



Court File No.: CV-18-00610995-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE

JUSTICE *CONWAY*

) FRIDAY, THE 20TH
)
) DAY OF DECEMBER, 2019
)

**IN THE MATTER OF THE RECEIVERSHIP OF
2442931 ONTARIO INC.**

BETWEEN:

BANK OF MONTREAL, AS ADMINISTRATIVE AGENT

Applicant

- and -

2442931 ONTARIO INC.

Respondent

ORDER

THIS MOTION, made by the Unity for, *inter alia*, an Order lifting the stay of proceedings granted pursuant to the Receivership Order, to allow Unity to exercise certain remedial rights under the Project Agreement, on an interim basis, to facilitate the orderly continuation of the St. Michael's Hospital Redevelopment Project, in circumstances where the Cost to Complete the Bonded Obligations has not yet been determined, was heard this day at 330 University Ave in Toronto, Ontario.

ON READING the Affidavit of Michael Keen, sworn December 19, 2019 and on being advised of the consent of the Administrative Agent, Receiver, and Infrastructure Ontario, and that Zurich and BCCL are not opposing, and on hearing the submissions of counsel for the parties:

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Affidavit of Michael Keen, sworn December 19, 2019, is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that in this Order the following terms have the following meanings:

- (a) “Administrative Agent” means Bank of Montreal.
- (b) “Construction Manager” means EllisDon Ltd. and any successor.
- (c) “Construction Management Contract” means the Construction Management Contract to be entered into between Unity and the Construction Manager, under which the Construction Manager shall oversee and perform or obtain the performance, by the Construction Manager and/or the Trades, of all remaining work under the Project Agreement, up to and until Tower Interim Completion, and the on-going design, construction, infrastructure improvement and renovation works commenced prior to Tower Interim Completion, and being performed concurrent with works to achieve Towner Interim Completion all in accordance with the Project output specifications and executed change orders;
- (d) “Court” means the Ontario Superior Court of Justice (Commercial List);
- (e) “Cost to Complete the Bonded Obligations” means sum of (i) all amounts reasonably incurred to achieve Tower Interim Completion pursuant to this order; and (ii) the Obligees’ reasonable estimate of the Cost to complete the Bonded Obligations in addition to Tower Interim Completion, to be obtained prior to Tower Interim Completion.

- (f) “Credit Agreement” means the Credit Agreement made as of January 27, 2015 between ProjectCo, the Lenders, and the Administrative Agent, and includes without limitation the Security Documents as defined therein.
- (g) “Design Agreements” means the design agreement to be entered into, if required, between Unity and NORR, and the design agreement to be entered into, if required, between Unity and an engineering firm, concerning the completion, revision, and finalization of all designs contemplated by the Project Agreement.
- (h) “Design and Construction Contract” means the Design and Construction Contract made as of January 27, 2015, between ProjectCo and BCCL.
- (i) “Lenders” means the syndicate of Lenders financing the Project and represented by the Administrative Agent.
- (j) “Lenders’ Direct Agreement” means the Lenders’ Direct Agreement made as of the day of January 27, 2015, between St. Michael’s Hospital (now Unity), the Administrative Agent, and Project Co.
- (k) “NORR” means NORR Architects and Engineers Ltd., and any successor.
- (l) “Obligees” means the Obligees under the Performance Bond including ProjectCo as the original Obligee, and Administrative Agent and Unity as additional Obligees.
- (m) “Payment Certifier Agreement” means the Payment Certifier Agreement to be entered into between Unity and NORR concerning the certification of all payments to be made to the Trades and to the Construction Manager for self-performed works, up to and until Tower Interim Completion.
- (n) “Performance Bond” means the Public Private Partnership Performance Bond No. 6343517 with Multiple Obligee Rider issued by Zurich.
- (o) “Performance Bond Amount” means CDN \$156,325,362,60.

- (p) “Performance Bond Option 2.4 Payment Amount” means the lesser of the Performance Bond Remainder Payment Amount and the Cost to Complete the Bonded Obligations;
- (q) “Performance Bond Remainder Payment Amount” means the amount calculated by subtracting from the Performance Bond Amount all payments which have been made by Zurich pursuant to and in accordance with the Performance Bond at the time the Performance Bond Remainder Amount is determined.
- (r) “Project” means the St. Michael’s Hospital Redevelopment Project;
- (s) “Project Agreement” means the Project Agreement made as of January 27, 2015, between Unity and ProjectCo.
- (t) “ProjectCo” means 2442931 Ontario Inc.
- (u) “Receiver” means Alvarez & Marsal Canada Inc., solely in its capacity as court appointed receiver of ProjectCo, and not in its personal or corporate capacity.
- (v) “Receivership Order” means the order of the Court dated December 21, 2018 appointing the Receiver, as may be amended from time to time.
- (w) “Redevelopment Project Agreements” means the Project Agreement, the Credit Agreement, and the Lenders’ Direct Agreement.
- (x) “Supplemental Agreements” means, collectively, the Payment Certifier Agreement, the Construction Management Contract, the Design Agreements, the Trade Agreements, as such agreements may be amended or supplemented from time to time.
- (y) “Tower Interim Completion” has the meaning specified in the Project Agreement.

