

COURT OF APPEAL FILE NO.
1296371 B.C. Ltd. v. Aviva Insurance Company of Canada
Appellant's Application Book for Leave to Appeal and Stay of Order

COURT OF APPEAL

ON APPEAL FROM the order of Madam Justice Fitzpatrick of the Supreme Court of British Columbia pronounced on the 22nd day of July, 2022.

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

AND

IN THE MATTER OF THE CANADA BUSINESS CORPORATIONS ACT,
R.S.C. 1985, C. c-44, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF
PORT CAPITAL DEVELOPMENT (EV) INC.
and EVERGREEN HOUSE DEVELOPMENT LIMITED PARTNERSHIP

PETITIONERS/
RESPONDENTS

AND:

1296371 B.C. LTD.

APPELLANT

AND:

AVIVA INSURANCE COMPANY OF CANADA, ERNST & YOUNG INC.,
PORT CAPITAL DEVELOPMENT (EV) INC., SOLTERRA ACQUISITIONS CORP.,
DOMAIN MORTGAGE CORP., JING CHIANG, and the HYNES GROUP

RESPONDENTS

**APPELLANTS APPLICATION BOOK REGARDING
NOTICE OF APPLICATION FOR LEAVE TO APPEAL AND STAY OF ORDER
OF 1296371 B.C. LTD.**

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PART 1 – REASONS FOR JUDGMENT

There are none.

PART 2: ORDER

See attached.



No. S-205095
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

– AND –

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,
S.B.C. 2002, C. 57, AS AMENDED

– AND –

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF
PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE DEVELOPMENT
LIMITED PARTNERSHIP

ORDER MADE AFTER APPLICATION

APPROVAL AND VESTING ORDER

BEFORE THE HONOURABLE)
MADAM JUSTICE FITZPATRICK) 22/July/2022
)

THE APPLICATION of Aviva Insurance Company of Canada ("**Aviva**") coming on for hearing on the this day; AND ON HEARING Will Roberts, counsel for Aviva, and those other counsel and parties listed on **Schedule "A"** hereto; AND UPON READING the material filed, including the Fourteenth Report of the Monitor (the "**Fourteenth Report**");

THIS COURT ORDERS AND DECLARES THAT:

1. The sale transaction (the "**Transaction**") contemplated by the Purchase and Sale Agreement dated July 22, 2022 (the "**Sale Agreement**") between the Petitioners and Solterra Acquisitions Corp. (the "**Purchaser**"), a copy of which is attached as **Schedule "B"** hereto, is hereby approved, and the Sale Agreement is commercially reasonable. The execution of the Sale Agreement by Ernst & Young, Inc. (the "**Monitor**") on behalf

of the Petitioners is hereby authorized and approved, and the Monitor and the Petitioners are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance to the Purchaser of the assets described in the Sale Agreement (the "**Purchased Assets**").

2. Upon delivery by the Monitor to the Purchaser of a certificate substantially in the form attached as **Schedule "C"** hereto (the "**Monitor's Certificate**"), the following shall occur and be deemed to have occurred on the Closing Date (as defined in the Sale Agreement) in the following sequence:

- a. first, the Monitor shall incorporate a new subsidiary^v of Port Capital Development (EV) Inc. ("**GP ResidualCo**"), which shall be added as a Petitioner in these proceedings pursuant to paragraph 9 hereof;
- b. second, all of the Petitioners' right, title and interest in and to the Excluded Assets and Liabilities (as defined in the Sale Agreement) shall vest absolutely and exclusively in ResidualCo, and any and all Claims and Encumbrances shall continue to attach to the Excluded Assets with the same nature and priority as they had immediately prior to their transfer;
- c. third, GP shall issue one common voting share (the "**New Common Share**") to the Purchaser, or such other entity as the Purchaser may direct, and, concurrently, and without the need for any further action by GP or any of its shareholders, directors or officers, all other issued and outstanding securities of GP (but, for clarity, excluding the New Common Share), including without limitation any shares in GP, any options and warrants issued by GP to acquire any shares in GP, and any other document, instrument or writing of GP commonly known as a security, are hereby cancelled, none of which shall be with any further force or effect, and the obligations of GP thereunder, or in any way related thereto, shall be satisfied and discharged, with no compensation or participation being provided or payable therefor, or in connection therewith, and all certificates formerly representing any such securities shall be deemed to be cancelled and shall be null and void;

- d. fourth, all of the Petitioners' right, title and interest in and to the Purchased Assets (as defined in the Sale Agreement) shall vest absolutely in the Purchaser in fee simple, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by any orders of this court; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* of British Columbia or any other personal property registry system; and (iii) those Claims enumerated in **Schedule "D"** hereto (all of which are collectively referred to as the "**Encumbrances**", which term shall not include the permitted encumbrances, easements and restrictive covenants enumerated in **Schedule "E"** hereto), and, for greater certainty, this court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets; and
- e. fifth, ~~Port Capital Development (EV) Inc.~~^{GP} shall cease to be a Petitioner in these proceedings and shall be deemed released from the purview of all orders of this court granted in these proceedings, save and accept for this order.
3. Upon presentation for registration in the Land Title Office for the Land Title District of Vancouver of a certified copy of this order, together with a letter from Blake Cassels & Graydon LLP, solicitors for the Monitor, authorizing registration of this order, the British Columbia Registrar of Land Titles, having considered the interest of third parties, is hereby directed to discharge, release, delete and expunge from title to the Lands as identified in **Schedule "E"**, all of the registered Encumbrances except for those listed in **Schedule "D"**:
4. For the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased

Assets, and from and after the delivery of the Monitor's Certificate all Claims shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having had possession or control immediately prior to the sale.

5. The Monitor is to file with the Court a copy of the Monitor's Certificate forthwith after delivery thereof.
6. Subject to the terms of the Sale Agreement, vacant possession of the Purchased Assets, including any real property, shall be delivered by the Monitor to the Purchaser at 12:00 noon on the Closing Date, subject to the permitted encumbrances as set out in the Sale Agreement and enumerated in Schedule "E".
7. The Monitor and the Purchaser shall be at liberty to extend the Closing Date to such later date as those parties may agree without the necessity of a further Order of this Court.
8. Notwithstanding:
 - (a) these proceedings;
 - (b) any applications for a bankruptcy order in respect of the Petitioners now or hereafter made pursuant to the *Bankruptcy and Insolvency Act* and any bankruptcy order issued pursuant to any such applications; and
 - (c) any assignment in bankruptcy made by or in respect of the Petitioners,

the vesting of the Purchased Assets in the Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Petitioners and shall not be void or voidable by creditors of the Petitioners, nor shall it constitute or be deemed to be a transfer at undervalue, fraudulent preference, assignment, fraudulent conveyance or other reviewable transaction under the *Bankruptcy and Insolvency Act* or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

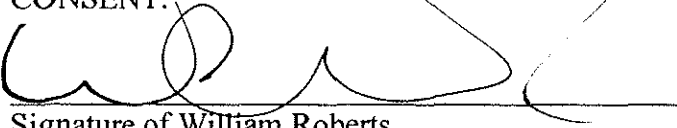
9. As of the Closing Date and in the sequence set out in paragraph 2 herein:
- (a) ResidualCo shall be a company to which the *Companies' Creditors Arrangement Act* (the "CCAA") applies;
 - (b) the corporate entity referred to herein as ResidualCo shall be added as a Petitioner in these proceedings and all references in any order of this court made in these proceedings to: (i) the "Petitioners" shall refer to and include ResidualCo, *mutatis mutandis*, and (ii) "Property" shall refer to and include the current and future assets, licenses, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof, of ResidualCo; and
 - (c) The Monitor shall be exempt from compliance with section 23(1)(a) of the CCAA with respect to ResidualCo; provided, however, that, within five days of the Closing Date, the Monitor shall make this order publically available in the manner prescribed under the CCAA.
10. Immediately after the Closing Date, the Monitor is hereby authorized and directed to bankrupt ResidualCo. Neither GP nor the Purchaser shall be liable for any obligations of ResidualCo, whether in their capacities as direct or indirect shareholders of ResidualCo or otherwise.
11. ~~The stay of proceedings provided for in the Initial Order pronounced herein on May 29, 2020, as amended and restated on June 8, 2020, and further extended by subsequent orders of this court and of the Court of Appeal (Court of Appeal File No. CA-47585) is hereby continued and extended to and including September 30, 2022.~~
12. Monitor, counsel to the Monitor, and counsel to the Petitioner shall be entitled to the benefit of and are hereby granted a charge (the "**Supplemental Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of \$150,000 as security for their respective fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this order which are related to the Petitioner's restructuring. The Supplemental Administration Charge shall rank subordinate to the Administration Charge, the debt and

security held by Domain Mortgage Corp. (“**Domain**”) to the extent of the Senior Creditor Priority Limit, as defined in the Priority/Subordination Agreement dated March 16, 2022 between Aviva Insurance Company of Canada and Domain, but shall otherwise rank in priority to all other security interests, trusts, liens, mortgages, charges and encumbrances and claims of secured creditors, statutory or otherwise, in favour of any Person, save and except those claims contemplated by section 11.8(8) of the CCAA. As between the Monitor, counsel to the Monitor, and counsel to the Petitioners, the Supplemental Administrational Charge shall be allocated, first, to the fees and disbursements of the Monitor and Monitor’s counsel incurred from the date of this Order, and, second, to the unpaid fees and disbursements incurred by the Monitor, Monitor’s counsel, and counsel to the Petitioners prior to the granting of this Order. For greater certainty, the protections afforded to the Administration Charge by Orders granted by this Court in the within proceedings shall apply, mutatis mutandis, to the Supplemental Administration Charge.

13. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body, wherever located, to give effect to this Order and to assist the Monitor and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.
14. The Monitor or any other party affected by this order have liberty to apply for such further or other directions or relief as may be necessary or desirable to give effect to this order.

15. Endorsement of this Order by counsel appearing on this application, other than counsel for the Monitor, is hereby dispensed with.

THE FOLLOWING PARTIES ~~APPROVE THE~~ FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:



Signature of William Roberts

☐ Party ☒ Lawyer for Aviva Insurance
Company of Canada

BY THE COURT


REGISTRAR

Schedule "A"

(List of Counsel)

Counsel name/litigant	Party represented
Peter Bychawski	Ernst & Young, Inc., the Monitor
Kibben Jackson	Solterra Acquisitions Corp.
Mitchell Ferreira	<i>Jing Chen (pre-sale purchaser)</i>
Keely Cameron	The Petitioners
Scott Stephens	Domain Mortgage Corp.

*Douglas Hyndman**The Hynes Group*

**PURCHASE AND SALE AGREEMENT
(TERRACE HOUSE, VANCOUVER, BC)**

THIS AGREEMENT is dated for reference July 22, 2022 and is made

AMONG:

PORT CAPITAL DEVELOPMENT (EV) INC., a British Columbia corporation formed under the *Business Corporations Act* (British Columbia)

(the "**GP**")

AND:

EVERGREEN HOUSE DEVELOPMENT LIMITED PARTNERSHIP, a British Columbia limited partnership formed under the *Partnership Act* (British Columbia)

(the "**Limited Partnership**" and, together with the GP, the "**Vendor**")

AND:

SOLTERRA ACQUISITIONS CORP., a British Columbia corporation formed under the *Business Corporations Act* (British Columbia)

(the "**Purchaser**")

BACKGROUND:

- A. The Vendor is the legal and beneficial owner of the lands and premises legally described in Part 1 of Schedule A (the "**Lands**").
- B. The Vendor obtained an initial order of the Supreme Court of British Columbia dated May 29, 2020 under the *Companies' Creditors Arrangement Act*, which among other things, commenced the CCAA Proceedings and granted an initial stay of proceedings in respect of the Vendor.
- C. The Vendor agrees to sell and the Purchaser has agrees to purchase all of the Vendor's right, title, and interest in and to the Purchased Assets (as defined in this Agreement) on the terms and conditions set out in this Agreement.

FOR CONSIDERATION, the receipt and sufficiency of which is acknowledged by each of the parties, the parties agree as follows:

ARTICLE 1 - INTERPRETATION

1.1 Definitions. In this Agreement:

- (a) "**Approved Contracts**" means those Contracts entered into by the Vendor and any third party consultants in connection with the Project along with any other

material Contracts which the Purchaser has approved by way of notice in writing to the Vendor no less than two Business Days prior to the Closing Date.

- (b) **"Authorized Parties"** has the meaning given to it in Section 11.17.
- (c) **"Balance"** has the meaning given to it in Section 2.2(c).
- (d) **"Buildings"** means all buildings and improvements located on the Lands.
- (e) **"Business Day"** means any day that is not a Saturday, Sunday, Boxing Day, Easter Monday or statutory holiday in British Columbia.
- (f) **"CCAA Proceedings"** means the legal proceedings in the Court under the *Companies' Creditors Arrangement Act*, Vancouver Registry No. S-205095.
- (g) **"Chattels"** means all of the personal property owned by the Vendor and used in connection with Project including without limitation, all fixtures, leasehold improvements, glass, personal property, plant, and equipment, inventory including spare parts, furniture whether moveable or built-in, computer hardware, kitchen equipment, tools and supplies, whether the same is located on the Lands or otherwise.
- (h) **"Closing Date"** means either the Original Closing Date or, if the Second Deposit is paid on or before the Original Closing Date, the Extended Closing Date.
- (i) **"Closing Documents"** has the meaning given to it in Section 9.4.
- (j) **"Consultant Reports"** means all consultant reports and studies that were commissioned by the Vendor in connection with the Project.
- (k) **"Contracts"** means all contracts or agreements, other than Title Contracts and Pre-Sale Contracts, relating to the use or operation of the Property or any part thereof or the design, development and construction of the Project, including, without limitation, the consulting agreements in connection with the Property or any part thereof made by or on behalf of the Vendor relating to the Property.
- (l) **"Court"** means the Supreme Court of British Columbia.
- (m) **"Delay Notice"** has the meaning given to it in Section 11.13.
- (n) **"Deposit"** means the First Deposit and, if applicable, the Second Deposit.
- (o) **"Encumbrance"** means any legal notation, charge, lien, interest or other encumbrance or title defect of whatever kind or nature, regardless of form, whether or not registered or registrable and whether or not consensual or arising by law (statutory or otherwise), including any mortgage, lien, pledge, debenture, trust deed, assignment by way of security, security interest, conditional sales contract or similar interest or instrument charging, or creating a security interest in, the Purchased Assets or any part thereof or interest therein, and any agreement, lease, licence, option or claim, easement, right of way, restriction, execution or other encumbrance (including any notice or other registration in respect of any of

the foregoing) affecting title to or the ownership of the Purchased Assets or any part thereof or interest therein.

- (p) **"ETA"** has the meaning given to it in Section 10.1.
- (q) **"Execution Date"** means the date this Agreement is fully executed by all parties to the Agreement.
- (r) **"Excluded Assets and Liabilities"** means: (i) all shares of capital stock or other equity interest in securities in any entity other than the Shares; (ii) any partnership interest in the Limited Partnership; (iii) Contracts which are not Approved Contracts; (iv) all Liability of the Vendor arising prior to the Closing Date including, but not limited to, Liability owed to lenders, service contractors or third parties of any kind including all Liability under the Approved Contracts or Plans, Permits and Approvals; (v) any Liability relating to or arising out of the assets of the Vendor which are not being acquired by the Purchaser, including, without limitation, Liability for terminating, not complying with or a defaulting under any Contract; (vi) any Liability of the Vendor for taxes resulting from the Vendor's sale of the Purchased Assets; (vii) all employees, employment agreements, executive personnel agreements, officer or director agreements, union contracts, collective agreements, employee wages, employee benefit plans or payments, pension obligations, employee tax withholding obligations, employee health or dental plan obligations, all grievances, arbitrations, employee complaints or claims, labour relations board actions or other employee proceedings and similar obligations of the Vendor; (viii) all Liability for payment of fees for operations of the Purchased Assets up to the Closing Date; (ix) any proceedings, claims or actions commenced in any court initiated against the Vendor or threatened against the Vendor; (x) the costs and expenses and Liability of the Vendor under the CCAA Proceedings; (xi) any Liability for a breach or non-compliance with any applicable law; (xii) the Liability of the Vendor under this Agreement and any other assets, property or obligations which pursuant to the terms and conditions of this Agreement, remain the property of the Vendor after the completion of the transactions contemplated herein including, without limitation, the rights of the Vendor under this Agreement; (xiii) any proceedings, claims or causes of action for the benefit of the Vendor; (xiv) all cash of the Vendor; (xv) Receivables; and (xvi) all Pre-Sale Contracts, including, for greater certainty, all deposits provided pursuant to the Pre-Sale Contracts and all claims, causes of action or rights in relation to such deposits.
- (s) **"Excusable Delay"** means any delay in the performance or observance by the Vendor or Purchaser of any obligation or act of the Vendor or Purchaser, as applicable, hereunder which occurs as a consequence of or is attributable to any circumstance which is not caused by any default or act of commission or omission of that party and which is beyond the reasonable control of that party, including without limiting the generality of the foregoing, strikes or labour or industrial disturbances (including lock-outs), civil disturbances, acts, orders, legislation, regulations, good faith compliance with an order, directive, guideline or other recommendation of any governmental or other public authorities (including, without limitation, health authorities or occupational safety authorities), acts of public enemies, war, riots, sabotage, blockades, embargoes, shortages of materials and suppliers, shortages of labour, lightning, earthquakes, fire, storms, pandemics, epidemics, quarantines and health emergencies, hurricanes, floods, wash-outs,

explosions and acts of God, but excluding, for clarity, the financial circumstances of the Purchaser.

