

Issued by PATRICIA ARROWSMITH
Local registrar

Address of court office 85 Frederick Street
Kitchener, ON
N2H 0A7

TO: 2423402 ONTARIO INC.
407 Basaltic Road
Concord, Ontario
L4K 4W8

**AND TO: BONDFIELD CONSTRUCTION
COMPANY LIMITED**
407 Basaltic Road
Concord, Ontario
L4K 4W8

CLAIM

1. The plaintiff, Cambridge Memorial Hospital ("**CMH**"), claims from the defendants or either of them:

- (a) damages in the amount of \$14,000,000;
- (b) pre-judgment and post-judgment interest on all amounts found due and owing to CMH in accordance with the terms of the Project Agreement described below or, in the alternative, pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (c) its costs of this action together with all applicable taxes; and
- (d) such further and other relief as this Honourable Court deems just.

2. CMH is a non-share capital corporation incorporated under the laws of the Province of Ontario and is a public hospital under the *Public Hospitals Act* (Ontario) located in Cambridge, Ontario.

3. The defendant 2423402 Ontario Inc. ("**Project Co**") is a corporation incorporated under the laws of the Province of Ontario. Project Co is a single-purpose entity and is wholly owned by the defendant Bondfield Construction Company Limited ("**Bondfield**").

4. Bondfield is a corporation incorporated under the laws of the Province of Ontario.

5. On or about August 28, 2014:

- (a) CMH entered into a written agreement with Project Co (the "**Project Agreement**") for the construction, installation, testing, commissioning and completion of new hospital facilities and the renovation of existing hospital facilities located in Cambridge, Ontario (the "**Project**");
- (b) Project Co entered into a construction contract with Bondfield whereby the latter agreed to perform all of Project Co's obligations contained in the Project Agreement with respect to the construction of the Project;

- (c) CMH entered into a written agreement (the "**Guarantee**") with Bondfield whereby the latter guaranteed to CMH, as a direct obligation, the full and prompt performance and observance by Project Co of each and every obligation contained in the Project Agreement with respect to the construction of the Project.

6. The Project is an alternative financing and procurement (also known as "P3") project and complies with the Ministry of Economic Development, Employment and Infrastructure's principles for such projects.

7. The Project Agreement provides, among other things, that:

- (a) time is of the essence;
- (b) Project Co shall perform and complete the Work (as that term is defined in the Project Agreement) so as to satisfy and in strict accordance with the contract documents and the construction schedule;
- (c) Project Co shall provide all of the labour, products, tools, construction machinery, equipment, water, heat, light, power, transportation and other facilities and services required for the performance and completion of the Work;
- (d) the Work shall be free from defects and deficiencies and/or any defects or deficiencies would be remedied promptly and, in any event, prior to Final Completion (as that term is defined in the Project Agreement);
- (e) subject to adjustment to the contract time Project Co shall:
 - (i) achieve Interim Completion (as that term is defined in the Project Agreement) by November 30, 2016;
 - (ii) achieve Substantial Completion (as that term is defined in the Project Agreement) by March 31, 2019; and
 - (iii) achieve Final Completion by May 15, 2019.

8. CMH states that Project Co breached the Project Agreement and/or was negligent in its performance of the Project Agreement in that, among other things, Project Co:

- (a) failed to achieve Interim Completion by the scheduled Interim Completion date (November 30, 2016) and, in fact, has not achieved Interim Completion as of the date of issuance of this Statement of Claim;
- (b) has advised that it will not achieve Substantial Completion until February 17, 2021 or later, which is well past the scheduled Substantial Completion date (March 31, 2019);
- (c) has significantly decreased all activity on the Project;
- (d) failed to pay charges incurred by Project Co for electricity, water, steam and parking;
- (e) failed to pay subcontractors and suppliers and failed to remove construction liens registered by Project Co's unpaid subcontractors and suppliers;
- (f) failed to take over the defence of construction lien actions brought against CMH by Project Co's unpaid subcontractors and suppliers;
- (g) failed to maintain the construction schedule for the Project and failed to obtain CMH's approval to changes in the critical path of the Project;
- (h) failed to comply with CMH's repeated demands to increase efforts and resources on the Project;
- (i) failed to correct defective work, including defective flooring, fireproofing coatings, roofing and exterior cladding systems.