- (z) “Trade Agreements” means any agreement entered into by Unity with a Trade to provide labour, services, or materials to the Project from and after the date hereof to Tower Interim Completion.
- (aa) “Trades” means suppliers of labour, services, or materials to the Project from and after the date hereof to Tower Interim Completion, and may include BCCL where it enters into a Trade Agreement to provide labour, services, or materials to the Project from and after the date hereof to Tower Interim Completion and any other trades, subcontractors, or suppliers retained by Unity or the Construction Manager to provide labour, services or materials to the Project from and after the date hereof to Tower Interim Completion.
- (bb) “Unity” means Unity Health Toronto, formerly St. Michael’s Hospital.
- (cc) “Zurich” means Zurich Insurance Company Limited.

3. **THIS COURT ORDERS** that the stay of proceedings against ProjectCo, granted pursuant to the Receivership Order, is hereby lifted for the purpose of permitting Unity to exercise the remedy pursuant to Section 34.4(d) of the Project Agreement to engage and directly make payment to, at ProjectCo’s risk and expense, and by taking commercially reasonable steps to mitigate such costs: (i) the Construction Manager, pursuant to and in accordance with the Construction Management Contract; (ii) NORR, pursuant to and in accordance with the Payment Certifier Agreement; (iii) NORR and/or an engineering firm pursuant to and in accordance with Design Agreements; and (iv) Trades, pursuant to and in accordance with any Trade Agreement which may be necessary to enter into to achieve Tower Interim Completion and to continue the on-going design, construction, infrastructure improvement and renovation works commenced prior to Tower Interim Completion, and being performed concurrent with works to achieve Tower Interim Completion all in accordance with the Project output specifications and executed change orders.

4. **THIS COURT ORDERS** that Unity shall incur no further liability or obligation as a result of carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or failure to take commercially reasonable steps to mitigate costs, including, without limitation, it shall (subject only to the *Construction Act* (Ontario)) have no liability or obligation as a result of carrying out the provisions of this Order: (i) in respect of any of ProjectCo's, the Construction Manager's, NORR's, counter-parties to the Design Agreements, or Trades' obligations; or, (ii) in respect of the Design and Construction Contract; or, (iii) in respect of any pre-existing claims, demands, or liabilities by or to ProjectCo, BCCL, or any of their respective subcontractors and suppliers retained prior to the date of this Order for the performance of the Design and Construction Contract.

5. **THIS COURT DECLARES** that the demand on the Performance Bond by the Receiver dated December 21, 2018 is valid, and that Zurich has elected and is bound by Option 2.4 of the Performance Bond.

6. **THIS COURT ORDERS** that subject to paragraphs 4, all payments made by Unity in respect of the Supplemental Agreements and any other payments for labour, services, materials, or expenses incurred, to achieve Tower Interim Completion and to continue the on-going design, construction, infrastructure improvement and renovation works commenced prior to Tower Interim Completion, and being performed concurrent with works to achieve Towner Interim Completion all in accordance with the Project output specifications and executed change orders, shall first be reimbursed from the Performance Bond Option 2.4 Payment Amount, failing which it shall be set off by Unity against the Tower Interim Completion Payment (as defined in the Project Agreement), pursuant and subject to the terms of the Project Agreement.

7. **THIS COURT ORDERS** that the Construction Manager shall, effective on the date that it delivers a Notice of Project to the Ministry of Labour, be the "Constructor" under the *Occupational Health and Safety Act (Ontario)*, in respect of all works from the date of the Notice of Project until Tower Interim Completion.

8. **THIS COURT ORDERS** that all Trades providing services or materials to the Project under a Trade Agreement shall not take instructions or report to Zurich, BCCL, ProjectCo, or the Lenders, but shall take instructions from and report to the Construction Manager notwithstanding any agreement or arrangement to the contrary.

9. **THIS COURT ORDERS** that nothing in this Order shall amend Unity's rights of set-off under the Project Agreement, the Lenders security in the Performance Bond and the proceeds thereof, or the rights of the Obligees in the Performance Bond or the proceeds thereof.

10. **THIS COURT ORDERS THAT** this Order is made on an interim basis, subject to further Order of the Court, and is without prejudice to the right of any party to apply to the Court for further or other directions or relief, which application may include to exercise any rights or remedies under any of the Redevelopment Project Agreements, and including, without limitation, Unity's right to apply to the Court to exercise its right to terminate the Project Agreement.



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(Commercial List)**

Proceeding commenced at Toronto

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ORDER

MCCARTHY TÉTRAULT LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto ON M5K 1E6

Julie K. Parla LSUC#: 45763L
Tel: (416) 601-8190 / Fax: 416-868-0673
Email: jparla@mccarthy.ca

Andrew Kalamut LSUC#: 59838E
Tel: (416) 601-7726 / Fax: 416-868-0673
Email: akalamut@mccarthy.ca

Lawyers for Unity Health Toronto
144895/510907
MT DOCS 19933600v7