- (t) **"Extended Closing Date"** means that date which is 30 days after the Original Closing Date.
- (u) **"First Deposit"** has the meaning given to it in Section 2.2(a).
- (v) **"GST"** has the meaning given to it in Section 10.1.
- (w) **"GST Certificate"** has the meaning given to it in Section 10.1.
- (x) **"Intellectual Property"** means all intellectual property and proprietary rights of any kind in connection with the Project, including the "Terrace House" name, architectural design and instruments of service and all rights to the branding, logo and design in connection with the same.
- (y) **"Interim Period"** means the period commencing on the Execution Date until and including the Closing Date.
- (z) **"Land Title Office"** means the Land Title and Survey Authority of British Columbia, land title office applicable to the Lands.
- (aa) **"Lands"** has the meaning given to it in Recital A.
- (bb) **"Liability"** means any debts, claim, liability, duty, responsibility, obligations, commitment, assessment, cost, expense, loss, expenditure, charge, fee, penalty, fine, contribution or premium of any kind or nature whatsoever, whether known or unknown, asserted or unasserted, absolute or contingent, direct or indirect, or due or to become due and regardless of when sustained, incurred or asserted or when the relevant events occurred or circumstances existed.
- (cc) **"LP Agreement"** means the limited partnership agreement of Evergreen House Development Limited Partnership made as of June 30, 2014 and restated as of March 13, 2015 between those persons who from time to time execute the agreement and become a limited partner, as limited partners, and the GP, as general partner, as further amended and restated, modified or supplemented from time to time.
- (dd) **"Material Loss"** means the loss or damage to or destruction of the Property or any part of it to such an extent that the replacement or repair of it cannot be substantially completed: (i) at a cost of less than \$500,000.00; or (ii) within six (6) months of the occurrence.
- (ee) **"Monitor"** means Ernst & Young Inc., in its capacity as monitor of the CCAA Proceedings or such other monitor or monitors as are appointed by the Court from time to time in connection with the CCAA Proceedings.
- (ff) **"Order"** means an order of the Court.

- (gg) **"Original Closing Date"** means that date which is 60 days after the date on which the Reverse Vesting Order is granted.
- (hh) **"Permitted Encumbrances"** means the Encumbrances set out in Part 2 of Schedule A.
- (ii) **"Plans, Permits and Approvals"** means: (i) all plans and specifications pertaining to the construction of the Project, including, without limitation, all structural, architectural, mechanical, electrical, landscape and interior design and specifications for the Project; and (ii) all planning approvals, permits, licences, development agreements, crane swing, underpinning and airspace agreements with respect to the Project.
- (jj) **"Pre-Sale Contracts"** means each of those agreements between the Vendor and a Buyer in respect of the purchase and sale of one or more condominium units at the Property. For greater certainty, a Pre-Sale Contract is not a Contract.
- (kk) **"Project"** means the construction and development of the Buildings on the Lands.
- (ll) **"Property"** means the Lands and the Buildings.
- (mm) **"Purchase Price"** means:
 - (i) \$18,500,000 plus the Revenue Share Portion if the transactions that are the subject of this Agreement complete on the Original Closing Date, exclusive of any applicable taxes; or
 - (ii) \$18,500,000 plus \$650,000 plus the Revenue Share Portion if the transactions that are the subject of this Agreement complete on the Extended Closing Date, exclusive of any applicable taxes.
- (nn) **"Purchased Assets"** means:
 - (i) the Shares; and
 - (ii) all of the Limited Partnership's right, title and interest, in and to the following assets and properties:
 - (A) the Property;
 - (B) the Chattels;
 - (C) the Approved Contracts;
 - (D) the Title Contracts;
 - (E) the Plans, Permits and Approvals;
 - (F) the Warranties;
 - (G) subject to such transfer being approved by the necessary parties in accordance with Section 3.1(c)(i), the Intellectual Property;

- (H) all insurance and new home warranties obtained in connection with the Project; and
- (I) all marketing materials prepared in connection with the Project, excluding, for certainty, the Excluded Assets and Liabilities.
- (oo) **"Purchaser's Solicitors"** means Fasken Martineau DuMoulin, LLP or such other firm or firms of solicitors or agents as are retained by the Purchaser from time to time and written notice of which is provided to the Vendor.
- (pp) **"Receivables"** means the Vendor's interest in all receivables including, without limitation, receivables relating to amounts owed by a Buyer in connection with a Pre-Sale Contract, any grants, subsidies (including the Canada Emergency Wage Subsidy), tax relief or gifts or any other receivable.
- (qq) **"ResidualCo"** means a company to be incorporated by the Vendor and which shall be a subsidiary of GP, to which all Excluded Assets and Liabilities will be transferred by the Vendor in connection with the closing of the transactions contemplated herein, and which will replace the GP in its role as general partner of the Limited Partnership.
- (rr) **"Revenue Share Portion"** means 40% of the amount by which the gross sales revenue derived from the sale of the Units exceeds \$134,000,000.
- (ss) **"Reverse Vesting Order"** has the meaning given to it in Section 8.3(a).
- (tt) **"Second Deposit"** means the sum of \$650,000.
- (uu) **"Shares"** means all of the issued and outstanding shares in the capital of the GP.
- (vv) **"Specified Date"** has the meaning given to it in Section 11.13.
- (ww) **"Title Contracts"** means, collectively, those agreements and instruments affecting the Property or any part thereof, including without limitation, the Permitted Encumbrances and any municipal site plan and development agreements, crane swing, underpinning and airspace agreements, common use agreements and easement agreements, concession or other agreements with any governmental authority or other public authorities having jurisdiction, and any new agreements of similar nature respecting the Property or any part thereof (other than the Contracts or Approved Contracts). For greater certainty, a Title Contract is not a Contract.
- (xx) **"Units"** means each of the condominium units comprising the Buildings.
- (yy) **"Vendor's Solicitors"** means Blake Cassels & Graydon LLP or such other firm or firms of solicitors or agents as are retained by the Vendor from time to time and written notice of which is provided to the Purchaser.

- (zz) **"Warranties"** means all subsisting warranties and guarantees in connection with the Project or any part thereof that are assignable without consent and in effect on the Closing Date.

ARTICLE 2 – PURCHASE AND SALE

2.1 Agreement of Purchase and Sale. Subject to the terms and conditions of this Agreement, the Vendor agrees to sell and the Purchaser agrees to purchase the Purchased Assets for the Purchase Price on the Closing Date free and clear of all Encumbrances, except for the Permitted Encumbrances.

2.2 Payment of Purchase Price. The Purchase Price for the Purchased Assets will be paid by the Purchaser as follows:

- (a) by a deposit in the amount of \$1,000,000 (the **"First Deposit"**) to be paid to the Vendor's Solicitors within two Business Days of the Execution Date;
- (b) if applicable, by payment of the Second Deposit on or before the Original Closing Date;
- (c) by payment of the balance of the Purchase Price (the **"Balance"**), as adjusted in accordance with Article 5, on the Closing Date as provided in Article 9; and
- (d) the Revenue Share Portion within 30 days of completion of the sale of all of the Units.

2.3 Deposits. The Vendor shall cause the Vendor's Solicitors to: (i) deposit the Deposits into an interest bearing trust account promptly following receipt of the Deposits; and (ii) pay the Deposits and any interest that may accrue thereon only as set out in this Agreement or as directed in writing by the Vendor and the Purchaser or as directed by a court of competent jurisdiction. The Vendor shall cause the Vendor's Solicitors to pay the Deposits to:

- (a) the Vendor, without interest (less the \$10.00 paid by the Vendor to the Purchaser pursuant to Section 8.6):
 - (i) on account of the Purchase Price on the Closing Date as set out in Article 9; or
 - (ii) as liquidated damages upon the default of the Purchaser if the Purchaser is in default of its obligation to complete the transactions contemplated by this Agreement, unless such default is waived in writing by the Vendor and which payment shall be in full satisfaction of all claims the Vendor may have by reason of such default;
- (b) the Purchaser, with interest (less the \$10.00 paid by the Purchaser to the Vendor pursuant to Section 8.2):
 - (i) if the Purchaser is not required to complete the transaction contemplated by this Agreement, promptly following the date on which the Purchaser becomes entitled not to complete the transactions contemplated by this Agreement;

- (ii) upon the default of the Vendor without prejudice to any other right or remedy of the Purchaser, if the Vendor is in default of its obligation to complete the transactions contemplated by this Agreement, unless such default is waived in writing by the Purchaser and provided that the maximum aggregate liability of the Vendor in connection with such a default is limited and shall not exceed an amount equal to the Deposits; or
- (iii) if any or all of the conditions set out in Sections 8.1 and 8.3 have not been satisfied or waived.

2.4 Allocation of Purchase Price. The parties agree that the Purchase Price shall be allocated among the Purchased Assets as follows: (i) \$1.00 to the Shares; (ii) \$18,499,998 plus, if applicable, \$650,000 to the Lands and Buildings; and (iii) \$1.00 to the remaining Purchased Assets.

ARTICLE 3 – GENERAL COVENANTS

3.1 Covenants of the Vendor. The Vendor:

- (a) throughout the Interim Period, will upkeep and maintain the Property in its present condition, reasonable wear and tear excepted, and will manage the Property in a professional and diligent manner and as a careful and prudent owner would do in accordance with current practices in the CCAA Proceedings and in compliance with all applicable laws, regulations and orders;
- (b) throughout the Interim Period, will maintain in full force and effect insurance coverage for fire, earthquake and all risks in respect of the Property as well as commercial liability coverage until closing on the Closing Date, in such amounts and on such terms as would a prudent owner;
- (c) throughout the Interim Period, will use commercially reasonable efforts to:
 - (i) obtain all consents, approvals and authorizations that may be required in order to provide the Purchaser with the right to use the Intellectual Property for the purposes of the marketing, development and construction of the Project as of the Closing Date;
 - (ii) obtain an extension of at least six months from the City of Vancouver in connection with the building permit for the Project; and
 - (iii) obtain reliance letters in favour of the Purchaser in connection with those Consultant Reports that the Purchaser identifies to the Vendor, in writing, not less than fifteen (15) Business Days prior to the Closing Date;
- (d) from the Execution Date until the satisfaction or waiver of all of the conditions precedent set out in Section 8.1(a), will not enter into any commitment or agreement or contract, or modify any material terms or terminate any of the Approved Contracts, Permitted Encumbrances, Title Contracts, Plans, Permits and Approvals, or any mortgage or charge relating to the Purchased Assets or that would form an Encumbrance on the Purchased Assets without prior written notice to the Purchaser, and from the date of satisfaction or waiver by the Purchaser of

all of the conditions precedent set out in Section 8.1(a) will not enter into any commitment or agreement or contract, or modify any material terms or terminate any of the Approved Contracts, Permitted Encumbrances, Title Contracts, Plans, Permits and Approvals, or any mortgage or charge relating to the Purchased Assets or that would form an Encumbrance on the Purchased Assets without the prior written consent of the Purchaser, which the Purchaser may withhold in its sole discretion;

- (e) will, on or prior to the Closing Date, cancel, disclaim or terminate at its expense all Contracts other than Approved Contracts;
- (f) will take or cause to be taken all proper steps and actions and corporate proceedings on its part to enable the Vendor to vest a good and marketable title to the Purchased Assets in the Purchaser free and clear of all Encumbrances except for Permitted Encumbrances and to enable the Vendor to carry out the sale of the Purchased Assets and to execute and deliver this Agreement as valid and binding obligations of the Vendor;
- (g) will promptly notify the Purchaser if the Vendor becomes aware that, after the date of this Agreement, any of its representations or warranties in this Agreement become untrue or incorrect or if any covenants, terms or conditions in this Agreement are breached or cannot be performed; and
- (i) throughout the Interim Period, grant to the Purchaser and its authorized representatives the right to enter upon the Property during business hours upon reasonable notice for the purposes of carrying out such inspections, examinations, tests and surveys, including soil tests, as the Purchaser may deem necessary; provided that the Purchaser shall indemnify and save harmless the Vendor from any and all loss, cost or damage suffered as a direct result of the Purchaser exercising its rights pursuant to this clause.

ARTICLE 4 – RISK

4.1 Risk. The Purchased Assets will be at the risk of the Vendor until completion of closing on the Closing Date and thereafter at the risk of the Purchaser.

4.2 Material Loss Damage. If there is any Material Loss prior to the passing of risk as set out in Section 4.1, the Purchaser will, within fifteen (15) days following such Material Loss, by notice in writing at its option either:

- (a) terminate this Agreement, in which case the Deposit together with accrued interest will be paid to the Purchaser and neither party will be under any further obligation to the other; or
- (b) elect to complete the purchase of the Purchased Assets, in which case the insurance proceeds and the right to receive the proceeds of all insurance will be assigned by the Vendor to the Purchaser on the Closing Date and the Purchase Price shall be reduced by the amount of any insurance deductible that has not been paid by the Vendor.

Failure by the Purchaser to so elect within the period set out above will be deemed to be an election to complete the purchase of the Purchased Assets. The Vendor will promptly notify the Purchaser if it becomes aware of any Material Loss.

ARTICLE 5 – ADJUSTMENTS AND RELATED MATTERS

5.1 Adjustments. The Purchase Price payable by the Purchaser to the Vendor for the Purchased Assets will be subject to adjustment. All adjustments with respect to the Purchased Assets, including taxes, utilities, deposits and interest on deposits (if any), and other items normally adjusted between a vendor and purchaser in the sale of similar properties in British Columbia will be adjusted as of the Closing Date so that the Vendor will bear and pay all expenses and receive all income related to the Purchased Assets accruing prior to the Closing Date and the Purchaser will bear and pay all expenses and receive all income related to the Purchased Assets accruing on and after the Closing Date and the Purchase Price will be adjusted accordingly. The Vendor shall cause any water, gas, or electrical meter readings required to make the adjustments herein.

5.2 Statement of Adjustments. A statement of adjustments will be delivered to the Purchaser by the Vendor at least five (5) Business Days prior to the Closing Date and shall have annexed to it complete details of the calculations used by the Vendor to arrive at all debits and credits on the statement of adjustments. On request, the Vendor shall give the Purchaser access to the Vendor's working papers and backup materials in order to confirm the statement of adjustments.

5.3 Re-Adjustment Determination. The parties acknowledge and agree that there will be no re-adjustment after the Closing Date.

ARTICLE 6 – POSSESSION

6.1 Possession Date. The Purchaser will, upon completion of the purchase and sale have possession of all Purchased Assets as of the Closing Date free and clear of all Encumbrances subject only to the Permitted Encumbrances.

6.2 Non-assignable Assets. If any of the Purchased Assets are not transferable without consent of a third party by the terms of the applicable instruments, the Vendor shall use commercially reasonable efforts to obtain such consent prior to the Closing Date and, if such consent is not obtained by the Closing Date, the Vendor shall use commercially reasonable efforts to obtain an Order in the CCAA Proceedings transferring or assigning, as applicable, such Purchased Assets to the Purchaser. For certainty, any failure to obtain the consent of any such third party will not constitute a default of the Vendor nor will it entitle the Purchaser to terminate this Agreement.

ARTICLE 7 – REPRESENTATIONS AND WARRANTIES

7.1 Vendor's Representations and Warranties. The Vendor represents and warrants to the Purchaser, regardless of any independent investigations that the Purchaser may cause to be made, that as at the date of this Agreement:

- (a) the Limited Partnership is a limited partnership formed under the *Partnership Act* (British Columbia) and has the power and authority to own the Purchased Assets, to enter into this Agreement, and to perform its obligations under this Agreement, all of which have been authorized by all necessary proceedings;

- (b) the GP is a corporation formed under the *Business Corporations Act* (British Columbia) and has the power and authority to own the Purchased Assets, in its capacity as general partner of the Limited Partnership or in its own capacity, as applicable, to enter into this Agreement, and to perform its obligations under this Agreement, all of which have been authorized by all necessary proceedings;
- (c) the Limited Partnership is a Canadian partnership within the meaning of the *Income Tax Act* (Canada); and
- (d) the GP is not a non-resident of Canada within the meaning of the *Income Tax Act* (Canada).

7.2 Survival of Vendor's Representations and Warranties. The representations and warranties contained in Section 7.1 will survive the Closing Date and will continue in full force and effect for the benefit of the Purchaser after the Closing Date for a period of 12 months, unless otherwise expressly indicated herein, notwithstanding any independent inquiry or investigation by the Purchaser or the satisfaction or waiver by the Purchaser of any condition set out in Section 8.1, the subject matter of which is contained in a representation or warranty in this Agreement.

7.3 Purchaser's Representations and Warranties. The Purchaser represents and warrants to the Vendor, regardless of any independent investigation that the Vendor may cause to be made that:

- (a) the Purchaser is a corporation incorporated and existing under the laws of British Columbia;
- (b) the Purchaser has the corporate power and authority to enter into this Agreement and to perform its obligations under this Agreement;
- (c) there is no action or proceeding pending or to the best of the Purchaser's knowledge, threatened against the Purchaser before any court, arbiter, arbitration panel, administrative tribunal or agency which, if decided adversely to the Purchaser, might materially affect the Purchaser's ability to perform the Purchaser's obligations hereunder;
- (d) neither the Purchaser's entering into this Agreement nor the performance of its terms will result in the breach of or constitute a default under any term or provision of any indenture, mortgage, deed of trust or other agreement to which the Purchaser is bound or subject;
- (e) the Purchaser is not a non-Canadian for the purposes of the *Investment Canada Act* (Canada); and
- (f) the Purchaser is not a foreign entity for the purposes of the *Property Transfer Tax Act* (British Columbia).

7.4 Survival of Purchaser's Representations and Warranties. The representations and warranties contained in Section 7.3 will survive the Closing Date and will continue in full force and effect for the benefit of the Vendor after the Closing Date for a period of 12 months, unless otherwise expressly indicated herein, notwithstanding any independent inquiry or investigation by the Vendor.

7.5 "As Is" Purchase. The Purchaser acknowledges and agrees that:

- (a) in entering into this Agreement and completing the transactions contemplated herein, except for the representations and warranties of the Vendor set out in Section 7.1, the Purchaser has relied and will continue to rely solely upon its own due diligence with respect to the Purchased Assets;
- (b) the Purchased Assets are being purchased by the Purchaser on an "as is, where is" basis as of the Closing Date and without any representation or warranty, whether expressed or implied by this Agreement or at law, by the Vendor of any nature or kind whatsoever respecting any of the Purchased Assets or any matter relating thereto, except for the representations and warranties of the Vendor set out in Section 7.1 or in the Closing Documents;
- (c) except for the representations and warranties of the Vendor set out in Section 7.1 or in the Closing Documents, the Vendor makes no representations or warranties concerning any statements made or information delivered or made available to the Purchaser (whether by the Vendor, the Vendor's Solicitors or any other agents, representatives or advisors of the Vendor or any of their respective affiliates, or any other person) with respect to the Purchased Assets, whether included as part of any due diligence matters or any other information disclosed to the Purchaser or otherwise; and
- (d) except as otherwise expressly provided for in this Agreement or in the Closing Documents, the Vendor shall have no obligations or responsibility to the Purchaser after the Closing Date with respect to any matter relating to the Purchased Assets or the condition thereof.

The provisions of this Section shall survive closing or the termination of this Agreement.