9. On March 12, 2018 CMH issued a Notice of Project Co Event of Default under the Project Agreement due to Project Co's failure to pay to CMH amounts then owing for utilities and parking charges. Project Co cured this event of default on or about April 10, 2018.

10. On May 31, 2018 CMH issued a further Notice of Project Co Event of Default under the Project Agreement due to Project Co's failure to remove construction liens that had been registered by Project Co's unpaid subcontractors and suppliers. This event of default was never cured.

11. On August 3, 2018 Project Co was noted in default by its lenders under a credit agreement entered into by Project Co in connection with Project Co's financing of the Project, for failing to pay amounts owing on account of interest and other charges under the credit agreement.

12. On August 10, 2018 CMH issued further Notice of Project Co Events of Default under the Project Agreement due to, among other things:

- (a) Project Co's anticipated failure to achieve Substantial Completion by the Longstop Date (as that term is defined in the Project Agreement);
- (b) Project Co's failure to provide sufficient resources to maintain the Project schedule;
- (c) Project Co's failure to pay to CMH amounts owing for utilities and parking charges;
- (d) Project Co's failure to remove additional construction liens registered by Project Co's unpaid subcontractors and suppliers.

13. CMH states that Project Co breached the Project Agreement and/or was negligent in the performance thereof in that Project Co and/or those for whom Project Co is at law responsible delayed and/or failed to complete satisfactorily the Work by virtue of its failure to provide subcontractors, employees, materials, equipment and services in a timely, competent, proficient and workmanlike manner, resulting in significant delays and deficiencies in Project Co's work, particulars of which include, but are not limited to Project Co's:

- (a) failure to plan, schedule, coordinate, perform and complete the Work in accordance with the contract documents and schedule;
- (b) failure to maintain sufficient and/or experienced supervision and/or workforce and/or resources necessary to complete the Work in a competent, proficient, timely and workmanlike manner;
- (c) failure to properly monitor and maintain the progress of the Work;
- (d) failure to maintain the construction schedule;

- (e) use of defective or improper equipment, materials and/or tools; and
- (f) failure to complete the Work and correct deficiencies.

14. CMH states that as a result of Project Co's delay, its other breaches of the Project Agreement, and/or its negligent performance thereof, CMH has and/or will suffer losses and has and/or will incur costs, expenses and damages estimated at this time in the amount of \$14,000,000, which CMH claims against Project Co and which include, without limitation:

- (a) increased operating costs for the hospital;
- (b) increased ancillary costs, such as project management, supervisory and administrative costs;
- (c) additional fees, costs and expenses charged by consultants;
- (d) additional costs associated with relocating equipment from temporary locations;
- (e) extended equipment warranty costs and losses on the value of equipment;
- (f) increased costs of equipment due to price escalations;
- (g) amounts incurred and paid for water, heat, light, power and other utilities, facilities and services, and other charges and reimbursable expenses which are the responsibility of Project Co;
- (h) labour, material and equipment costs and expenses incurred and/or to be incurred to perform and complete the Work and to correct defects, deficiencies and/or non-compliant items in the Work;
- (i) loss of Ministry of Health and Long-Term Care funding needed for hospital operations.

15. CMH further states that Project Co's delay, its other breaches of the Project Agreement, and/or its negligent performance thereof, have compromised the reputation and integrity of CMH and have caused and will continue to cause adverse impacts on CMH and CMH's ability to operate the hospital. Particulars include:

- (a) CMH has been forced to operate with a divided Emergency Department (Triage in one area and the remaining Emergency Department in another area), resulting in extended patient wait times, increased costs of operation, and negative impacts on patient and staff satisfaction and CMH's ability to effectively and expeditiously treat emergency patients;
- (b) CMH has been required to provide intensive care unit (ICU) services from temporary facilities for an unduly extended period of time, resulting in detrimental impacts on the costs of operation, patient treatment, and patient and staff satisfaction;
- (c) the clinical expansion and increased patient capacity expected by the Ministry of Health and Long-Term Care and the local community have been significantly delayed, thereby impacting CMH's ability to meet public needs and expectations, as well as negatively impacting the funding of hospital operations and CMH's ability to treat patients effectively;
- (d) CMH has been unable to install state of the art equipment and new technology as intended since the planned spaces have not been completed, thereby restricting CMH's ability to provide improved treatment to patients, which was a core objective of having undertaken the Project;
- (e) CMH's organizational planning for the new hospital facilities and the existing hospital facilities have been severely impacted as a result of Project Co's unreliable schedules and cancellation of planned activities.