ARTICLE 8 – CONDITIONS PRECEDENT

8.1 Purchaser's Conditions. The Purchaser's obligation to complete the transactions contemplated by this Agreement is subject to the following conditions, all of which are for the sole benefit of the Purchaser:

- (a) on the Closing Date, the representations and warranties of the Vendor contained in Section 7.1 will be true and correct in all material respects with the same effect as though such representations and warranties had been made on and as of the Closing Date; and
- (b) on the Closing Date, all of the covenants and agreements of the Vendor to be performed on or before the Closing Date pursuant to this Agreement will have been duly performed in all material respects.

If the conditions set out in this Section have not been satisfied by notice in writing from the Purchaser to the Vendor, by the times specified in this Section, the Purchaser may by notice in writing to the Vendor waive satisfaction of such conditions, in whole or in part, without prejudice to any of its other rights under this Agreement and complete the purchase of the Purchased Assets or elect not to complete.

8.2 Consideration for and Nature of Conditions. A portion of the First Deposit in the amount of \$10.00 represents non-refundable consideration paid by the Purchaser for its right to satisfy or waive the conditions set out in Section 8.1 and Section 8.3 and the Vendor acknowledges the sufficiency in all respects of such consideration. Although the Purchaser's obligation to complete the transaction contemplated by this Agreement is subject to satisfaction or waiver of conditions, those conditions are not conditions to there being a binding agreement of purchase and sale between the parties respecting the Purchased Assets and until the time limited for the satisfaction or waiver of such conditions has expired, this Agreement is not void, voidable, revocable or, except for default, otherwise capable of being terminated by either of the parties.

8.3 Mutual Condition. The obligation of each of the parties to complete the transactions contemplated by this Agreement is subject to the following mutual conditions, all of which are for the benefit of both the Vendor and the Purchaser, on or before 5:00 p.m. (Vancouver time) on July 22, 2022, the Vendor has obtained (at the sole cost of the Vendor) an Order in substantially form attached hereto as Schedule "B" (the "**Reverse Vesting Order**"):

- (a) approving this Agreement and implementing the transactions contemplated herein in accordance with its terms;
- (b) adding ResidualCo as a debtor to the CCAA Proceedings;
- (c) replacing the GP as the general partner of the Limited Partnership with ResidualCo;
- (d) transferring and assigning all of the Excluded Assets and Liabilities to ResidualCo;
- (e) vesting title to the Purchased Assets (including, without limitation, the Shares) in and to the Purchaser, free and clear of all Encumbrances except the Permitted Encumbrances; and
- (f) authorizing and directing the Monitor to assign ResidualCo into bankruptcy.

8.4 Satisfaction of Mutual Condition. The parties agree that if each of the Purchaser and the Vendor do not give notice to the other party by the time limited in Section **Error! Reference source not found.** that the condition in that Section is satisfied, then this Agreement will automatically be null and void upon the expiry of such time and the Deposits shall be returned to the Purchaser with interest (if any). For certainty, a failure to satisfy the conditions set out in Section 8.3 shall not constitute a default of either party.

8.5 Vendor's Conditions. The Vendor's obligation to complete the transactions contemplated by this Agreement is subject to the following conditions, all of which are for the sole benefit of the Vendor:

- (a) on the Closing Date, the representations and warranties of the Purchaser contained in Section 7.3 will be true and correct in all material respects with the same effect as though such representations and warranties had been made on and as of the Closing Date; and
- (b) on the Closing Date, all of the covenants and agreements of the Purchaser to be performed on or before the Closing Date pursuant to this Agreement will have been duly performed in all material respects.

If the conditions set out in this Section have not been satisfied by notice in writing from the Vendor to the Purchaser, by the times specified in this Section, the Vendor may, with the written consent of the Monitor, by notice in writing to the Purchaser waive satisfaction of such conditions, in whole or in part, without prejudice to any of its other rights under this Agreement and complete the sale of the Purchased Assets or elect not to complete.

8.6 Consideration for and Nature of Conditions. The Vendor hereby pays to the Purchaser the amount of \$10.00 representing non-refundable consideration paid by the Vendor for its right to satisfy or waive the conditions set out in Sections 8.3 and 8.5 and the Purchaser acknowledges the sufficiency in all respects of such consideration. Although the Vendor's obligation to complete the transaction contemplated by this Agreement is subject to satisfaction or waiver of conditions, those conditions are not conditions to there being a binding agreement of purchase and sale between the parties respecting the Purchased Assets and until the time limited for the satisfaction or waiver of such conditions has expired, this Agreement is not void, voidable, revocable or, except for default, otherwise capable of being terminated by either of the parties.

8.7 CCAA Proceedings. The Purchaser and the Vendor shall support the application for the Reverse Vesting Order. In the event any variation is sought or leave to appeal is sought, an appeal is taken or a stay pending appeal is requested with respect to the Reverse Vesting Order, the Vendor shall promptly notify the Purchaser of such application for leave to appeal, appeal or stay request and shall promptly provide to the Purchaser a copy of the related notice(s) or order(s).

8.8 Form of Order. The Vendor or its solicitors will provide the Purchaser and its solicitors with a draft copy of all Orders proposed to be obtained in connection with this Agreement for review and comment at least two (2) days prior to the date that the Vendor applies for such Order(s), and, provided that such amendments are consistent with the terms set out herein, the Vendor will incorporate any reasonable amendments requested by the Purchaser or its solicitors.

ARTICLE 9 – CLOSING

9.1 Closing. The closing of the purchase and sale of the Purchased Assets will commence at 10:00 a.m. (Vancouver time) on the Closing Date. The closing will be a virtual closing with documents to be exchanged electronically, or at such other time on the Closing Date, or in such other format as may be agreed in writing by the Vendor and the Purchaser.

9.2 Vendor's Closing Documents. On or before the Closing Date, the Vendor will deliver, or cause the Vendor's Solicitors to deliver, to the Purchaser's Solicitors in trust to be held in escrow as provided in this Agreement, the following duly executed as applicable and all in a form satisfactory to the Purchaser, acting reasonably:

- (a) Court certified copy of the Reverse Vesting Order and any other Orders as are necessary, all in a form registrable in all necessary offices required to effect the transfer of the Purchased Assets;
- (b) letters from legal counsel to the Vendor to the Land Title Survey Authority or other agency as may be required by the Reverse Vesting Order;
- (c) a beneficial transfer conveying the beneficial interest in the Property to the Purchaser;

- (d) an assignment and assumption of Approved Contracts, Plans, Permits and Approvals wherein the Purchaser assumes the rights and obligations under the Approved Contracts and Plans, Permits and Approvals as of the Closing Date and the Purchaser indemnifies the Vendor for all Liability under the Approved Contracts and Plans, Permits and Approvals arising after the completion of the transactions contemplated herein and the Vendor retains all Liability under the Approved Contracts and Plans, Permits and Approvals arising prior to the Closing Date and indemnifies the Purchaser for all Liability under the Approved Contracts and Plans, Permits and Approvals arising prior to the completion of the transactions contemplated herein;
- (e) an assignment and assumption of Permitted Encumbrances and Title Contracts;
- (f) an assignment and assumption of the Vendor's right, title and interest, in and to:
 - (i) subject to such transfer being approved by the necessary parties in accordance with Section 3.1(c)(i), the Intellectual Property; (ii) all insurance and new home warranties obtained in connection with the Project; and (iii) all marketing materials prepared in connection with the Project;
- (g) a bill of sale conveying the Chattels to the Purchaser;
- (h) a statement of adjustments pursuant to Article 5;
- (i) an assignment of all of the Vendor's rights under any and all Warranties wherein the Purchaser acquires all rights under the Warranties whether arising prior to or after the Closing Date;
- (j) a transfer of the Shares together with all resolutions, certificates and acknowledgements of the Limited Partnership and the GP as may be reasonably required by the Purchaser to effectively transfer the Shares
- (k) an amendment to the LP Agreement effecting the change in the general partner from the GP to ResidualCo, together with all supporting resolutions, certificates and acknowledgements of the Limited Partnership and the GP as may be reasonably required by the Purchaser;
- (l) a certificate dated as of the Closing Date of a senior officer of the GP, in its own capacity and as general partner of the Limited Partnership, having knowledge of the facts certifying, on behalf of the GP and the Limited Partnership and without personal liability, that the representations and warranties set out in Section 7.1 are true and correct in all material respects as at the Closing Date and that the Vendor's covenants and agreements to be observed or performed on or before the Closing Date pursuant to the terms of this Agreement have been duly observed and performed in all material respects;
- (m) a notice from the Vendor to the other parties under the Approved Contracts giving notice of the sale of the Property;
- (n) keys to all units and facilities of the Property to the extent required by the Purchaser; and

- (o) such other documents and assurances as may be reasonably required by the Purchaser to give full effect to the intent and meaning of this Agreement.

9.3 Purchaser's Closing Documents. On or before the Closing Date, the Purchaser will deliver, or cause the Purchaser's Solicitors to deliver, to the Vendor's Solicitors in trust to be held in escrow as provided in this Agreement, the following duly executed as applicable:

- (a) an assignment and assumption of Approved Contracts, Plans, Permits and Approvals;
- (b) an assignment and assumption of Permitted Encumbrances and Title Contracts;
- (c) an assignment and assumption of the Vendor's right, title and interest, in and to: (i) subject to such transfer being approved by the necessary parties in accordance with Section 3.1(c)(i), the Intellectual Property; (ii) all insurance and new home warranties obtained in connection with the Project; and (iii) all marketing materials prepared in connection with the Project;
- (d) the GST Certificate;
- (e) a certificate dated as of the Closing Date of a senior officer of the Purchaser having knowledge of the facts certifying, on behalf of the Purchaser and without personal liability, that the representations and warranties set out in Section 7.3 are true and correct in all material respects as at the Closing Date and that the Purchaser's covenants and agreements to be observed or performed on or before the Closing Date pursuant to the terms of this Agreement have been duly observed and performed in all material respects; and
- (f) such other documents and assurances as may be reasonably required by the Vendor to give full effect to the intent and meaning of this Agreement.

9.4 Preparation and Form of Documents. The closing documents contemplated in Sections 9.2 and 9.3 (collectively, the "**Closing Documents**"), other than the statement of adjustments in Article 5, and the materials required in connection with a Reverse Vesting Order set out in Section 9.2(j) will be prepared by the Purchaser's Solicitors and delivered to the Vendor's Solicitors at least five (5) Business Days before the Closing Date. The Closing Documents (including the statement of adjustments in Article 5 and the materials required in connection with a Reverse Vesting Order set out in Section 9.2(j)) will be in a form and substance reasonably satisfactory to the parties. The Vendor shall provide the Purchaser with drafts of all materials to be filed with the Court no later than two (2) days prior to the date of any hearing of the Court regarding the Reverse Vesting Order.

9.5 Payment into Trust. On or before the Closing Date, the Purchaser will pay to the Purchaser's Solicitors, in trust, by way of certified cheque, bank draft, or wire transfer, funds in an amount equal to the Balance, as adjusted, less any amount to be advanced to the Purchaser on the Closing Date under any mortgage financing arranged by the Purchaser, as further described in Section 9.9.

9.6 Registration. On the Closing Date, after receipt by the Purchaser's Solicitors of the Closing Documents set out in Section 9.2 and the funds as set out in Section 9.5, and after receipt by the Vendor's Solicitors of the Closing Documents set out in Section 9.3, the Purchaser will

cause the Purchaser's Solicitors to file the Reverse Vesting Order in the Land Title Office and any security documents applicable to any mortgage financing arranged by the Purchaser, as further described in Section 9.9.

9.7 Closing Escrow. All Closing Documents, funds, and other items delivered by the parties, except the Reverse Vesting Order (which will be dealt with pursuant to Section 9.6), will be held in trust by the Vendor's Solicitors and the Purchaser's Solicitors until completion of closing on the Closing Date in accordance with this Agreement. Promptly after the filings set out in Section 9.6 and a satisfactory post filing for registration search has been received by the Purchaser's Solicitors showing that title to the Property will be free and clear of all Encumbrances except for the Permitted Encumbrances or any Encumbrances granted by or claimed through the Purchaser, the Closing Documents will be released to the appropriate parties and the Purchaser will cause the Purchaser's Solicitors to pay the Purchase Price, as adjusted, to the Vendor's Solicitors by way of wire transfer.

9.8 Concurrent Requirements. It is a condition of the closing that all matters of payment, execution and delivery of documents by each party to the other and the filing of documents in the Land Title Office as set out in Section 9.6, all pursuant to the terms of this Agreement, will be deemed to be concurrent requirements and it is specifically agreed that nothing will be complete at the closing until everything required as a condition precedent at the closing has been paid, executed and delivered and all filings set out in Section 9.6 have been completed.

9.9 Purchaser's Financing. If the Purchaser is relying upon a new mortgage to finance the purchase of the Purchased Assets, the Purchaser, while still required to pay the Purchase Price on the Closing Date, may wait to pay the Purchase Price until after the Reverse Vesting Order and new mortgage documents have been filed in the Land Title Office and after receipt of the proceeds of such mortgage financing, but only if, before such filing, the Purchaser has:

- (a) made available for tender to the Vendor that portion of the Purchase Price not secured by the new mortgage;
- (b) fulfilled all the new mortgagee's conditions for funding except filing the mortgage for registration; and
- (c) made available to the Vendor, a lawyer's undertaking to pay the Purchase Price upon the filing of the Reverse Vesting Order and new mortgage documents and the advance by the mortgagee of the mortgage proceeds.

9.10 Payment by Wire Transfer. Notwithstanding anything else contained herein, provided the Purchaser's Solicitors have initiated the wire transfer for the balance of the Purchase Price, as adjusted, to the Vendor's Solicitors on the Closing Date, and provided the Vendor's Solicitors with written confirmation thereof, the Purchaser will be deemed to have paid the balance of the Purchase Price, as adjusted, due to the Vendor if such amount is credited to the Vendor's Solicitors account by 11:00 a.m. (Vancouver time) on the first Business Day following the Closing Date without interest or penalty. If such amount is not received by 11:00 a.m. (Vancouver time) on the first Business Day following the Closing Date, the Purchaser will pay to the Vendor interest at the rate of the prime rate of interest designated from time to time by Royal Bank of Canada plus 3% per annum on such amount until such time as it is received by the Vendor.

ARTICLE 10 – TAXES

10.1 GST. The Purchaser represents and warrants to Vendor that it is and will be, as of the closing on the Closing Date, registered for the purposes of Part IX of the *Excise Tax Act* (Canada) (the “ETA”) in accordance with the requirements of Subdivision D of Division V of the ETA and will assume responsibility to account for, report and remit any goods and services tax and harmonized sales tax (collectively, the “GST”) payable under the ETA in connection with the transaction contemplated in this Agreement. On the Closing Date, the Purchaser will deliver to the Vendor a certificate (the “GST Certificate”) of a senior officer of the Purchaser certifying, on behalf of the Purchaser and without personal liability (a) that the Purchaser is registered under Part IX of the ETA as of the Closing Date; (b) its registration number; and (c) that the Purchaser will account for, report and remit any GST payable in respect of the purchase of the Purchased Assets in accordance with the ETA. If the Purchaser delivers such GST Certificate, then the Purchaser will not be required to pay to the Vendor, and the Vendor will not be required to collect from the Purchaser nor report or remit, any GST in connection with the transaction contemplated in this Agreement. The Purchaser shall indemnify and hold the Vendor and its directors, officers, employees, advisors and agents harmless from any liability under the ETA arising as a result of any breach of this Section, the GST Certificate or any declaration made therein and such indemnity shall survive the completion of the transactions contemplated herein.

10.2 Provincial Sales Tax. The Purchaser acknowledges that it may be liable to pay provincial sales tax in respect of some or all of the Chattels and, if required, it will report and remit as required by applicable law any such sales tax that is due directly to the applicable taxing authority. The Purchaser shall indemnify and hold the Vendor and its directors, officers, employees, advisors and agents harmless from any liability related to the Vendor's failure to account for, report and remit such provincial sales tax and such indemnity shall survive the completion of the transactions contemplated herein.

10.3 Tax Elections. Notwithstanding the above, the Vendor will cooperate with the Purchaser to execute any election available under applicable law that may reduce or defer the amount or due date of any GST or other tax payable by the Purchaser provided such election will not result in any increased cost or tax liability for the Vendor.

10.4 Other Taxes. The Purchaser shall be responsible for all transfer taxes (subject to an adjustment to the Purchase Price in accordance with Section **Error! Reference source not found.**), fees and expenses in connection with the registration of the Final Order or transfer of the Purchased Assets.

10.5 Preparation of Tax Returns After Closing. Forthwith following closing on the Closing Date the Vendor will, in consultation with the Purchaser and the Purchaser's professional advisors and accountants, cause income tax and other tax returns consequent to the closing to be prepared for the GP. The Purchaser will be responsible for all reasonable costs related to the preparation and filing of these returns along with the costs of the Purchaser's own accountant and other consultants in reviewing the same. The Vendor will also provide reasonable assistance in preparing and filing all financial statements, tax returns and other documents required by law in respect of any government charges or in respect of any federal, provincial, municipal or other taxing statute for fiscal periods of the GP ending for tax purposes on or before the Closing Date.

ARTICLE 11 – GENERAL

11.1 Further Assurances. Each of the parties will execute and deliver all such further documents and do such further acts and things as may be reasonably required from time to time to give effect to this Agreement.

11.2 No Merger. The execution and delivery of the Closing Documents is not intended to and will not in any way merge or otherwise restrict the terms, covenants, conditions, representations, warranties or provisions made or to be performed or observed by the parties contained in this Agreement other than the obligation to deliver the Closing Documents.

11.3 Entire Agreement. This Agreement constitutes the entire agreement between the Vendor and the Purchaser pertaining to the purchase and sale of the Purchased Assets and supersedes all prior agreements and undertakings, negotiations and discussions, whether oral or written, of the Vendor and the Purchaser and there are no representations, warranties, covenants or agreements between the Vendor and Purchaser except as set out in this Agreement.

11.4 Amendment. Subject to Section 11.5, this Agreement may only be altered or amended by an agreement in writing executed by all of the parties.

11.5 Solicitors as Agents. Any notice, approval, waiver, agreement, instrument, document or communication permitted, required or contemplated in this Agreement may be given or delivered and accepted or received by the Purchaser's Solicitors, on behalf of the Purchaser, and by the Vendor's Solicitors, on behalf of the Vendor, and any tender of Closing Documents and the Purchase Price may be made upon the Vendor's Solicitors and the Purchaser's Solicitors, as the case may be.

11.6 Notices. Any notice, document or communication required or permitted to be given under this Agreement will be in writing and delivered by hand or electronic transmission as follows:

(a) if to the Purchaser:

Solterra Acquisitions Corp.
460 Fraserview Place
Delta, BC V3M 6H4

Attention: Gerry Nichele
E-mail: Gnasst@niradia.com

with a further copy to the Purchaser's Solicitors:

Fasken Martineau DuMoulin LLP
#2900 – 550 Burrard Street
Vancouver, BC V6C 0A3

Attention: Kibben Jackson
E-mail: kjackson@fasken.com [mailto:](mailto:kjackson@fasken.com)

(b) if to the Vendor:

Port Capital Development (EV) Inc. / Evergreen House Development Limited
Partnership
c/o Ernst & Young Inc.
700 West Georgia Street
Vancouver, BC V7Y 1C7

Attention: Mike Bell
E-mail: mike.bell@parthenon.ey.com

with a further copy to the Vendor's Solicitors:

Bennett Jones LLP
666 Burrard Street, Suite 2500
Vancouver, BC V6C 2X8

Attention: David Gruber and Mark Lewis
E-mail: gruberd@bennettjones.com; lewismlv@bennettjones.com

with a further copy to the Monitor's Solicitors:

Blake, Cassels & Graydon LLP
595 Burrard Street, P.O. Box 49314,
Suite 2600, Three Bentall Centre
Vancouver, BC V7X 1L3

Attention: Peter Rubin and Greg Umbach
E-mail: peter.rubin@blakes.com; greg.umbach@blakes.com

or to such other address in Canada as either party may in writing advise. Any notice, document or communication will be deemed to have been given on the Business Day when delivered by hand if delivered prior to 5 p.m. (Vancouver time), otherwise will be deemed to be delivered and received on the next Business Day; or, if made by email, shall be deemed to have been given on the Business Day when transmitted if it is so transmitted prior to 5 p.m. (Vancouver time) on the day of transmittal, otherwise will be deemed to be given and received on the next Business Day.

11.7 Fees. Each of the parties will pay its own legal fees and fees of its consultants. The Purchaser will pay all registration costs and property transfer tax payable in connection with its purchase of the Purchased Assets, subject to an adjustment to the Purchase Price in accordance with Section **Error! Reference source not found.**

11.8 Real Estate Commissions. Each of the Vendor and the Purchaser represents and warrants that it has not made any agreement with any real estate agent or broker regarding payment of any commission in respect of the purchase and sale of the Purchased Assets.

11.9 Waiver of Site Disclosure Statement. The Purchaser waives any right it may have to be provided with, and any requirement for the Vendor to provide, a site disclosure statement for the Property under the *Environmental Management Act* (British Columbia) and the regulations under that act.

11.10 Time. Time is of the essence of this Agreement. If anything is required to be done under this Agreement on a day which is not a Business Day, the same shall be done on the next following Business Day.

11.11 Tender. Unless otherwise set out herein, any tender of documents or money may be made upon the party being tendered or upon its solicitors and money will be tendered by certified cheque, bank draft, or wire transfer.

11.12 Enurement. This Agreement will enure to the benefit of and be binding upon the parties and their respective successors and permitted assigns.

11.13 Force Majeure. If by reason of Excusable Delay, the Vendor or Purchaser is delayed in performing or observing a covenant or obligation hereunder which is to be performed or observed (the "**Specified Date**"), or if either the Purchaser or the Vendor is delayed in satisfying or waiving any of the conditions precedent set out in Sections 8.1, 8.3 or 8.5, the applicable Specified Date will be extended by a period of time equal to the duration of the Excusable Delay, provided that the Vendor or Purchaser, as applicable, notifies the other party in writing prior to the applicable Specified Date, and such notice sets out in detail the date of the commencement and nature of such circumstances (the "**Delay Notice**"), and provided further that the party giving the Delay Notice uses its commercially reasonable efforts to render performance in a timely manner utilizing to such end commercially reasonable and available resources required in the circumstances. If the duration of the Excusable Delay exceeds 60 days from the date of giving a Delay Notice, the party receiving such Delay Notice may terminate this Agreement forthwith, notwithstanding any other provision of this Agreement, by giving written notice of termination to the other party, in which event the parties shall have no further obligations to one another. In determining whether delay is excusable, the party giving the Delay Notice shall be held to a commercially reasonable standard and not to a best efforts standard.

11.14 Assignment. The Purchaser will be entitled to assign its rights and obligations under this Agreement on prior written notice to, but without the consent of the Vendor to any one or more affiliates (within the meaning of the *Business Corporations Act* (British Columbia)) of the Purchaser or to one or more limited partnerships in which the general partners are affiliates (within the meaning of the *Business Corporations Act* (British Columbia)) of the Purchaser if: (i) the Purchaser delivers written notice of such assignment(s) to the Vendor; (ii) the assignee(s) enters into an agreement pursuant to which the assignee(s) agrees to be bound by all of the obligations and Liability of the Purchaser under this Agreement as if it was the original Purchaser; (iii) the Purchaser is not released from its obligations and Liability under this Agreement until the completion of the transactions contemplated in this Agreement, at which time the assignor will be automatically released from all of its obligations and Liability under this Agreement without the need for any further deliveries or instruments of release; and (iv) such assignment(s) is completed not less than ten (10) Business Days prior to the Closing Date. The Purchaser will not otherwise be entitled to assign its rights and obligations under this Agreement except with the prior written consent of the Vendor, such consent may be arbitrarily withheld or delayed by the Vendor.

11.15 Governing Law. This Agreement will be governed by and construed in accordance with the laws of the Province of British Columbia and the laws of Canada applicable in it.

11.16 Waiver. No waiver of any of the provisions of this Agreement will be deemed or will constitute a waiver of any other provision nor will any waiver constitute a continuing waiver unless otherwise expressed or provided.

11.17 Confidentiality. Except as may be required in the CCAA Proceedings, the parties will not disclose the existence of nor the contents of this Agreement to any third party, except their respective directors, officers, employees, agents or advisors, including lawyers, accountants, consultants, bankers and financial advisors (collectively, the “**Authorized Parties**”), without the prior written consent of the other party, not to be unreasonably withheld, provided that such consent is not required in the case of disclosure required by law or disclosure by either party to enforce any of its rights under this Agreement or to obtain necessary consents under this Agreement. The parties will instruct their respective Authorized Parties to comply with the provisions of this Section 11.17 and the parties will be responsible for any breach of the provisions of this Section 11.17 by their respective Authorized Parties. This Section 11.17 does not apply to public information or information in the public domain at the time that such information is obtained, information in the possession of a party not provided by the other party, or information received in good faith from a third party lawfully in possession of the information and not in breach of any confidentiality obligation. The obligations under this Section 11.17 shall terminate as of the second anniversary of the date of this Agreement. The provisions of this Section 11.17 shall supersede the confidentiality provisions of any non-disclosure or confidentiality agreements entered into by the parties with respect to the Purchased Assets and the transactions contemplated in this Agreement.

11.18 Public Announcement. The parties agree that no disclosure or announcement, public or otherwise shall be made concerning this Agreement or the transactions contemplated hereunder without the prior consent of both parties, except as otherwise required by applicable law, regulation or regulatory authority or stock exchange rules or requirements. The parties shall consult and cooperate with each other with respect to any proposed announcement of the transactions contemplated hereunder.

11.19 No Registration. The Purchaser will not register this Agreement or notice of this Agreement against title to the Property.

11.20 Currency. All dollar amounts referred to are Canadian dollars.

11.21 Construction. The division and headings of this Agreement are for reference only and are not to affect construction or interpretation.

11.22 Counterparts and Execution. This Agreement may be executed in counterparts and delivered by electronic transmission including by PDF format, and each such counterpart will constitute an original and all such counterparts together will constitute one and the same agreement.

11.23 Schedules. The following schedules are attached to and form a part of this Agreement:

Schedule A – Legal Description and Permitted Encumbrances

Schedule B – Reverse Vesting Order

[Signature pages follow]

The parties are signing this Agreement as of the date set out above.

**ERNST & YOUNG INC. in its capacity as the
Monitor of EVERGREEN HOUSE DEVELOPMENT
LIMITED PARTNERSHIP, by its general partner,
PORT CAPITAL DEVELOPMENT (EV) INC., and
not in its personal capacity**

By: _____
Name: Mike Bell
Title: Senior Vice President, Ernst & Young
Inc.

**ERNST & YOUNG INC. in its capacity as the
Monitor of PORT CAPITAL DEVELOPMENT (EV)
INC., and not in its personal capacity**

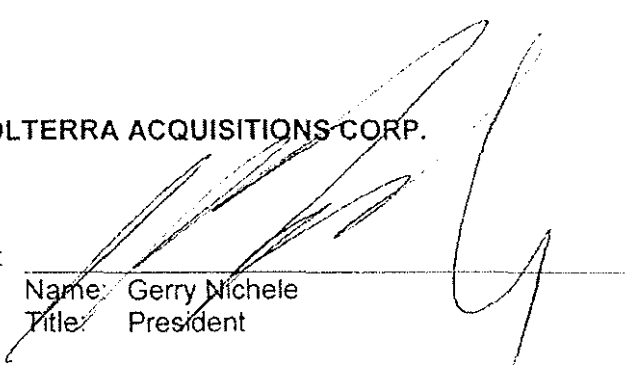
By: _____
Name: Mike Bell
Title: Senior Vice President, Ernst & Young
Inc.

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SOLTERRA ACQUISITIONS CORP.

By:

Name: Gerry Nichele
Title: President

A large, stylized handwritten signature in black ink, written over a horizontal line. The signature is slanted upwards to the right and appears to be the name 'Gerry Nichele'.A small, handwritten signature in black ink, located in the bottom right corner of the page. It is slanted upwards to the right.

SCHEDULE A
LEGAL DESCRIPTION AND PERMITTED ENCUMBRANCES

Part 1 – Legal Description of Lands

PID: 006-721-397; LOT 18, EXCEPT THAT PART OF THE CANADIAN PACIFIC RAILWAY RIGHT-OF-WAY AS DESCRIBED IN ABSOLUTE FEE PARCELS BOOK, VOLUME 9, FOLIO 317, NO. 1154C, AND EXCEPT THE SOUTH 7 FEET NOW ROAD, BLOCK 29 DISTRICT LOT 185 PLAN 92

Part 2 – Permitted Encumbrances

- (a) the reservations, limitations, provisions or conditions expressed in the original grants from the Crown of any of the Lands and the statutory exceptions to title currently applicable to the Lands;
- (b) a claim of right, title or jurisdiction which may be made or established by any aboriginal peoples by virtue of their status as aboriginal peoples to or over any Lands;
- (c) liens for taxes, assessments, rates, duties, charges or levies not at the time due, which relate to obligations or Liability assumed by the Purchaser; and
- (d) the Encumbrances listed below in respect of the Lands.

Legal Notations

- 1. Easement No. BP238635

Charges, Liens and Interests

- 1. Restrictive Covenant No. R18424
- 2. Easement and Indemnity Agreement No. J7909
- 3. Easement No. BP238634

C
Schedule B – Monitor's Certificate

No. S-205095
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

– AND –

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,
S.B.C. 2002, C. 57, AS AMENDED

– AND –

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF
PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE
DEVELOPMENT LIMITED PARTNERSHIP

MONITOR'S CERTIFICATE

- A. By order made May 29, 2020, as amended and restated on June 8, 2020 and February 14, 2022, this Court appointed Ernst & Young Inc. as monitor (the "**Monitor**") of each of the Petitioners, pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-46 (as amended, the "CCAA");
- B. Pursuant to an order of the Court dated July 9, 2022 (the "**Approval and Vesting Order**"), the Court approved the sale of the Purchased Assets to Solterra (the "**Purchaser**"), providing for the vesting in the Purchaser of all of the Petitioners' right, title and interest in and to the Purchased Assets (as defined in the Sale Agreement), which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Monitor to the Purchaser of a certificate confirming: (i) the payment by the Purchaser of the Closing Payment (as defined in the Purchase Agreement).
- C. Unless otherwise indicated herein, the capitalized terms have the meanings set out in the Approval the Vesting Order.

THE MONITOR HEREBY CERTIFIES the following:

1. The Monitor has incorporated ResidualCo in accordance with the Approval and Vesting Order. ResidualCo shall hereafter be referred to as ●.
2. The Monitor has received the Purchase Price.
3. This Certificate was delivered by the Monitor at _____ on _____, 2022.

ERNST & YOUNG INC., in its capacity as
Monitor of the Petitioners, and not in its
personal capacity.

Per: _____
Name:

^D
Schedule C – Claims to be deleted/expunged from title to Real Property

Nature: MORTGAGE

Registration Number: CA6395613

Registration Date and Time: 2017-10-25 14:37

Registered Owner: AVIVA INSURANCE COMPANY OF CANADA
INCORPORATION NO. A0051421

Nature: ASSIGNMENT OF RENTS

Registration Number: CA6395614

Registration Date and Time: 2017-10-25 14:37

Registered Owner: AVIVA INSURANCE COMPANY OF CANADA
INCORPORATION NO. A0051421

Nature: MORTGAGE

Registration Number: CA7337616

Registration Date and Time: 2019-02-06 15:25

Registered Owner: CMLS FINANCIAL LTD.

INCORPORATION NO. BC0124226

Transfer Number: CA7337616 TRANSFERRED TO CA9459739

Registered Owner: DOMAIN MORTGAGE CORP.

INCORPORATION NO. BC1140295

Transfer Number: CA9459739

Remarks: MODIFIED BY CA9459782

MODIFIED BY CA9790630

Nature: ASSIGNMENT OF RENTS

Registration Number: CA7337617

Registration Date and Time: 2019-02-06 15:25

Registered Owner: CMLS FINANCIAL LTD.

INCORPORATION NO. BC0124226

Transfer Number: CA7337617 TRANSFERRED TO CA9459740

Registered Owner: DOMAIN MORTGAGE CORP.

INCORPORATION NO. BC1140295

Transfer Number: CA9459740

Nature: PRIORITY AGREEMENT

Registration Number: CA7337731

Registration Date and Time: 2019-02-06 16:03

Remarks: GRANTING CA7337616 PRIORITY OVER CA6395613 AND
CA6395614

Nature: PRIORITY AGREEMENT

Registration Number: CA7337732

Registration Date and Time: 2019-02-06 16:03

Remarks: GRANTING CA7337617 PRIORITY OVER CA6395613 AND

CA6395614

Nature: CLAIM OF BUILDERS LIEN
Registration Number: CA8047964
Registration Date and Time: 2020-02-21 12:07
Registered Owner: AR-CON HOLDINGS LTD.
INCORPORATION NO. BC1172997

Nature: CLAIM OF BUILDERS LIEN
Registration Number: CA8140760
Registration Date and Time: 2020-04-15 16:55
Registered Owner: URBAN ONE BUILDERS CM INC.
INCORPORATION NO. BC1028882

Nature: CLAIM OF BUILDERS LIEN
Registration Number: CA8148543
Registration Date and Time: 2020-04-21 11:42
Registered Owner: MATAKANA SCAFFOLDING B.C. INC.
INCORPORATION NO. BC0683439

Nature: CLAIM OF BUILDERS LIEN
Registration Number: CA8154113
Registration Date and Time: 2020-04-23 17:28
Registered Owner: FRANCL ARCHITECTURE INC.
INCORPORATION NO. BC1143645

Nature: CLAIM OF BUILDERS LIEN
Registration Number: CA8155198
Registration Date and Time: 2020-04-24 11:09
Registered Owner: DOKA CANADA LTD./LTEE
INCORPORATION NO. A0070064

Nature: CLAIM OF BUILDERS LIEN
Registration Number: CA8170195
Registration Date and Time: 2020-05-01 11:14
Registered Owner: CAIRNS ELECTRIC LTD.
INCORPORATION NO. BC1191875

Nature: CLAIM OF BUILDERS LIEN
Registration Number: WX2147027
Registration Date and Time: 2020-05-01 13:44
Registered Owner: DYNAMIC STRUCTURES LTD.