16. CMH anticipates that it will suffer and incur additional losses and adverse impacts and damages as a result of Project Co's ongoing and continued delays and breaches of the Project Agreement, particulars of which will be provided prior to trial.

17. CMH states that, pursuant to the Guarantee, Bondfield absolutely, unconditionally and irrevocably guaranteed to CMH, as a direct obligation of Bondfield, the full and prompt performance and observance by Project Co of each and every covenant, agreement, undertaking and obligation of Project Co contained in the Project Agreement with respect to the Work.

18. CMH therefore states it is entitled to recover all damages, costs and expenses it incurred and suffered as a result of the matters hereinbefore described from either or both defendants.

CMH proposes that this action be tried at Kitchener.

November 16, 2018

MILLER THOMSON LLP

Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto, ON Canada M5H 3S1

Adam J. Stephens LSO#: 47286N

astephens@millerthomson.com

Tel: 416.595.8572

Fax: 416.595.8695

Cara Shamess LSO#: 48408V

cshamess@millerthomson.com

Tel: 905.532.6610

Fax: 905.660.0139

Lawyers for the Plaintiff

CAMBRIDGE MEMORIAL HOSPITAL
Plaintiff and

2423402 ONTARIO INC. et al.
Defendants

CV-18-00001459-0000³⁴

Court File No.:

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Kitchener

STATEMENT OF CLAIM

MILLER THOMSON LLP
SCOTIA PLAZA
40 KING STREET WEST, SUITE 5800
TORONTO, ON CANADA M5H 3S1

Adam J. Stephens LSO#: 47286N
astephens@millerthomson.com
Tel: 416.595.8572
Fax: 416.595.8695

Cara Shames LSO#: 48408V
cshames@millerthomson.com
Tel: 905.532.6610
Fax: 905.660.0139

Lawyers for the Plaintiff

TAB D



700 Coronation Blvd.
Cambridge, ON
N1R 3G2
www.cmh.org

Ref# CRP19_0025

February 7, 2019

Sent Via Fax and E-Mail

2423402 Ontario Inc.
407 Basaltic Road
Concord, ON L4K 4W8

Attention: John Aquino

Dear Mr. Aquino:

- Re: Cambridge Memorial Hospital ("CMH") Capital Redevelopment Project (the "Project")**
- Re: Project Agreement dated August 28, 2014 (the "Project Agreement") between CMH and 2423402 Ontario Inc. ("Project Co")**
- Re: CMH Set Off Against Additional CMH Payments**

As of February 1, 2019 all liens registered against the title to the Site have been removed and title was clear of liens.

Additional CMH Payments

Prior to February 1, 2019 CMH had withheld payment of Additional CMH Payments identified in certificates for payment nos. 9-22 totalling \$1,072,133.73 (including HST) in accordance with Section 3.1 of Schedule 18 of the Project Agreement.

Amounts Due to CMH by Project Co

As of February 1, 2019 the amounts which are due to CMH by Project Co pursuant to the terms of the Project Agreement on account of unpaid utilities and parking charges aggregate \$1,089,252.64 (including HST and Payment Compensation Amount) (collectively the "**Amounts Due to CMH**"). The Amounts Due to CMH will increase each month as additional charges are incurred but are not paid by Project Co.

CMH Set Off

Pursuant to Section 4.13(a)(i) of the Project Agreement, CMH hereby sets off against all Additional CMH Payments currently due or which may hereafter become payable to Project Co, the Amounts Due to CMH as such may increase with the passage of time. As a result of such set off, no payment on account of the Additional CMH Payments will be made to Project Co.

Capitalized terms not defined in this letter shall have the meanings given to them in the Project Agreement.

This is Exhibit ¹¹ D ⁴ referred to in the
affidavit of Eden Drbach
sworn before me, this 7th
day of June 20 19

A COMMISSIONER FOR TAKING AFFIDAVITS

CMH continues to reserve all of its rights and remedies under the Project Agreement.