Nature: CLAIM OF BUILDERS LIEN
Registration Number: CA8187493
Registration Date and Time: 2020-05-13 14:07

Registered Owner: GLASTECH GLAZING CONTRACTORS LTD.
INCORPORATION NO. BC1188251

Nature: CLAIM OF BUILDERS LIEN
Registration Number: CA8193236
Registration Date and Time: 2020-05-15 12:26
Registered Owner: TWO PILLARS CONSTRUCTION LTD.
INCORPORATION NO. BC0740590

Nature: CLAIM OF BUILDERS LIEN
Registration Number: CA8198230
Registration Date and Time: 2020-05-20 12:53
Registered Owner: CENTURA BUILDING SYSTEMS (2013) LTD.
INCORPORATION NO. BC0959038

Nature: CERTIFICATE OF PENDING LITIGATION
Registration Number: CA8208931
Registration Date and Time: 2020-05-27 11:24
Registered Owner: URBAN ONE BUILDERS CM INC.
INCORPORATION NO. BC1028882

Nature: CLAIM OF BUILDERS LIEN
Registration Number: CA8213493
Registration Date and Time: 2020-05-28 15:40
Registered Owner: RDH BUILDING SCIENCE INC.
INCORPORATION NO. BC0549924

Nature: CLAIM OF BUILDERS LIEN
Registration Number: CA8232262
Registration Date and Time: 2020-06-08 16:39
Registered Owner: COLUMBIA SEAL LTD.
INCORPORATION NO. 1091476

Nature: CLAIM OF BUILDERS LIEN
Registration Number: CA8381710
Registration Date and Time: 2020-08-25 09:42
Registered Owner: HARRIS STEEL ULC
INCORPORATION NO. A0078280

Nature: CLAIM OF BUILDERS LIEN
Registration Number: CA8381711
Registration Date and Time: 2020-08-25 09:42
Registered Owner: HARRIS STEEL ULC
INCORPORATION NO. A0078280

Nature: CLAIM OF BUILDERS LIEN
Registration Number: CA8381712
Registration Date and Time: 2020-08-25 09:42
Registered Owner: HARRIS STEEL ULC DBA HARRIS REBAR
INCORPORATION NO. A0078280

Nature: CLAIM OF BUILDERS LIEN
Registration Number: CA8381713
Registration Date and Time: 2020-08-25 09:42
Registered Owner: HARRIS STEEL ULC
INCORPORATION NO. A0078280

Nature: CLAIM OF BUILDERS LIEN
Registration Number: CA8381714
Registration Date and Time: 2020-08-25 09:42
Registered Owner: HARRIS STEEL ULC
INCORPORATION NO. A0078280

Nature: CLAIM OF BUILDERS LIEN
Registration Number: CA8381715
Registration Date and Time: 2020-08-25 09:42
Registered Owner: HARRIS STEEL ULC
INCORPORATION NO. A0078280

Nature: CLAIM OF BUILDERS LIEN
Registration Number: CA8430537
Registration Date and Time: 2020-09-15 15:37
Registered Owner: INTEGRAL GROUP CONSULTING (BC) LLP

Nature: CERTIFICATE OF PENDING LITIGATION
Registration Number: CA8783490
Registration Date and Time: 2021-02-19 09:20
Registered Owner: AR-CON HOLDINGS LTD.
INCORPORATION NO. BC1172997

Nature: CLAIM OF BUILDERS LIEN
Registration Number: CA8904368
Registration Date and Time: 2021-04-08 14:23
Registered Owner: DOKA CANADA LTD./LTEE

Nature: CERTIFICATE OF PENDING LITIGATION
Registration Number: CA8932182
Registration Date and Time: 2021-04-20 10:17
Registered Owner: MATAKANA SCAFFOLDING B.C. INC.
Remarks: INTER ALIA

Nature: CERTIFICATE OF PENDING LITIGATION

Registration Number: CA8939175

Registration Date and Time: 2021-04-22 11:47

Registered Owner: FRANCL ARCHITECTURE INC.
INCORPORATION NO. BC1143645

Nature: CERTIFICATE OF PENDING LITIGATION

Registration Number: CA8984690

Registration Date and Time: 2021-05-06 15:08

Registered Owner: GLASTECH GLAZING CONTRACTORS LTD.
INCORPORATION NO. BC1188251

Nature: CERTIFICATE OF PENDING LITIGATION

Registration Number: CA9002006

Registration Date and Time: 2021-05-13 10:11

Registered Owner: TWO PILLARS CONSTRUCTION LTD.
INCORPORATION NO. BC0740590

Nature: CERTIFICATE OF PENDING LITIGATION

Registration Number: CA9281560

Registration Date and Time: 2021-08-17 11:58

Registered Owner: HARRIS STEEL ULC
INCORPORATION NO. A0078280

Nature: CERTIFICATE OF PENDING LITIGATION

Registration Number: CA9341705

Registration Date and Time: 2021-09-08 09:29

Registered Owner: INTEGRAL GROUP CONSULTING (BC) LLP

Nature: MODIFICATION

Registration Number: CA9459782

Registration Date and Time: 2021-10-26 15:59

Remarks: MODIFICATION OF CA7337616

Nature: PRIORITY AGREEMENT

Registration Number: CA9459931

Registration Date and Time: 2021-10-26 16:47

Remarks: GRANTING CA7337616 PRIORITY OVER CA6395613 AND
CA6395614

Nature: PRIORITY AGREEMENT

Registration Number: CA9459932

Registration Date and Time: 2021-10-26 16:47

Remarks: GRANTING CA7337617 PRIORITY OVER CA6395613 AND
CA6395614

Nature: MODIFICATION
Registration Number: CA9790630
Registration Date and Time: 2022-03-16 16:36
Remarks: MODIFICATION OF CA7337616

Nature: PRIORITY AGREEMENT
Registration Number: CA9790647
Registration Date and Time: 2022-03-16 16:44
Remarks: GRANTING CA7337616 PRIORITY OVER CA6395613 AND
CA6395614

Nature: PRIORITY AGREEMENT
Registration Number: CA9790648
Registration Date and Time: 2022-03-16 16:44
Remarks: GRANTING CA7337617 PRIORITY OVER CA6395613 AND
CA6395614

Pending Application
Parcel Identifier: 006-721-397
Application Number/Type: BB1547883 CLAIM OF BUILDERS LIEN

^E
Schedule D – Permitted Encumbrances, Easements and Restrictive Covenants
related to Real Property

1. The reservations, limitations, provisos and conditions expressed in the original grant thereof from the Crown of any of the Lands and the statutory exceptions to title currently applicable to the Lands;
2. A claim of right, title or jurisdiction which may be made or established by any aboriginal peoples by virtue of their status as aboriginal peoples on or over any Lands;
3. Liens for taxes, assessments, rates, duties, charges or levies not at the time due, which related to obligations or liabilities assumed by the Purchaser;
4. The encumbrances listed below with respect to the Lands:
 - (a) Easement No. BP238635
 - (b) Restrictive Covenant No. R18424
 - (c) Easement and Indemnity Agreement No. J7909
 - (d) Easement No. BP238634

F

Schedule E – Legal Description of Lands

PARCEL IDENTIFIER: 006-721-397

LOT 18, EXCEPT THAT PART OF THE CANADIAN PACIFIC RAILWAY RIGHT-OF-WAY AS DESCRIBED IN ABSOLUTE FEE PARCELS BOOK, VOLUME 9, FOLIO 317, NO. 1154C, AND EXCEPT THE SOUTH 7 FEET NOW ROAD, BLOCK 29 DISTRICT LOT 185 PLAN 92

PART 3: EVIDENCE, EXHIBITS OR AFFIDAVITS

<u>Document</u>	<u>Page</u>
Exhibit A – Order Made After Application (Amended and Restated Initial Order), made June 8, 2020, entered June 9, 2020	50
Exhibit B – Notice of Application of Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership, filed May 11, 2022	86
Exhibit C – Order Made After Application (Interim Financing and Stay Extension), made May 13, 2022, entered May 18, 2022	96
Exhibit D – Notice of Application of Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership, filed June 15, 2022	104
Exhibit E – Notice of Application of Domain Mortgage Corp., filed July 5, 2022	113
Exhibit F – Petition to the court, <i>Domain Mortgage Corp. v. Evergreen House Development Limited Partnership and Port capital Development (EV) Inc.</i> , Supreme Court, Vancouver Registry No. S225423	131
Exhibit G – Notice of Application of Domain Mortgage Corp., filed July 5, 2022	166
Exhibit H – Notice of Hearing (re Petition), filed July 5, 2022	184
Exhibit I – Notice of Application of Aviva Insurance Company of Canada, filed July 7, 2022	186
Exhibit J – Notice of Application of Ernst & Young in its capacity as Monitor of Port Capital and Evergreen House, filed July 11, 2022	200
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Exhibit L – Notice of Application of Aviva Insurance Company of Canada, filed July 22, 2022	290
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No. S-205095
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

– AND –

**IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,
S.B.C. 2002, C. 57, AS AMENDED**

– AND –

**IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF
PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE DEVELOPMENT
LIMITED PARTNERSHIP**

ORDER MADE AFTER APPLICATION

(Amended and Restated Initial Order)

BEFORE THE HONOURABLE	)	
MADAM JUSTICE FITZPATRICK	)	08/June/2020
	)	

THE APPLICATION of the Petitioners coming on for hearing via telephone conference, on the 8th day of June, 2020 (the "Order Date"); AND ON HEARING David E. Gruber and Alexandra Andrisoi, counsel for the Petitioners and those other counsel and parties listed on Schedule "A" hereto all attended via telephone; AND UPON READING the material filed, including the First Report of Ernst & Young, Inc. ("EY"), the court appointed Monitor; AND pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 as amended (the "CCAA"), the British Columbia Supreme Court Civil Rules and the inherent jurisdiction of this Honourable Court;

THIS COURT ORDERS AND DECLARES THAT:

1. This Amended and Restated Initial Order amends and restates the Order (the "**Initial Order**") of this Court made in these proceedings on May 29, 2020 (the "**Order Date**").

SERVICE

2. The time for service of the Notice of Application dated June 5, 2020 herein be and is hereby abridged such that the Notice of Application is properly returnable today and service thereof on any interested party is hereby dispensed with.

JURISDICTION

3. Port Capital Development (EV) Inc. ("**Port Capital GP**") is a company to which the CCAA applies. Pursuant to s. 11 of the CCAA, Evergreen House Development Limited Partnership (together with Port Capital GP, the "**Petitioners**") shall enjoy the benefits of the protections and authorizations provided in this Order, and shall be subject to the same restrictions hereunder.

PLAN OF ARRANGEMENT

4. The Petitioners shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

5. Subject to this Order and any further Order of this Court, including for clarity the Enhanced Monitor's Powers provided herein, the Petitioners shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"), and continue to carry on their business (the "**Business**") in the ordinary course and in a manner consistent with

the preservation of the Business and the Property. The Petitioners shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively, "Assistants") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for carrying out the terms of this Order.

6. The Petitioners shall be entitled, but not required, to pay the following expenses which may have been incurred prior to the Order Date:

- (a) all outstanding wages, salaries, employee and pension benefits (including long and short term disability payments), vacation pay and expenses (but excluding severance pay) payable before or after the Order Date, in each case incurred in the ordinary course of business and consistent with the relevant compensation policies and arrangements existing at the time incurred (collectively "Wages"); and
- (b) the fees and disbursements of any Assistants retained or employed by the Petitioners which are related to the Petitioners' restructuring, at their standard rates and charges, including payment of the fees and disbursements of legal counsel retained by the Petitioner, whenever and wherever incurred, in respect of:
 - (i) these proceedings or any other similar proceedings in other jurisdictions in which the Petitioners or any subsidiaries or affiliated companies of the Petitioners are domiciled;
 - (ii) any litigation in which the Petitioners are named as a party or is otherwise involved, whether commenced before or after the Order Date; and
 - (iii) any related corporate matters.

7. Except as otherwise provided herein, and subject to the terms of the Commitment Letter and the Definitive Documents (as hereinafter defined) including for clarity the Enhanced

Monitor's Powers provided herein, the Petitioners shall be entitled to pay all expenses reasonably incurred by the Petitioners in carrying on the Business in the ordinary course following the Order Date, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

- (a) all expenses and capital expenditures reasonably incurred and which are necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors' and officers' insurance), maintenance and security services, provided that any capital expenditure exceeding \$5,000.00 shall be approved by the Monitor;
- (b) all obligations incurred by the Petitioners after the Order Date, including without limitation, with respect to goods and services actually supplied to the Petitioners following the Order Date (including those under purchase orders outstanding at the Order Date but excluding any interest on the Petitioners' obligations incurred prior to the Order Date); and
- (c) fees and disbursements of the kind referred to in paragraph 6(b) which may be incurred after the Order Date.

8. The Petitioners are authorized to remit, in accordance with legal requirements, or pay:

- (a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from Wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes or any such claims which are to be paid pursuant to Section 6(3) of the CCAA;
- (b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Petitioners in connection with the sale of goods and services by the Petitioner, but only where such Sales Taxes accrue or are collected after the Order Date, or where such Sales Taxes accrued or were collected prior to

the Order Date but not required to be remitted until on or after the Order Date; and

- (c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal property taxes, municipal business taxes or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors.

9. Until such time as a real property lease is disclaimed in accordance with the CCAA, the Petitioners shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated between the Petitioners and the landlord from time to time ("Rent"), for the period commencing from and including the Order Date, twice-monthly in equal payments on the first and fifteenth day of the month in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including Order Date shall also be paid.

10. Except as specifically permitted herein, the Petitioners are hereby directed, until further Order of this Court:

- (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Petitioners to any of their creditors as of the Order Date except as authorized by this Order;
- (b) to make no payments in respect of any financing leases which create security interests;
- (c) to grant no security interests, trust, mortgages, liens, charges or encumbrances upon or in respect of any of their Property, nor become a guarantor or surety, nor otherwise become liable in any manner with respect to any other person or entity except as authorized by this Order;

- (d) to not grant credit except in the ordinary course of the Business only to their customers for goods and services actually supplied to those customers, provided such customers agree that there is no right of set-off in respect of amounts owing for such goods and services against any debt owing by the Petitioners to such customers as of the Order Date; and
- (e) to not incur liabilities except in the ordinary course of Business.

11. Notwithstanding paragraph 10, the Petitioners are permitted, with the consent of the Monitor, to make regular payments under all mortgages granted by the Petitioners due and after the Order Date.

RESTRUCTURING

12. Subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as hereinafter defined), the Petitioners shall have the right to:

- (a) permanently or temporarily cease, downsize or shut down all or any part of their Business or operations and commence marketing efforts in respect of any of their redundant or non-material assets and to dispose of redundant or non-material assets not exceeding \$10,000.00 in any one transaction or \$100,000.00 in the aggregate. If the disposition of assets exceeds these quantums, the Petitioners shall seek the approval of the Monitor, and if the Monitor deems appropriate, the approval of the Court for such dispositions;
- (b) terminate the employment of such of their employees or temporarily lay off such of their employees as it deems appropriate;
- (c) pursue all avenues of refinancing for their Business or Property, in whole or part; and
- (d) with the approval of the Court, and subject to this Order and any further Order, including for clarity the Enhanced Monitor's Powers provided herein, and on notice to (i) CMLS Financial Ltd. ("CMLS"), (ii) Aviva Insurance Company of Canada

("Aviva") and (iii) the pre-sale purchasers, deliver a notice of disclaimer or notice of termination of any pre-sale purchase and sale agreements for real property owned by the Petitioners (the "**Pre-Sale Contracts**") pursuant to Section 32 of the CCAA,

all of the foregoing to permit the Petitioners to proceed with an orderly restructuring of the Business (the "**Restructuring**").

13. The Petitioners shall provide each of the relevant landlords with notice of the Petitioners' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Petitioners' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors who claim a security interest in the fixtures, such landlord and the Petitioner, or by further Order of this Court upon application by the Petitioner, the landlord or the applicable secured creditors on at least two (2) clear days' notice to the other parties. If a Petitioner disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any dispute concerning such fixtures (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to the Petitioners' claim to the fixtures in dispute.

14. If a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then: (a) during the period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours on giving the Petitioners and the Monitor 24 hours' prior written notice; and (b) at the effective time of the disclaimer, the landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims the landlord may have against the Petitioner, or any other rights the landlord might have, in respect of such lease or leased premises and the landlord shall be entitled to notify the Petitioners of the basis on which it is taking possession and gain possession of and re-lease such leased premises to any third party or parties on such terms as the landlord considers

advisable, provided that nothing herein shall relieve the landlord of its obligation to mitigate any damages claimed in connection therewith.

15. Pursuant to Section 7(3)(c) of the *Personal Information Protection and Electronics Documents Act*, S.C. 2000, c. 5 and Section 18(1)(o) of the *Personal Information Protection Act*, S.B.C. 2003, c. 63, and any regulations promulgated under authority of either Act, as applicable (the "**Relevant Enactment**"), the Petitioners, in the course of these proceedings, are permitted to, and hereby shall, disclose personal information of identifiable individuals in their possession or control to stakeholders, their advisors, prospective investors, financiers, buyers or strategic partners (collectively, "**Third Parties**"), but only to the extent desirable or required to negotiate and complete the Restructuring or to prepare and implement the Plan or transactions for that purpose; provided that the Third Parties to whom such personal information is disclosed enter into confidentiality agreements with the Petitioners binding them in the same manner and to the same extent with respect to the collection, use and disclosure of that information as if they were an organization as defined under the Relevant Enactment, and limiting the use of such information to the extent desirable or required to negotiate or complete the Restructuring or to prepare and implement the Plan or transactions for that purpose, and attorning to the jurisdiction of this Court for the purposes of that agreement. Upon the completion of the use of personal information for the limited purposes set out herein, the Third Parties shall return the personal information to the Petitioners or destroy it. If the Third Parties acquire personal information as part of the Restructuring or the preparation and implementation of the Plan or transactions in furtherance thereof, such Third Parties may, subject to this paragraph and any Relevant Enactment, continue to use the personal information in a manner which is in all respects identical to the prior use thereof by the Petitioner.

STAY OF PROCEEDINGS, RIGHTS AND REMEDIES

16. Until and including September 3, 2020 or such later date as this Court may order (the "**Stay Period**"), no action, suit or proceeding in any court or tribunal (each, a "**Proceeding**") against or in respect of the Petitioners, or Port Capital Development Inc. or Macario (Tobi) Reyes solely in their capacities as a guarantor, covenantor, indemnifier or similar capacity of any of the Petitioners' debts or liabilities, or the Monitor, or affecting the Business or the Property,

shall be commenced or continued except with the written consent of the Petitioners and the Monitor or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Petitioners or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

17. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Petitioners or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Petitioners and the Monitor or leave of this Court.

18. Nothing in this Order, including paragraphs 16 and 17, shall: (i) empower the Petitioners to carry on any business which the Petitioners are not lawfully entitled to carry on; (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA; (iii) prevent the filing of any registration to preserve or perfect a mortgage, charge or security interest (subject to the provisions of Section 39 of the CCAA relating to the priority of statutory Crown securities); or (iv) prevent the registration or filing of a lien or claim for lien or the commencement of a Proceeding to protect lien or other rights that might otherwise be barred or extinguished by the effluxion of time, provided that no further step shall be taken in respect of such lien, claim for lien or Proceeding except for service of the initiating documentation on the Petitioner.

NO INTERFERENCE WITH RIGHTS

19. During the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Petitioner, except with the written consent of the Petitioners and the Monitor or leave of this Court.

CONTINUATION OF SERVICES

20. During the Stay Period, all Persons having oral or written agreements with the Petitioners or mandates under an enactment for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Petitioner, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with, or terminating the supply of such goods or services as may be required by the Petitioner, and that the Petitioners shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the Order Date are paid by the Petitioners in accordance with normal payment practices of the Petitioners or such other practices as may be agreed upon by the supplier or service provider and the Petitioners and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

21. Notwithstanding any provision in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the Order Date, nor shall any Person be under any obligation to advance or re-advance any monies or otherwise extend any credit to the Petitioners on or after the Order Date. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

22. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against the directors or officers of the Petitioners with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Petitioners whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Petitioner,

if one is filed, is sanctioned by this Court or is refused by the creditors of the Petitioners or this Court. Nothing in this Order, including in this paragraph, shall prevent the commencement of a Proceeding to preserve any claim against a director or officer of the Petitioners that might otherwise be barred or extinguished by the effluxion of time, provided that no further step shall be taken in respect of such Proceeding except for service of the initiating documentation on the applicable director or officer.