Yours truly,



Mike Prociw
Vice President, Finance and Corporate Services, CFO and CIO

- c. Steven Aquino
Bondfield Construction Company Ltd.
- c. Denise McNally; Danny Polny
Infrastructure Ontario
- c. Michael Moxam
Stantec Architecture Ltd.
- c. Ronald Mandowsky
Pelican Woodcliff
- c. Eden Orbach; Stanley Julien
BMO
- c. Adrian Branganza
Zurich North America Surety Department

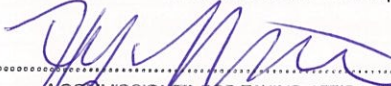
TAB E

Ref# CRP19 0061

May 10, 2019

Sent Via Fax and E-Mail

Paul A. Bordieri, Jr., P.E.
Senior Project Manager
Perini Management Services, Inc.
73 Mount Wayte Ave.
Framingham, MA 01701-9160
T: 508.628.2125
C: 781.589.7232
F: 508.628.2357

This is Exhibit....." E ".....referred to in the
affidavit of Eden Orbach
sworn before me, this.....7th.....
day of June.....2019.

.....
COMMISSIONER FOR TAKING AFFIDAVITS

Attention: Paul Bordieri

Dear Mr. Bordieri,

Section 11.2(a)(vii) of the Project Agreement (PA) provides that Project Co (P Co) shall:

- (a) provide all water, heat, light, power, transportation and other facilities and services required for the performance and completion of the Work; and
- (b) perform, observe, fulfil and abide by all covenants, agreements, provisions and conditions mentioned in and contained in the Contract Documents.

As such, P Co is required to supply and fund all the utilities required for the project. If that is not possible and P Co chooses to use CMH utilities, it would be required that P Co enter into an agreement with CMH for access, tracking and payment of the utilities (inclusion of connection and disconnect costs). See Sections 2.1.1 and 2.1.2 of Specification 01 50 00. This was done for electricity but not for water and steam. In fact, as P Co gained access to areas for construction, there were significant periods of time in which P Co connected to both CMH water and steam without P Co or CMH tracking their usage. By not tracking the usage of these two utilities, P Co has circumvented its responsibility for the costs, and has left it for CMH to cover these costs. In addition, P Co has unfairly placed the onus fully on CMH to try and prove the consumption and related costs without having put proper measuring devices to accurately measure P Co consumption. Retrospectively, substantiating usage is challenging. That said, CMH has compiled detailed information that estimates the consumption and costs for both water and steam, which have been summarized in previous letters sent to P Co. Letter Ref CRP18_0025 (dated 12Feb18) and CRP18_0061 (dated 23Mar18) for water; and CRP18_0079 (dated 11May18) for steam. These letters indicate the data collected, how consumption was estimated, and the basis for cost calculation.

As of March 31 2019, CMH is owed \$1,365,129 from P Co for electricity, water, steam, parking and fire watch costs related to the Capital Redevelopment Project. CMH has offset \$1,152,235 against this amount owing, leaving a net amount that is still owed of \$212,894 as of the end of March (please note that the \$1,152,235 amount represents the sum of Change Order

Applications #9 through #25). See Appendix A. The breakdown of the original receivable balance is contained below:

Expense type	Section	Total:
Electricity		\$502,512.13
Water		\$58,401.68
Unmetered Water		\$103,319.82
Steam		\$414,726.11
Unmetered Steam		\$68,136.74
Steam Meter Installation		\$16,441.50
Parking		\$97,112.20
Fire watch		\$81,237.16
Interest		\$23,242.06
Total		\$1,365,129.40

This document will outline how the billing amounts for each section are determined. January 2019 amounts will be shown for illustrative purposes.

Electricity

The total electricity billings to March 31/19 are \$502,212.13. They represent charges dating back to January 2018 (as previous balances have been paid).

Each month, meter readings are completed by a representative from Project Co and CMH and a picture of each meter is kept on file. The monthly meter readings are sent to Blackstone Energy Services for costing. Blackstone will send a chart outlining the electricity costs by meter for the electricity meters used by Project Co. The January 2019 chart is as follows:

Project Co.'s Energy Usage – Jan 2019						
	ATS1	ATS2	ATS5	UC56	MCC E7	MCC E8
Electricity Charge (Spot)	\$ 2,183	\$ 956	\$ 876	\$ 9	\$ 123	\$ 242
Global Adjustment	\$ 7,468	\$ 3,272	\$ 2,996	\$ 32	\$ 422	\$ 829
Debt Retirement Charge	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Regulatory Charges other	\$ 425	\$ 186	\$ 171	\$ 2	\$ 24	\$ 47
Delivery Charge	\$ 1,281	\$ 561	\$ 514	\$ 5	\$ 72	\$ 142
Total Costs (pre-tax)	\$ 11,357	\$ 4,976	\$ 4,557	\$ 49	\$ 642	\$ 1,260
Consumption (MWh)	110,805	48,550	44,455	473	6,261	12,297

The amount to bill to Project Co is determined by adding the amounts in the "Total Costs (pre-tax)" column. In this case the calculation is: \$11,357 + \$4,976 + \$4,557 + \$49 + \$642 + \$1,260 = \$22,841.00 + HST = \$25,810.33. See Appendix B for a summary of all the monthly billings. Appendix C contains one of the Blackstone Energy Service monthly costing charts.

Water (Metered and Unmetered)

Metered Water usage

The total metered water billings to March 31/19 are \$58,401.68. Each month, meter readings are completed by a representative from Project Co and CMH and a picture of each meter is kept

on file. In January 2019, the water consumption was 182 cubic meters. Project Co is charged for water consumption at a rate of \$4.40/cubic meter. The CMH water bill is made up of both fixed and variable costs. The average cost per meter cubed of water used is \$4.40 when both the fixed and variable costs are considered. The rate was determined by adding the total billings from the City of Cambridge from April 1, 2016 to March 2017 (\$256,193) divided by the total consumption for that period (58,220m³) for a rate of \$4.40 per cubic meter (Appendix D – Water Consumption letter dated Feb 12/18). For billing purposes this calculated rate has not been adjusted for inflation since it was originally calculated. The billing calculation for January 2019 is as follows: 182 X \$4.40 = \$800.80 + HST = \$904.90. See Appendix B for a summary of all the monthly billings.

Unmetered Water Usage

The total unmetered water billings from July 2017 to December 2017 are \$103,319.82. The charge is based on significant consumption in excess of hospital usage as described below. For further explanation see Appendix D - letter dated February 12/18 and Appendix E – letter dated March 23, 2018.

Phase 1 - During Phase 1 of the project, P Co was in control of the site along the north (east) side of CMH (along Coronation St), and during Phase 2 in control of the entire west side of CMH (golf course side). During these phases, P Co had essentially unhindered access to the water main lines as they completed civil works related to each area. Although the PA says P Co must provide its own utilities, P Co never did engage CMH for direct access to water. Although CMH is aware water was consumed by P Co during Phase 1 without measuring, at this point CMH has not included this consumption in its billing to P Co. That said, P Co should have requested for an arrangement to access CMH water during this phase of the construction.

Phase 2 - As per the PA, P Co was to complete all of Phase 1 before starting Phase 2. At the start of the CRP project (in August 2014) P Co had approximately 10% access to the Phase 2 construction area. Over time, they gradually acquired access to increased components of the Phase 2 space: starting in November 2014 they had 56% access; in May 2015 they had 90% access and in September 2015 P Co acquired 100% access to the Phase 2 construction area. Elements of Phase 2 included major civil work, water main lines, fire hydrant pipes and the need to connect the water main lines to the new Wing A mechanical room. During this phase P Co had essentially unhindered access to the water main lines as they completed these major civil works and utilized CMH water without any request for access or tracking of usage.