APPOINTMENT OF MONITOR

23. EY is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Petitioners with the powers and obligations set out in the CCAA or set forth herein, and that the Petitioners and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Petitioners pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

24. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

- (a) assist the Petitioners in sourcing debtor-in-possession financing, and advising the Petitioners in relation thereto;
- (b) assist the Petitioners, to the extent required by the Petitioners, in dissemination, to the Interim Lender (as hereinafter defined) and its counsel on a bi-weekly basis of financial and other information as agreed to between the Petitioners and Interim Lender which may be used in these proceedings including reporting on a basis to be agreed with the Interim Lender;
- (c) monitor the Petitioners' receipts and disbursements;

- (d) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;
- (e) advise the Petitioners in their preparation of the Petitioners' cash flow statements and reporting required by the Interim Lender, which information shall be reviewed with the Monitor and delivered to the Interim Lender and its counsel on a periodic basis, but not less than every four weeks following delivery of the initial cash flow projections or as otherwise agreed to by the Interim Lender;
- (f) advise the Petitioners in their development of the Plan and any amendments to the Plan;
- (g) assist the Petitioners, to the extent required by the Petitioners, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;
- (h) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Petitioners, to the extent that is necessary to adequately assess the Petitioners' business and financial affairs or to perform its duties arising under this Order;
- (i) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and
- (j) perform such other duties as are required by this Order or by this Court from time to time.

25. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintained possession or

control of the Business or Property, or any part thereof, and nothing in this Order shall be construed as resulting in the Monitor being an employer or a successor employer, within the meaning of any statute, regulation or rule of law or equity, for any purpose whatsoever.

26. Nothing herein contained shall require or allow the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Fisheries Act*, the *British Columbia Environmental Management Act*, the *British Columbia Fish Protection Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. For greater certainty, the Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

27. The Monitor shall provide any creditor of the Petitioners and the Interim Lender with information provided by the Petitioners in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Petitioners are confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Petitioners may agree.

28. In addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the rights and protections afforded the Monitor by the CCAA or any applicable legislation.

ENHANCED MONITOR POWERS

29. The expansion of the Monitor's powers set forth below is hereby authorized and approved on the terms and conditions set out herein. Nothing in this Order shall derogate from the powers and duties of the Monitor provided for above and in the CCAA.

30. In addition to the powers and duties of the Monitor set forth above, and without altering in any way the limitations and obligations of the Petitioners arising under this Order and by virtue of the institution of these proceedings, the Monitor is hereby authorized and empowered to:

- (a) monitor the activities of any senior officer of the Petitioners in place at the time of this Order or who may be appointed by any subsequent orders of this Court;
- (b) receive, collect and take possession of all monies and accounts now owed or hereinafter owing to any of the Petitioners, including without limitation refunds, management fees, dividends, distributions, rents, proceeds payable pursuant to a sale of any of the Petitioners' assets, and any other amounts payable to the Petitioners;
- (c) take control of any and all accounts of the Petitioners, including accounts with financial institutions, and take all required acts with any financial institution to facilitate the Monitor's control of such accounts, including changing the signing authority on such accounts to such persons as the Monitor, in its sole discretion, deems appropriate, or, if deemed necessary by the Monitor, open one or more new accounts with any financial institution in the Monitor's own name (collectively the "**Monitor's Accounts**") and receive third party funds into the Monitor's Accounts or transfer into the Monitor's Accounts such funds from the Petitioners as the Monitor, in its sole discretion, deems necessary or appropriate to assist with the exercise of the Monitor's powers and duties as set out herein, provided that the monies standing to the credit of the Monitor's Accounts from time to time shall be

held by the Monitor to be dealt with as permitted by this Order, or any other order to be made by the Court in these proceedings;

- (d) oversee and consent to any disbursement or payment required in respect of the Property or the Business, including capital expenditure or other expenditure relating to the preservation or protection of any of the Property and any disbursement or payment made under any order in these proceedings, or, if deemed necessary or appropriate by the Monitor in its sole discretion, make use of funds in the Monitor's Accounts from time to time to make any disbursements or payments for and on behalf of the Petitioners or in connection with the Monitor's exercise of its powers and duties set out herein;
- (e) oversee and assist in the preparation of cash flow statements of the Petitioners and assist in the dissemination of financial and other information in these proceedings to those interested parties that, in the Monitor's discretion in consultation with the Petitioners, and in consideration of confidentiality concerns, ought to receive such information, including the delivery of monthly current rent rolls to mortgagees with interests in rental property;
- (f) review and investigate the books and records of the Petitioners as necessary to enable the Monitor to exercise and discharge its powers and duties set out herein;
- (g) be entitled to rely on the books and records of the Petitioners without independent investigation, unless otherwise ordered by the Court, and, for greater certainty, the Monitor shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information;
- (h) conduct a review of the Petitioners' intercorporate accounts with all affiliates of the Petitioners and any entities managed by the Petitioners that are not Petitioners herein and:

- (i) take any steps necessary in the Monitor's discretion to prevent any of the Petitioners' monies being transferred to affiliates of the Petitioners, any entities managed by the Petitioners, or any other party in the opinion of the Monitor as appropriate; and
 - (ii) file a report with the Court regarding same, including any recommendations by the Monitor as to how such intercorporate accounts, or the Petitioners' interests therein, should be dealt with;
- (i) on behalf of the Petitioners or on its own behalf, engage such employees or former employees of the Petitioners and such consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, that the Monitor deems, at its sole discretion, to be necessary or appropriate to assist the Monitor with the exercise of the powers and duties conferred by this Order, including, without limitation, a chief restructuring officer and a project manager;
- (j) if deemed necessary or appropriate by the Monitor in its sole discretion, subject to such requirements as are imposed by the CCAA, to cause the Petitioners to:
 - (i) permanently or temporarily cease, downsize or shut down all or any part of the Petitioners' Business or operations;
 - (ii) terminate the employment of such of the Petitioners' employees or temporarily lay off such of the Petitioners' employees as the Monitor deems appropriate; and
 - (iii) deliver, pursuant to Section 32 of the CCAA, a notice of disclaimer or notice of termination of any lease or agreement other than Pre-Sale Contracts;

- (k) subject to paragraph 31, with respect to the Pre-Sale Contracts pursuant to paragraph 11(d) of this Order, to determine whether such Pre-Sale Contracts are deemed by the Monitor in its discretion, but in consultation with the Petitioners, CMLS and Aviva, to be in default (the “**Defaulted Pre-Sale Contracts**”), and in the event the Monitor so determines, to seek directions of the Court as to whether such Pre-Sale Contracts ought to be disclaimed, and in the event such Pre-Sale Contracts are disclaimed:
 - (i) collect the forfeited deposit monies in connection with the Defaulted Pre-Sale Contracts (the “**Forfeited Deposits**”); and
 - (ii) hold the Forfeited Deposits in trust, subject to the specific security of CMLS and Aviva (subject to the existing priorities as between those parties), pending the results of the SISP or alternatively the Restructuring, and failing CMLS being fully paid via a sale under the SISP or other Restructuring on or before August 31, 2020, these Forfeited Deposits shall be paid to CMLS or Aviva, as the case may be, and applied against the Petitioners’ debt owing to CMLS or Aviva, as the case may be;
- (l) implement the sales and investment solicitation plan (the “**SISP**”) attached hereto as **Schedule “B”**;
- (m) with the consent of CMLS, seek approval of the Court for a sale of all or any part of the Property following the conclusion of the timelines set out in the SISP; and
- (n) perform such other duties or take any steps reasonably incidental to the exercise of any powers and obligations conferred upon the Monitor by this Order or any further order of the Court.

31. Notwithstanding the Monitor’s discretion to determine whether Pre-Sale Contracts are in default, CMLS and/or Aviva are at liberty to:

- (a) oppose the Monitor's application for directions as to whether such Pre-Sale Contracts ought to be disclaimed; and
- (b) to bring an application seeking a declaration of this Court that any Pre-Sale Contract is in default, and in the event the Court declares any Pre-Sale Contract is in default, then the provisions of paragraphs 30(k)(i) and 30(k)(ii) of this Order shall apply.

32. No provision of this Order is intended, or shall be deemed to appoint the Monitor as an officer, director or employer of any of the Petitioners. Additionally, nothing in this Order shall constitute or be deemed to constitute the Monitor as a receiver, assignee, liquidator, or receiver and manager of any of the Petitioners. Any distribution made to creditors of the Petitioners or any other Person in accordance with the terms of this Order and any other orders of this Court in these proceedings will be deemed to have been made by the applicable Petitioner and not the Monitor.

33. The Petitioners and their current and former shareholders, officers, directors, employees, agents and representatives shall cooperate fully with the Monitor in the exercise of its powers and discharge of its duties and obligations under this Order or any other order of this Court.

ADMINISTRATION CHARGE

34. The Monitor, counsel to the Monitor, if any, and counsel to the Petitioners shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Petitioners as part of the cost of these proceedings. The Petitioners are hereby authorized and directed to pay the accounts of the Monitor, counsel to the Monitor and counsel to the Petitioners on a periodic basis and, in addition, the Petitioners are hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Petitioner, retainers in the amount[s] of \$50,000.00 each to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

35. Counsel to the Petitioners, the Monitor and its legal counsel shall be careful to differentiate their accounts in this CCAA from time spent in other insolvency matters for related entities to the Petitioners and shall pass their accounts from time to time, and for this purpose the accounts of the Petitioners, the Monitor and its legal counsel are hereby referred to a judge of the British Columbia Supreme Court who may determine the manner in which such accounts are to be passed, including by hearing the matter on a summary basis or referring the matter to a Registrar of this Court.

36. The Monitor, counsel to the Monitor, if any, and counsel to the Petitioners shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of \$250,000.00, as security for their respective fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order which are related to the Petitioners' restructuring. The Administration Charge shall have the priority set out in paragraphs 43 and 46 hereof.

INTERIM FINANCING

37. The Petitioners are hereby authorized and empowered to obtain and borrow under a credit facility from Desjardins Financial Security Life Assurance Company (the "**Interim Lender**") in order to finance the continuation of the Business and preservation of the Property, provided that borrowings under such credit facility shall not exceed \$1,250,000 unless permitted by further Order of this Court.

38. Such credit facility shall be on the terms and subject to the conditions set forth in the commitment letter between the Petitioners and the Interim Lender dated as of June 5, 2020 (the "**Commitment Letter**"), filed.

39. The Petitioners are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the Commitment Letter or as may be reasonably required by the Interim Lender pursuant to the

terms thereof, and the Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the Interim Lender under and pursuant to the Commitment Letter and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

40. The Interim Lender shall be entitled to the benefit of and is hereby granted a charge (the "**Interim Lender's Charge**") on the Property. The Interim Lender's Charge shall not secure an obligation that exists before this Order is made. The Interim Lender's Charge shall have the priority set out in paragraphs 43 and 46 hereof.

41. Notwithstanding any other provision of this Order:

- (a) the Interim Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Interim Lender's Charge or any of the Definitive Documents;
- (b) upon the occurrence of an event of default under any of the Definitive Documents or the Interim Lender's Charge, the Interim Lender, upon five business days notice to the Petitioners and the Monitor, may exercise any and all of its rights and remedies against the Petitioners or the Property under or pursuant to the Commitment Letter, Definitive Documents and the Interim Lender's Charge, including without limitation, to cease making advances to the Petitioners and set off and/or consolidate any amounts owing by the Interim Lender to the Petitioners against the obligations of the Petitioners to the Interim Lender under the Commitment Letter, the Definitive Documents or the Interim Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Petitioners and for the appointment of a trustee in bankruptcy of the Petitioners; and

- (c) the foregoing rights and remedies of the Interim Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Petitioners or the Property.

42. The Interim Lender, in such capacity, shall be treated as unaffected in any plan of arrangement or compromise filed by the Petitioner under the CCAA, or any proposal filed by the Petitioners under the *Bankruptcy and Insolvency Act* of Canada (the "BIA"), with respect to any advances made under the Definitive Documents.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

43. The priorities of the Administration Charge and the Interim Lender's Charge, as among them, shall be as follows:

- (a) First – Administration Charge (to the maximum amount of \$250,000.00);
- (b) Second – Interim Lender's Charge.

44. Any security documentation evidencing, or the filing, registration or perfection of, the Administration Charge and the Interim Lender's Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be effective as against the Property and shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered or perfected subsequent to the Charges coming into existence, notwithstanding any failure to file, register or perfect any such Charges.

45. Each of the Charges shall constitute a mortgage, security interest, assignment by way of security and charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, mortgages, charges and encumbrances and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**"), in favour of any Person, save and except those claims contemplated by section 11.8(8) of the CCAA.

46. Except as otherwise expressly provided herein, or as may be approved by this Court, the Petitioners shall not grant or suffer to exist any Encumbrances over any Property that rank in

priority to, or *pari passu* with the Charges, unless the Petitioners obtains the prior written consent of the Monitor, the Interim Lender and the beneficiaries of the Administration Charge.

47. The Administration Charge, the Interim Lender's Charge, the Commitment Letter and the Definitive Documents shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the Interim Lender shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, mortgage, security agreement, debenture, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Petitioners; and notwithstanding any provision to the contrary in any Agreement:

- (a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the Commitment Letter or the Definitive Documents shall create or be deemed to constitute a breach by the Petitioners of any Agreement to which they are a party;
- (b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Petitioners entering into the Commitment Letter, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and
- (c) the payments made by the Petitioner pursuant to this Order, the Commitment Letter or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

48. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Petitioners' interest in such real property leases.

SERVICE AND NOTICE

49. The Monitor shall (i) without delay, publish in the *Vancouver Sun* newspaper a notice containing the information prescribed under the CCAA, (ii) within five days after Order Date, (A) make the Initial Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Petitioners of more than \$1000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

50. The Petitioners and the Monitor are at liberty to serve the Initial Order, this Amended and Restated Initial Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Petitioners' creditors or other interested parties at their respective addresses as last shown on the records of the Petitioners and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

51. Any Person that wishes to be served with any application and other materials in these proceedings must deliver to the Monitor by way of ordinary mail, courier, personal delivery or electronic transmission a request to be added to a service list (the "Service List") to be maintained by the Monitor. The Monitor shall post and maintain an up to date form of the Service List on its website at: www.ey.com/ca/terracehouse

52. Any party to these proceedings may serve any court materials in these proceedings by emailing a PDF or other electronic copy of such materials to counsels' email addresses as

recorded on the Service List from time to time, and the Monitor shall post a copy of all prescribed materials on its website at: www.ey.com/ca/terracehouse

53. Notwithstanding paragraphs 50 and 52 of this Order, service of the Petition, the Notice of Hearing of Petition, any affidavits filed in support of the Petition and the Initial Order shall be made on the Federal and British Columbia Crowns in accordance with the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, and regulations thereto, in respect of the Federal Crown, and the *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, in respect of the British Columbia Crown.

GENERAL

54. The Petitioners or the Monitor may from time to time apply to this Court for directions in the discharge of its powers and duties hereunder.

55. Nothing in the Initial Order or this Amended and Restated Initial Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Petitioners, the Business or the Property.

56. THIS COURT REQUESTS the aid and recognition of other Canadian and foreign Courts, tribunal, regulatory or administrative bodies, including any Court or administrative tribunal of any federal or State Court or administrative body in the United States of America, to act in aid of and to be complementary to this Court in carrying out the terms of this Order where required. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Petitioners and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Petitioners and the Monitor and their respective agents in carrying out the terms of this Order.

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

Canada, including acting as a foreign representative of the Petitioners to apply to the United States Bankruptcy Court for relief pursuant to Chapter 15 of the *United States Bankruptcy Code*, 11 U.S.C. §§ 101-1330, as amended.

58. The Petitioners may (subject to the provisions of the CCAA and the BIA) at any time file a voluntary assignment in bankruptcy or a proposal pursuant to the commercial reorganization provisions of the BIA if and when the Petitioners determines that such a filing is appropriate.

59. The Petitioners are hereby at liberty to apply for such further interim or interlocutory relief as it deems advisable within the time limited for Persons to file and serve Responses to the Petition.

60. Leave is hereby granted to hear any application in these proceedings on two (2) clear days' notice after delivery to all parties on the Service List of such Notice of Application and all affidavits in support, subject to the Court in its discretion further abridging or extending the time for service.

61. Any interested party (including the Petitioners and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to all parties on the Service List and to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

62. Endorsement of this Order by counsel appearing on this application other than counsel for the Petitioner is hereby dispensed with.

63. This Order and all of its provisions are effective as of 12:01 a.m. local Vancouver time on the June 8, 2020.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:



Signature of David E. Gruber
Lawyer for the Petitioners

BY THE COURT

Digitally signed by
Fitzpatrick, J

Digitally signed by
Roberts, Nicole

REGISTRAR

Schedule "A"

(List of Counsel)

Counsel name/litigant	Party represented
Colin D. Brousson	CMLS Financial Ltd., and Desjardins Financial Security Life Assurance Company
Bryan Gibbons	Aviva Insurance Company of Canada
Peter Rubin	The Monitor

Schedule "B"

SALE AND INVESTMENT SOLICITATION PROCESS

INTRODUCTION

Pursuant to a Companies' Creditor Arrangement Act, R.S.C. 1985, c. C – 36 ("CCAA") initial order (as may be amended from time to time, the "Initial Order") of the Supreme Court of British Columbia (the "Court") dated May 29, 2020 in Action No. VLC-S-S-205095, Vancouver Registry (the "CCAA Proceeding") in regard to Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership (collectively the "Debtor"), Ernst & Young, Inc. was appointed as monitor (in such capacity, the "Monitor") in the CCAA Proceeding and was granted certain Enhanced Monitor's Powers (as defined in the Initial Order) including the power to implement the Sale and Investment Solicitation Plan set out herein (the "SISP") with regard to the assets of the Debtor being chiefly the development property having a legal description of PID: 006-721-397 Lot 18, Except that part of the Canadian Pacific Railway Right-of-Way as described in Absolute Fee Parcel Book, Volume 9, Folio 317, No. 1154C, and Except the South 7 Feet now Road, Block 29 District Lot 185 Plan 92 and the Debtor.

Accordingly, the Monitor intends to conduct this SISP in consultation with CMLS Financial Ltd. and Aviva Insurance Company of Canada (collectively, the "Secured Creditors") and the Debtor. The SISP is intended to solicit interest in a sale of, or investment in, the assets and/or the businesses of the Debtor.

Pursuant to the SISP, all qualified interested parties will be provided with an opportunity to participate in the SISP.