Water consumption from Sept 2015 to June 2017 reflected only minor variances from previous years' levels. Despite the installation of a water meter in June 2017, in July 2017 there was a significant spike in usage (from 17% to 114% above the highest past 3-year average), which persisted and then peaked in November 2017, when the CMH water consumption doubled. None of this spike in utilization was picked up by the installed water meter. This timing coincides with specific work being conducted by P Co in A Wing that required the frequent charging and flushing of the chiller/cooling tower. This occurred in mid-2017 and explains the massive water consumption that CMH experienced in that period. Furthermore, P Co has had a long history on this project of poor coordination, poor project management and therefore, it is possible that this work was also done numerous times. In addition, there were a number of reports from the consultants about water mains that were accessed for extended periods of time and a continuous flow of water from these mains either onto the river bank and river or onto the surrounding construction site. Following the completion of the work noted previously (calendar year 2018 and 2019), CMH returned to normal water consumption as CMH water consumption

from January 2018 to June 2018 was 8% less than the water consumption from January 2017 to June 2017. The water consumption from July 2018 to December 2018 was 85% less than the water consumption from July 2017 to December 2017. This major variance in water consumption served the basis for the unmetered water charge (see Appendix D and E for more details).

Steam (Metered and Unmetered)

The total metered steam billings to March 31/19 are \$414,726. As with electricity and water, this meter is read jointly by CMH and P Co staff on a monthly basis. The metering and review process began in February 2018.

The steam used in January 2019 as read from the meter is 3,677,502 pounds. The rate for billing purposes is \$15/1000 lbs which is explained further in the letter to Project Co dated May 11, 2018 (Appendix F). The calculation for January 2019 is as follows: $3,677,502 \times \$15.00/1000 = \$55,162.53 + \text{HST} = \$62,333.65$. See Appendix B for a summary of all the monthly billings.

The total unmetered steam billings are for the period from October 2017 to February 2018. In total, the preliminary charge was \$68,316. During this period, CMH had to estimate the P Co steam usage because steam was connected to A Wing, but it was not metered (this will be updated shortly based on updated comparisons utilizing the most recent year's usage). The billing price has been calculated by a steam industry leader, Preston Phipps.

The following commentary is provided as further explanation of the unmetered steam charges. In summary, prior to the winter of 2017/2018, the CRP building structure was still under construction and not enclosed, and/or it was enclosed and was being heated with propane heaters provided by P Co. There was no steam heat provided by CMH. As the winter of 17/18 approached and the Wing A building was enclosed, architectural finishes installed, and related building systems infrastructure were connected (i.e. HVAC) the building was ready for systems to be charged, tested and made operational for general purpose heating/cooling. The chillers/cooling towers were turned on during summer of 2017, and as winter approached the building needed to be heated, but the heating system (which uses existing CMH boiler plant to generate steam) had not yet been connected to Wing A. The responsibility to make these arrangements rested with P Co, however P Co was not proactive at any point with regards to making proper arrangements with CMH, including not supplying and installing a proper steam meter to track consumption. As damage to the new Wing A facility was both a risk to CMH and to P Co, CMH had little choice but to turn on the steam to Wing A on October 18, 2017 to ensure Wing A was heated. Due to the late action of P Co and the long lead time to acquire a new steam meter (a new steam meter was only installed on February 26, 2018), CMH supplied P Co with steam to the construction site with no tracking/ measurement for the four month period from Oct 2017 to Feb 2018.

To determine the cost of steam CMH sought the input of steam industry leader, Preston Phipps, who has provided a calculated cost of \$15/1000 lbs of steam. CMH provided communication in its letter reference number 'CRP18_0079' dated May 11, 2018 which outlines in greater detail the rational and pricing of the steam invoice. This is contained in Appendix F.

Steam Meter Installation

CMH installed the meter on Bondfield's direction as they were unable to coordinate this in a timely manner. This occurred in late February 2018. The steam meter installation cost was \$16,441 – see Appendix G for invoice dated Feb 28/18 from Roberts Onsite. Please refer to Appendix F – letter dated May 11, 2018 for further explanation.

Parking

The total parking charges to March 31/19 are \$97,112.20. The parking charges are based on Section 7.7 of Specification 01 37 00 and the signed lease agreement between Project Co and CMH dated September 1/17 (Appendix H) and date back to April 2018 (all previous parking charges were reimbursed by Bondfield as part of a previous Event of Default see Appendix I, which contains the Unpaid Parking letter dated January 15/18). As per the lease agreement, parking is charged at \$17,188 + HST = \$19,422 per quarter. See Appendix B for a summary of all the quarterly billings.

Fire Watch

Since the start of the project, P Co has been doing work within the existing hospital (Wing B, Level 0, 1, 2, 3 and 4) in which fire alarm systems have had to be bypassed or not operational. In such instances the Specifications clearly identify that the Contractor shall provide fire watch (see Specification Volume 1; 01 37 00 Existing Premises Procedures, Article 10.9, 10.10). Article 10.10 states that P Co shall pay for fire watch service, and that the service can either be provided by the hospital security provider (SP+) or P Co can employ a member of the construction team. Either way, the provider must meet the Project Agreement, Specification and CMH requirements, which include:

- Follow fire watch protocol, including but not limited to regular documented rounds, bar code system readers for verification of rounds, and maintenance of a log book;
- Complete "Statement of Understanding" contained within the CMH Contractors Policies and Procedures;
- Complete a current Vulnerable Sectors Check for each fire watch personnel;
- Staff providing the service must be trained in all CMH Code policies and procedures;
- Staff must also be trained on P Co construction site policies and procedures.

For the first four years of the project, P Co used CMH's security service (SP+), who's fire watch personnel comply with all of the above requirements. However, when P Co decided to stop using SP+ (as of October 5, 2018), and to utilize their own external third party fire watch service, it was done so without prior approval from CMH and without P Co meeting the minimum requirements as set out in the Project Agreement and Specifications. CMH had no issue with this third party provider providing fire watch services in Wing A, but would not allow them to provide fire watch in the existing facility because they had not met all the requirements stated previously and because of the associated risk it would create for the Hospital. This was communicated to P Co in three letters (CRP18_188, 195, 198) dated Sept 28, Oct 4 and Oct 5, 2018 respectively. At the same time CMH could not leave the construction areas (where fire alarm systems were bypassed or not operational) without any fire watch protection as this would create an unsafe environment for patients, staff and visitors. Therefore, CMH was forced to hire additional fire watch services for the hospital, and this additional cost was charged back to P Co.

The fire watch costs to March 31/19 are \$ 81,237. Reference Appendix J to see the SP+ invoice for the month of March and Appendix B contains a summary of all previous monthly billings.

Interest

The total interest charged to March 31/19 is \$23,242. The interest on billings starts being charged after the due date of the bill has passed, and the bill due date is 30 days after the bill is issued. The interest charged to Project Co is specified in the Project Agreement as BMO prime

rate plus 2%, calculated using a simple daily rate formula. See Section 33.1 (d) of the Project agreement and Section 1.149 of Schedule 1 to the Project Agreement. The BMO prime rate has been as follows over the period of time that interest has been charged:

2.7% from April 2017 to July 2017

2.95% from August 2017 to September 2017

3.2% from October 2017 to January 2018

3.45% from February 2018 to June 2018

3.7% from July 2018 to October 2018

3.95% from November 2018 to March 2019

See Appendix K for the full interest chart.

Should you have any further questions, please let us know.

Sincerely,



Ernie Sersen
Director of Finance



James Hildebrand
Director Capital Redevelopment

cc M. Prociw

Ontario
**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceedings commenced in Toronto

**AFFIDAVIT OF EDEN ORBACH
(Sworn June 7, 2019)**

McCarthy Tétrault LLP
Suite 5300, TD Bank Tower
Toronto Dominion Centre
66 Wellington Street West
Toronto, ON M5K 1E6
Fax: 416- 868-0673

Heather L. Meredith LSO#: 48354R
Tel: 416-601-8342
Email: hmeredith@mccarthy.ca

Geoff R. Hall LSO#: 34701O
Tel: 416-601-7856
Email: ghall@mccarthy.ca

Trevor Courtis LSO#: 67715A
Tel: 416-601-7643
Email: tcourtis@mccarthy.ca

Lawyers for the Applicant,
Bank of Montreal

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

REPLY MOTION RECORD

McCarthy Tétrault LLP
Suite 5300, TD Bank Tower
Toronto Dominion Centre
66 Wellington Street West
Toronto, ON M5K 1E6
Fax: 416- 868-0673

Heather L. Meredith LSO#: 48354R
Tel: 416-601-8342
Email: hmeredith@mccarthy.ca

Geoff R. Hall LSO#: 34701O
Tel: 416-601-7856
Email: ghall@mccarthy.ca

Trevor Courtis LSO#: 67715A
Tel: 416-601-7643
Email: tcourtis@mccarthy.ca

Lawyers for the Applicant,
Bank of Montreal
DOCS 19262492