OPPORTUNITY AND SISP SUMMARY

1. The SISP is intended to solicit interest in, and opportunities for, a sale of, or investment in, all or part of the Debtor's business and the Property (the "Opportunity").
2. In order to maximize the number of participants that may have an interest in the Opportunity, the SISP will provide for the solicitation of interest for:
 - (a) the sale of the Property (as defined in the Initial Order). Interested parties may submit proposals to acquire all, substantially all or a portion of the Property of the Debtor (a "Sale Proposal"); and
 - (b) the investment in the business operations (the "Business") of the Debtor on a going concern basis. Such proposals may take the form of an investment in or proposals to restructure, reorganize or refinance the Business (an "Investment Proposal").
3. Except to the extent otherwise set forth in a definitive sale or investment agreement with a successful bidder, any Sale Proposal or any Investment Proposal will be on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by the Monitor or any of its affiliates, agents, advisors or estates, and, in the event of a sale, all of the right, title and interest of the Debtor in and to the Property to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests therein and thereon pursuant to Court orders, except as otherwise provided in such Court orders.
4. As described more fully in this SISP, the major stages in the SISP will be comprised of the following:

- (a) **Pre-Marketing:** preparation of all marketing material, assembly of all relevant due diligence material, establishment of an electronic data room and preparation of potential buyer/investor lists;
 - (b) **Marketing:** advertising, contacting potential buyers/investors, responding to requests for information and disseminating marketing material to potential buyers and investors; and
 - (c) **Offer Submission and Evaluation:** solicitation, receipt of, evaluation and negotiation of offers from potential buyers and investors, as described below.
5. The offer submission and evaluation stage of the SISP will be comprised of a two Phase offering process: "**Phase 1**" being the submission of non-binding asset purchase agreements or investment agreements ("**Agreements**") from qualified bidders, and "**Phase 2**" being the submission of a binding offer from those parties that submitted non-binding Agreements and have been invited by the Debtor to participate in Phase 2 (defined below as Phase 1 Qualified Bidders).

TIMELINE

6. The following table sets out the target dates under the SISP:

Target Dates	Target Dates
Phase 1 Non-Binding Bid Deadline	July 10, 2020
Phase 2 Binding Bid Deadline (or Auction Date)	August 7, 2020
Court Approval Date (subject to Court availability)	August 25, 2020
Outside Closing Date	August 31, 2020

7. The target dates set forth above may be adjusted in the sole discretion of the Monitor after consultation with the Secured Creditors and the Debtor.

PRE-MARKETING STAGE

8. As soon as reasonably practicable:
- (a) The Monitor will solicit and consider marketing proposals from commercial real estate agents (an "**Agent**") for the marketing of the Property and negotiate, accept or reject any of such proposals in consultation with the Secured Creditors and the Debtor. For clarity, in consultation with the Secured Creditors and the Debtor the Monitor may reject all such proposals and choose to market the Property directly;
 - (b) the Monitor or its Agent (if any) will prepare: (i) a process summary (the "**Teaser Letter**") describing the Opportunity, outlining the process under the SISP and inviting recipients of the Teaser Letter to express their interest pursuant to the SISP; (ii) a non-disclosure agreement in form and substance satisfactory to the Monitor and its counsel (an "**NDA**"); and (iii) a confidential Information Memorandum ("**CIM**"). The CIM will specifically stipulate that the Monitor makes no representation or warranty as to the accuracy or completeness of the information contained in the CIM, the Data Room (as defined below), or otherwise made available pursuant to the SISP or otherwise, except to the extent expressly contemplated in any definitive sale or investment agreement with a Successful Bidder (as defined below) ultimately executed and delivered by the Monitor;

- (c) the Monitor, with the assistance of the Debtor, will gather and review all required due diligence material to be provided to interested parties and shall establish a secure, electronic data room (the "Data Room"), which will be maintained and administered by the Monitor during the SISP;
- (d) the Monitor, in consultation with the Secured Creditors and the Debtor, will develop a draft form of asset purchase agreement and draft form of investment agreement (collectively, the "Agreement Form"); and
- (e) the Monitor or its Agent (if any), will prepare a list of potential bidders, including: (i) parties that have approached the Debtor, the Monitor or the Agent (if any) indicating an interest in the Opportunity; and (ii) local, national and international strategic and financial parties who the Monitor or the Agent (if any) believe may be interested in purchasing all or part of the Business and Property or investing in the Debtor pursuant to the SISP (collectively, "Known Potential Bidders").

MARKETING STAGE

9. The Monitor or its Agent (if any) will arrange for a notice of the SISP (and such other relevant information as the Monitor considers appropriate) (the "Notice") to be published in the real estate section of the Globe and Mail (National Edition), and any other newspaper or journals as the Monitor considers appropriate, if any.
10. The Monitor or its Agent (if any) will send the Teaser Letter and NDA to all Known Potential Bidders and to any other party who responds to the Notice or otherwise requests such documents as soon as reasonably practicable after such request or identification, as applicable.
11. The Monitor or its Agent (if any) will send the CIM and grant access to the Data Room to those parties who have executed and delivered the NDA to the Monitor or its Agent (if any).
12. Requests for information and access will be directed to a designated representative of the Monitor or the Agent (if any). Without limiting the terms of the NDA, all printed information shall remain the property of the Monitor or the Debtor as the case may be and, if requested by the Monitor, shall be returned without further copies being made and/or destroyed with an acknowledgement that all such material has either been returned and/or destroyed and no electronic information has been retained.
13. Any party who expresses a wish to participate in the SISP (a "Potential Bidder") must, prior to being given any additional information such as the CIM and access to the Data Room, provide to the Monitor and the Debtor an NDA executed by it, and which shall inure to the benefit of any ultimate Successful Bidder, and a letter setting forth the identity of the Potential Bidder, the contact information for such Potential Bidder and full disclosure of the direct and indirect principals of the Potential Bidder.
14. If it is determined by the Monitor in consultation with the Secured Creditors and the Debtor and in the Monitor's reasonable business judgment that a Potential Bidder: (i) has delivered the documents contemplated in paragraph 13 above then such Potential Bidder will be deemed to be a "Phase 1 Qualified Bidder".

OFFER SUBMISSION AND EVALUATION STAGE

Phase 1: Non-Binding Agreement

Submission Phase

15. At any time prior to the Phase 1 Bid Deadline, the Monitor, in consultation with the Secured Creditors and the Debtor may in their reasonable business judgment, eliminate a Phase 1 Qualified Bidder from the SISP, in which case such bidder will no longer be a Phase 1 Qualified Bidder for the purposes of the SISP.
16. Potential Bidders must rely solely on their own independent review, investigation and/or inspection of all information and of the Property and Business in connection with their participation in the SISP and any transaction they enter into with the Monitor.
17. Phase 1 Qualified Bidders who advise the Monitor or its Agent (if any) that they wish to submit an offer will be provided with a copy of the Agreement Form.
18. A Phase 1 Qualified Bidder who wishes to pursue the Opportunity further must deliver an Agreement to the Monitor or its Agent (if any) at the addresses which will be Debtor and the specified in the Teaser Letter, so as to be received by not later than 5:00 PM (Vancouver time) on or before **July 10, 2020**, or such later date as the Monitor may determine after consultation with the Secured Creditors and the Debtor (the "**Phase 1 Bid Deadline**"). If the Phase 1 Bid Deadline is extended by the Monitor, it shall provide notice of such extension and the revised Phase 1 Bid Deadline to each Phase 1 Qualified Bidder.
19. An Agreement submitted in accordance with above paragraph will be considered a qualified Agreement (a "**Qualified Agreement**") only if:
 - (a) it is submitted on or before the relevant Phase 1 Bid Deadline by a Phase 1 Qualified Bidder;
 - (b) in the case of a Sale Proposal, it identifies or contains the following:
 - (i) the purchase price, in Canadian dollars, including details of any liabilities to be assumed by the Phase 1 Qualified Bidder and any assumptions supporting the valuation;
 - (ii) a description of the Property that is expected to be subject to the transaction and any of the Property expected to be excluded;
 - (iii) a specific indication of the financial capability, together with evidence of such capability, of the Phase 1 Qualified Bidder and the expected structure and financing of the transaction;
 - (iv) a description of the conditions and approvals required for a final and binding offer;
 - (v) an outline of any additional due diligence required to be conducted in order to submit a final and binding offer; and
 - (vi) any other terms or conditions of the Sale Proposal that the Phase 1 Qualified Bidder believes are material to the transaction;
 - (c) in the case of an Investment Proposal, it identifies or contains the following:
 - (i) a description of how the Phase 1 Qualified Bidder proposes to structure the proposed investment in the Business;
 - (ii) the aggregate amount of the equity and/or debt investment to be made in the Business or in the Debtor in Canadian dollars;

- (iii) the underlying assumptions regarding the pro forma capital structure;
 - (iv) a specific indication of the sources of capital for the Phase 1 Qualified Bidder and the structure and financing of the transaction;
 - (v) a description of the conditions and approvals required for a final and binding offer;
 - (vi) an outline of any additional due diligence required to be conducted in order to submit a final and binding offer;
 - (vii) all conditions to closing that the Phase 1 Qualified Bidder may wish to impose; and
 - (viii) any other terms or conditions of the Investment Proposal that the Phase 1 Qualified Bidder believes are material to the transaction;
- (d) in the case of either a Sale Proposal or an Investment Proposal, it contains such other information as reasonably requested by the Debtor and/or the Sale Advisor from time to time.
20. The Monitor may, in consultation with the Secured Creditors and the Debtor waive compliance with any one or more of the requirements specified above and deem such non-compliant bids to be a Qualified Agreement. For the avoidance of doubt, the completion of any Sale Proposal or Investment Proposal shall be subject to the approval of the Court and the requirement of approval of the Court may not be waived.

Preliminary Assessment of Phase 1 Bids and Subsequent Process

21. Following the Phase 1 Bid Deadline, the Monitor will, in consultation with the Secured Creditors and the Debtor, assess the Qualified Agreements. If it is determined by the Monitor that a Phase 1 Qualified Bidder that has submitted a Qualified Agreement (i) has a *bona fide* interest in completing a Sale Proposal or Investment Proposal (as the case may be); and (ii) has the financial capability (based on availability of financing, experience and other considerations) to consummate such a transaction based on the financial information provided, then such Phase 1 Qualified Bidder will be deemed a "Phase 2 Qualified Bidder", provided that the Monitor may, in its reasonable business judgment, in consultation with the Secured Creditors and the Debtor, limit the number of Phase 2 Qualified Bidders (and thereby eliminate some Phase 1 Qualified Bidders from the process). Only Phase 2 Qualified Bidders shall be permitted to proceed to Phase 2 of the SISF.
22. As part of the assessment of Qualified Agreements and the determination of the process subsequent thereto, the Monitor, in consultation with the Secured Creditors and the Debtor, shall determine the process and timing to be followed in pursuing Qualified Agreements based on such factors and circumstances as they consider appropriate in the circumstances including, but not limited to: (i) the number of Qualified Agreements received; (ii) the extent to which the Qualified Agreements involve Investment Proposals or Sales Proposals; (iii) the scope of the Property or Business to which any Qualified Agreements may relate; and (iv) whether to proceed by way of sealed bid or auction (with or without a stalking horse bidder) with respect to the Property, all provided that in the event that, prior to the determination of the manner of proceeding to Phase 2 of the SISF, the Monitor or the Debtor has received a proposal to refinance the secured debt owing to CMLS Financial Ltd. satisfactory to CMLS Financial Ltd. then the Monitor may determine to discontinue the SISF upon completion of such refinancing.

23. Upon the determination by the Monitor of the manner in which to proceed to Phase 2 of the SISP, and provided that the SISP is not discontinued, the Monitor will prepare a bid process letter for Phase 2 (the "Bid Process Letter"), which will be sent to all Phase 2 Qualified Bidders who are invited to participate in Phase 2.
24. Notwithstanding the process and deadlines outlined above with respect to Phase 1 of the SISP and the process to supplement Phase 2 by way of the Bid Process Letter, the Monitor may, in consultation with the Secured Creditors and the Debtor, at any time bring an application to seek approval of a stalking horse asset purchase agreement or investment proposal in respect of some or all of the Property or Business and related bid procedures in respect of such Property or to establish further or other procedures for the SISP.

Due Diligence

25. The Monitor shall in its reasonable business judgment and subject to competitive and other business considerations, afford each Phase 2 Qualified Bidder such access to due diligence materials through the Data Room and information relating to the Property and Business as they deem appropriate. Due diligence access may further include management presentations, on-site inspections, and other matters which a Phase 2 Qualified Bidder may reasonably request and to which the Monitor and/or Debtor, in their reasonable business judgment, may agree. The Monitor and Debtor will designate a representative to coordinate all reasonable requests for additional information and due diligence access from Phase 2 Qualified Bidders and the manner in which such requests must be communicated. Neither the Monitor nor the Debtor will be obligated to furnish any information relating to the Property or Business to any person. Further and for the avoidance of doubt, selected due diligence materials may be withheld from certain Phase 2 Qualified Bidders if the Monitor determines such information to represent proprietary or sensitive competitive information.

Phase 2: Formal Offers and Selection of Successful Bidder

26. Paragraphs 27 to 39 below and the conduct of Phase 2 bidding are subject to paragraphs 21 to 24, above, and any adjustments made to Phase 2 in accordance with the Bid Process Letter and any further Court order regarding the SISP.

Formal Binding Offers

27. Phase 2 Qualified Bidders that wish to make a formal offer to purchase or make an investment in the Debtor or its Property and Business shall submit to the Monitor or its Agent (if any) a binding offer at the addresses specified in the Bid Process Letter, so as to be received by not later than 5:00 PM (Vancouver Time) on August 7, 2020, or such later date as the Monitor may determine after consultation with the Secured Creditors and the Debtor (the "Phase 2 Bid Deadline"). If the Phase 2 Bid Deadline is extended by the Monitor, it shall provide notice of such extension and the revised Phase 2 Bid Deadline to each Phase 2 Qualified Bidder. The binding offer shall comply with all of the following requirements:
 - (a) the bid shall comply with all of the requirements set forth in respect of Phase 1 Qualified Agreements;
 - (b) cash is the preferred form of consideration, but if the bid utilizes other consideration, a description of the material terms of the consideration shall be provided;
 - (c) the bid (either individually or in combination with other bids that make up one bid) is an offer to purchase or make an investment in some or all of the Property or Business on terms and conditions reasonably acceptable to the Monitor;

- (d) unless otherwise agreed, the bid shall be set forth in a duly authorized and executed transaction agreement in the Agreement Form and shall include a letter stating that the Phase 2 Qualified Bidder's offer is irrevocable until the selection of the Successful Bidder (as defined below), provided that if such Phase 2 Qualified Bidder is selected as the Successful Bidder, its offer shall remain irrevocable until the closing of the transaction with the Successful Bidder;
- (e) the bid shall set forth the purchase price, investment amount and any other key economic terms expressed in Canadian dollars (the "Purchase Price"), together with all exhibits and schedules thereto, and the name or names of the ultimately beneficial owner(s) of the Phase 2 Qualified Bidder including their respective percentage interests;
- (f) to the extent that a bid is conditional upon new or amended agreements being entered into with other parties, the Qualified Phase 2 Bidder shall provide the proposed terms of such amended or new agreements and identify how such agreements may differ from existing agreements to which the Debtor may be a party. A Phase 2 Qualified Bidder's willingness to proceed without such conditions and, where such conditions are included in the bid, the likelihood of satisfying such conditions, shall be an important factor in evaluating the bid;
- (g) the bid includes written evidence of a firm, irrevocable commitment for financing or other evidence of ability to consummate the proposed transaction that will allow the Monitor, in consultation with the Secured Creditors and the Debtor, to make a determination as to the Phase 2 Qualified Bidder's financial and other capabilities to consummate the proposed transaction;
- (h) the bid should not be conditioned on the outcome of unperformed due diligence by the Phase 2 Qualified Bidder, apart from, to the extent applicable, to the disclosure of due diligence materials that represent proprietary or sensitive competitive information which was withheld in Phase 2 from the Phase 2 Qualified Bidder;
- (i) for a Sales Proposal or an Investment Proposal, the bid includes a commitment by the Phase 2 Qualified Bidder to provide a deposit in the amount of not less than 10% of the purchase price or investment contemplated in the bid upon the Phase 2 Qualified Bidder being selected as the Successful Bidder, which shall be paid to the Monitor in trust (the "Deposit"). The Deposit shall be submitted upon the Phase 2 Qualified Bidder being selected as the Successful Bidder. The Successful Bidder's Deposit shall be applied as against the Purchase Price;
- (j) the bid includes acknowledgments and representations of the Phase 2 Qualified Bidder that: (i) it has had an opportunity to conduct any and all due diligence regarding the Property, Business and the Debtor prior to making its offer (apart from, to the extent applicable, the disclosure of due diligence materials that represent proprietary or sensitive competitive information which were withheld in Phase 2 from the Phase 2 Qualified Bidder); (ii) it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Property in making its bid; and (iii) it did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever made by the Monitor or any of its employees, representatives, agents or advisors, whether express, implied, statutory or otherwise, regarding the Business, Property, or the Debtor or the accuracy or completeness of any information provided in connection therewith, except as expressly stated in the definitive transaction agreement(s) signed by the Monitor;
- (k) all required corporate approvals of the Phase 2 Qualified Bidder have been obtained prior to the submission of the bid;

- (l) the bid shall identify any material conditions in favour of the purchaser to be resolved prior to closing the transaction;
 - (m) the bid is received by the relevant Phase 2 Bid Deadline; and
 - (n) the bid contemplates a schedule for closing the transaction set out therein which is on or before August 31, 2020, which date may be extended by the Monitor in its discretion, following consultation with the Secured Creditors and the Debtor (the "Closing Date").
28. Following the Phase 2 Bid Deadline, the Monitor, in consultation with the Secured Creditors and the Debtor, will assess the Phase 2 bids received. The Monitor will designate the most competitive bids that comply with the foregoing requirements to be "Qualified Bids". Only Phase 2 Qualified Bidders whose bids have been designated as Qualified Bids are eligible to become the Successful Bidder(s).
 29. The Monitor, in consultation with the Secured Creditors and the Debtor may waive strict compliance with any one or more of the requirements specified above and deem such non-compliant bids to be a Phase 2 Qualified Bid.
 30. The Monitor shall notify each Phase 2 Qualified Bidder in writing as to whether its bid constitutes a Phase 2 Qualified Bid within three (3) business days of the Phase 2 Bid Deadline, or at such later time as the Debtor and the Sale Advisor deem appropriate.
 31. The Monitor may, in consultation with the Secured Creditors and the Debtor, remove any of the Property and the Business of the Debtor from the SISP at any time.
 32. The Monitor may, in consultation with the Secured Creditors and the Lender, terminate, at any time, further participation in the Phase 2 Bid Process by any interested party, or to modify dates or procedures as deemed appropriate or necessary, or to terminate the process.
 33. The Monitor may aggregate separate bids from unaffiliated Phase 2 Qualified Bidders to create one or more "Qualified Bid".

Evaluation of Competing Bids

34. A Phase 2 Qualified Bid will be evaluated based upon several factors, including, without limitation, items such as the Purchase Price and the net value and form of consideration to be paid provided by such bid, the identity, circumstances and ability of the Phase 2 Qualified Bidder to successfully complete such transactions, including, any conditions attached to the bid and the expected feasibility of conditions, the proposed transaction documents, factors affecting the speed, certainty and value of the transaction, the assets included or excluded from the bid, any related restructuring costs, and the likelihood and timing of consummating such transactions, and the ability of the bidder to finance and ultimately consummate the proposed transaction within the timeline established by the Monitor, each as determined by the Monitor in consultation with the Debtor and the Secured Creditors.

Selection of Successful Bid

35. The Monitor: (a) will review and evaluate each Phase 2 Qualified Bid, in consultation with the Debtor and the Secured Creditors, and the applicable Phase 2 Qualified Bidder, and such Phase 2 Qualified Bid may be amended, modified or varied as a result of such negotiations, and (b) will identify the highest or otherwise best bid (the "Successful Bid"), and the Phase 2 Qualified Bidder making such Successful Bid (the "Successful Bidder") for the Property or the Business in whole or part. The determination of any Successful Bid by the Debtor shall be subject to approval by the Court.
36. The Monitor shall have no obligation to identify a Successful Bid, and reserves the right, after consultation with the Debtor and the Secured Creditors, to reject any or all Phase 2 Qualified Bids.
37. The Monitor, in consultation with the Debtor and the Secured Creditors, may bring one of the Phase 2 Qualified Bids to Court for approval, or may conduct an auction among two or more of the Phase 2 Qualified Bidders and bring the highest auction bid to Court for approval.

Sale Approval Motion Hearing

38. At the hearing of the motion to approve any transaction with a Successful Bidder (the "Sale Approval Application") the Monitor shall seek, among other things, approval from the Court to consummate any Successful Bid. All the Phase 2 Qualified Bids other than the Successful Bid, if any, shall be deemed rejected by the Monitor on and as of the date of approval of the Successful Bid by the Court.

Confidentiality and Access to Information

39. Participants and prospective participants in the SISP shall not be permitted to receive any information that is not made generally available to all participants relating to the number or identity of Potential Bidders, Phase 1 Qualified Bidders, Agreements, Phase 2 Qualified Bidders, Phase 2 Qualified Bids, the details of any bids submitted or the details of any confidential discussions or correspondence between the Monitor and the Debtor and such other bidders or Potential Bidders in connection with the SISP. The Monitor may, however, with the consent of the applicable participants, disclose such information to other bidders for the purpose of seeking to combine separate bids from Phase 1 Qualified Bidders or Phase 2 Qualified Bidders.
40. It is not currently contemplated that any director, officer or senior management employee of the Debtor as of the date of the Initial Order ("Management") will have any interest in any Phase 1 Qualified Bidder or Phase 2 Qualified Bidder, including any economic, employment, contractual or other interest in such Phase 1 Qualified Bidder or Phase 2 Qualified Bidder. If any Management has or acquires any such interest in a Phase 1 Qualified Bidder or Phase 2 Qualified Bidder, it shall promptly disclose such interest to the Monitor. Upon being informed of such interest, the Monitor shall take such actions as it deems appropriate to preserve the integrity of the SISP in light of such interest, which actions may include placing restrictions on the information disclosed to such person in connection with the SISP and competing bids and bidders.

No. S-205095
Vancouver Registry



IN THE SUPREME COURT OF BRITISH COLUMBIA

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

– AND –

**IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,
S.B.C. 2002, C. 57, AS AMENDED**

– AND –

**IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF
PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE DEVELOPMENT
LIMITED PARTNERSHIP**

NOTICE OF APPLICATION

Names of applicants: Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership

To: The Service List

TAKE NOTICE that an application will be made by the applicants to Madam Justice Fitzpatrick at the courthouse at 800 Smithe Street Vancouver BC V6Z 2E1 on May 13, 2022 at 10:00 a.m., by MS Teams, for the orders set out in Part 1 below.

Part 1: ORDER(S) SOUGHT

1. An Order substantially in the form attached as **Schedule A** hereto, providing for the following relief:

- (a) abridging the time for service of this notice of application, to the extent necessary;
- (b) approving interim financing from Mandate Management Corporation ("**Mandate**") in the amount of \$20 million as provided for in a commitment letter dated April 19, 2022 with security over all the Petitioners' assets in priority all other security interests, trusts, liens, mortgages, charges and encumbrances and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**"), in favour of any

person, save and except those claims contemplated by section 11.8(8) of the CCAA and the Administration Charge (to a maximum of \$100,000);

- (c) authorizing the Petitioners upon drawing upon the interim financing facility from Mandate to repay all borrowings from Domain Mortgage Corp. ("**Domain**");
- (d) extending the stay of proceedings to and including September 30, 2022; and
- (e) such further and other relief as this Honourable Court may deem just.

Part 2: FACTUAL BASIS

1. The Petitioners, Evergreen House Development Limited Partnership and its general partner, Port Capital Development (EV) Inc., own the "**Terrace House Project**". The Terrace House Project consists of an ongoing development of a high-rise luxury residential strata development in the Coal Harbour neighbourhood, located at 1250 W Hastings St., Vancouver.

2. On May 29, 2020, the Applicants obtained an order in these proceedings (the "**Initial Order**") granting them various relief pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). The Initial Order included approval of a Sale and Investment Solicitation Process (the "**SISP**") and appointed Ernst & Young, Inc. as monitor (the "**Monitor**") in these proceedings.

3. At the comeback hearing on June 8, 2020 the Applicants obtained an Amended and Restated Initial Order (the "**ARIO**"). The ARIO included approval of an interim financing facility provided by Desjardins Financial Security Life Assurance Company ("**Desjardins**").

4. Pursuant to the SISP, the Court approved a Bid Offer Agreement between the Applicants and Bosa Properties (OC) Inc. on December 1, 2020. The transaction contemplated by that agreement did not complete.

5. On February 24, 2021, the Court approved an increase in the Desjardins interim lending facility and an extension of the stay of proceedings.

6. Pursuant to the SISP, the Court approved the break fee contained in a Purchase and Sale Agreement between the Applicants and Landa Global Acquisitions Ltd. on April 16, 2021, which agreement included a provision that the Monitor engage in a final marketing phase.

7. On June 15, 2021, the Court dismissed the application of 1296371 B.C. Ltd. ("129") seeking a refinancing of the within proceeding in preference to a sale of the Applicants' assets, and instead approved a sale by way of reverse vesting order of the Petitioners' assets and undertakings to Solterra Acquisitions Corp.

8. The following day the Court approved a further increase in the Desjardins interim lending facility and an extension of the stay of proceedings.

9. 129 sought and obtained leave to appeal from the Court's June 15, 2021 orders.

10. On October 20, 2021, the Court of Appeal granted 129's appeal, and issued an order (the "**Refinancing Order**") which among other things:

- (a) approved the proposed refinancing transaction between the Applicants and the New Lenders (as defined therein);
- (b) authorized the payout of the Desjardins interim facility;
- (c) authorized a purchase and assignment of the loan and security of CMLS Financial Ltd. ("**CMLS**") by Domain; and
- (d) upon completion of the previous steps, reduced the Administration Charge under the ARIO and made certain other amendments to the ARIO; and
- (e) extended the stay of proceedings herein to and including April 30, 2022.

11. Later in October 2021, the transactions authorized by the Refinancing Order took place.

12. On February 15, 2022, the Court granted the Further Amended and Restated Initial Order ("**FARIO**") and approved an additional \$1.8 million tranche of the Domain facility to provide working capital to the Petitioners for this proceeding.

Update on the Proceeding

13. Since February 15, 2022, the Petitioners have taken the following steps to advance a restructuring of the Terrace House project:

- (a) the Petitioners have identified a development partner, Enso Holdings Ltd. ("**Enso**"), who has agreed with the Petitioners' parent to co-develop the Terrace House project as the majority general partner, and whose covenant will support the necessary construction financing to exit this proceeding;
- (b) the Petitioners and Enso have advanced discussions towards securing pricing for a construction contract with a general contractor for the balance of construction;
- (c) the Petitioners have developed the key economic terms of a Plan of Arrangement and together with Enso have discussed the intended terms with Aviva and with a number of key unsecured trade creditors;
- (d) the Petitioners have obtained from Petitioners' counsel a draft form of Restructuring Support Agreement, which they intend to use to validate that the terms of the Plan of Arrangement would garner sufficient support to succeed if put to a vote of stakeholders;
- (e) the Petitioners, in conjunction with Enso, have negotiated a commitment for interim financing in the amount of \$20 million from Mandate which, if approved, would be used to repay Domain and to provide working capital for an extended stay period through to the end of August 2022 with the objective of putting a Plan of Arrangement to a vote, securing a sanction order, and exiting the CCAA proceeding upon new construction financing being available;
- (f) the Petitioners and Enso have engaged in the process of satisfying the conditions for the Mandate financing, and Enso has provided Mandate with a deposit; and
- (g) the Petitioners have discussed with Domain and Aviva the proposed Mandate interim financing and the need for an extension of the stay of proceedings.

14. Domain agreed to being repaid later than April 30, 2022 in order to afford Aviva time to consider the proposed Mandate interim financing.

15. On April 29, 2022 the Court granted an extension of the stay of proceedings to and including May 13, 2022 to enable Aviva more time to consider the Mandate financing.

16. In conjunction with the Monitor, the Petitioners have developed a cashflow which indicates that the Petitioners can meet obligations through to and including September 30, 2022 with the proceeds of the Mandate financing after repayment of Domain.

17. The Petitioners seek an extension of the Stay of Proceedings to and including September 30, 2022, being the approximate anticipated timeframe within which the Petitioners expect to have presented a Plan of Arrangement to their stakeholders, received sanction from the Court, and obtained construction financing required to exit these proceedings.

18. As set out in the Eleventh Report of the Monitor, the Cash Flow Forecast prepared by the Petitioners for the period of May 13, 2022 to September 30, 2022 projects that the authorized borrowings under the Mandate facility are sufficient to pay obligations anticipated to arise over the proposed extension of the Stay of Proceedings.

19. The extension of the Stay of Proceedings to September 30, 2022 is necessary to permit the Petitioners to maintain operational control and to preserve the Terrace House Project while advancing this proceeding towards an intended restructuring.

20. The Petitioners have acted and continue to act in these proceedings in good faith and with due diligence.

Part 3: LEGAL BASIS

1. The Petitioners rely on the CCAA, the Supreme Court Civil Rules and the inherent jurisdiction of this Honourable Court.

Interim Financing

2. On notice to those secured creditors likely to be affected by the charge, the court may order that all or part of the property of the debtors be subject to a charge in a priority determined by the

court, in an amount the court considers appropriate, in favour of a person who agrees to lend to the debtor company an amount approved by the court (s. 11.2(1) of the CCAA).

3. In deciding whether to make an order pursuant to s. 11.2(1) – (2) of the CCAA, the court is to consider, among other things: (a) the period during which the company is expected to be subject to the CCAA proceedings, (b) how the company's business and financial affairs are managed during the proceedings, (c) whether the company's management has the confidence of its major creditors, (d) whether the loan would enhance the prospect of a viable compromise or arrangement being made, (e) the nature and value of the company's property, (f) whether any creditor would be materially prejudiced as a result of the security or charge.

4. The facility from Mandate is essential to permit the Applicants to continue operations and to effectively allow them to restructure their business and affairs in the context of these CCAA proceedings. The Applicants are not aware of any creditors that would be materially prejudiced as a result of the order approving the facility from Mandate sought despite the overall increase in superpriority borrowings.

5. The Applicants have a critical and immediate need for additional financing. Accordingly, the Monitor is of the view that the Applicants' request for approval of the facility from Mandate is required and reasonable in the circumstances.

6. It would be convenient to amend the FARIO to reflect the obligations in respect of the interim financing on the terms usually contained in the Model Order.

7. Having regard to all the circumstances and the conditions outlined in s. 11.2 of the CCAA, approval of the Mandate financing is reasonable and appropriate.

Repayment of Domain

8. When the Court approved an extension to the Domain financing on February 14, 2022, it did so pursuant to s. 11.2 of the CCAA.

9. The Court has the discretion under ss. 11 and 11.2 of the CCAA to approve the repayment of a prior interim financing in conjunction with the approval of a new interim financing.

10. Although some of the indebtedness under the Domain facility arose pre-filing and was then assigned to Domain after the Restructuring Order, this Court has in any event a discretion to approve the repayment of the full indebtedness: *Re Mountain Equipment Co-Operative*, 2020 BCSC 1586 at paras. 47-52.

Stay Extension

11. Pursuant to s. 11.02(3) of the CCAA, the Court may extend the stay of proceedings for any period that the Court considers necessary provided that:

- (a) the extension sought is appropriate in the circumstances; and
- (b) the Petitioners have acted and are acting in good faith and with due diligence.

12. Since the Initial Order was pronounced on May 29, 2020, the Petitioners have acted and continue to act and operate in good faith and with due diligence.

13. The extension of the stay of proceedings is necessary permit the Petitioners to maintain operational control and to preserve the Terrace House Project while advancing this proceeding towards an intended restructuring.

14. Having regard to all the circumstances and the conditions outlined in s. 11.02(3) of the CCAA, the extension of the Stay of Proceedings to and including September 30, 2022 is reasonable and appropriate.

Part 4: MATERIAL TO BE RELIED ON

1. At the hearing of this Application, the Petitioners will rely on:

- (a) The Affidavit #6 of Tobi Reyes sworn April 27, 2022;
- (b) The Affidavit #1 of Danielle Hendry, sworn May 11, 2022;
- (c) The Tenth Report of the Monitor;
- (d) The Eleventh Report of the Monitor, to be filed;

- (e) Such further material as counsel may advise and the Court permits.

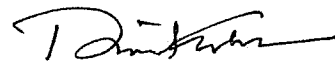
The applicants estimate that the application will take 1 hour.

☒ This matter is not within the jurisdiction of a master. Madam Justice Fitzpatrick is seized of this proceeding.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated: May 11, 2022



Signature of David E. Gruber
Lawyer for the Applicants

THIS NOTICE OF APPLICATION is prepared and delivered by David E. Gruber of the firm Bennett Jones LLP, Barristers & Solicitors, counsel for the applicants, File No. 090034.00001, whose place of business and address for delivery is 2500 – 666 Burrard Street, Vancouver, British Columbia, V6C 2X8. Telephone: (604) 891-7500. Facsimile: (604) 891-5100. [gruberd@bennettjones.com]

To be completed by the court only:

Order made

- ☐ in the terms requested in paragraphs _____ of Part 1 of this notice of application
- ☐ with the following variations and additional terms:

Dated: _____

Signature of ☐ Judge ☐ Master

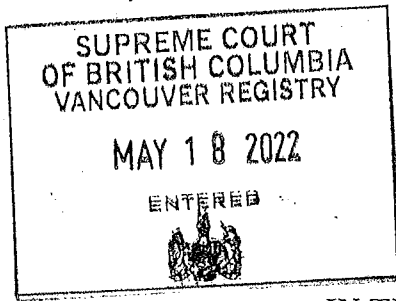
Appendix

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ other matters concerning document discovery
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☐ amend pleadings
- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts



No. S-205095
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

– AND –

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,
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– AND –

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF
PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE DEVELOPMENT
LIMITED PARTNERSHIP

ORDER MADE AFTER APPLICATION
(Interim Financing and Stay Extension)

BEFORE THE HONOURABLE)
MADAM JUSTICE FITZPATRICK) 13/MAY/2022

THE APPLICATION of the Petitioners coming on for hearing at 800 Smithe Street, Vancouver, British Columbia, on the 13th day of May, 2022; AND ON HEARING David Gruber, counsel for the Petitioners and those other counsel and parties listed on **Schedule "A"** hereto; AND UPON READING the material filed, including the Eleventh Report of Ernst & Young, Inc., in its capacity as court appointed monitor, to be filed; AND pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, the British Columbia Supreme Court Civil Rules and the inherent jurisdiction of this Honourable Court;

THIS COURT ORDERS AND DECLARES THAT:

SERVICE

1. The time for service of the Notice of Application filed May 11, 2022 herein be and is hereby abridged such that the Notice of Application is properly returnable today and service thereof on any interested party is hereby dispensed with.

INTERIM FINANCING

2. All capitalized terms in this Order not otherwise defined herein have the meaning ascribed to them in the as defined in the Further Amended and Restated Initial order pronounced by the Court on February 14, 2022 (the "**FARIO**").
3. The Petitioners are hereby authorized and empowered to obtain and borrow under a credit facility from Mandate Management Corporation and its group of lenders/investors (together the "**Interim Lender**") in order to finance the continuation of the Business and preservation of the Property, provided that the principal amount of such borrowings under such credit facility shall not exceed \$20,000,000.00 unless permitted by further Order of this Court.
4. Such credit facility shall be on the terms and subject to the conditions set forth in the commitment letter between the Petitioners and the Interim Lender dated as of May 11, 2022 (the "**Commitment Letter**"), filed.
5. The Petitioners are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the Commitment Letter or as may be reasonably required by the Interim Lender pursuant to the terms thereof, and the Petitioners are hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the Interim Lender under and pursuant to the Commitment Letter and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order or the FARIO.
6. The Interim Lender shall be entitled to the benefit of and is hereby granted a charge (the "**Interim Lender's Charge**") on the Property. The Interim Lender's Charge shall not secure an obligation that exists before this Order is made. The Interim Lender's Charge shall have the priority set out in paragraph 10 (a) hereof and in paragraphs 37-40 of the FARIO as amended by paragraph 10(b) hereof.

7. Notwithstanding any other provision of this Order:

- a. the Interim Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Interim Lender's Charge or any of the Definitive Documents;
 - b. upon the occurrence of an event of default under any of the Definitive Documents or the Interim Lender's Charge, the Interim Lender, upon 10 days notice to the Petitioners and the Monitor, may exercise any and all of its rights and remedies against the Petitioners or the Property under or pursuant to the Commitment Letter, Definitive Documents and the Interim Lender's Charge, including without limitation, to cease making advances to the Petitioners and set off and/or consolidate any amounts owing by the Interim Lender to the Petitioners against the obligations of the Petitioners to the Interim Lender under the Commitment Letter, the Definitive Documents or the Interim Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Petitioners and for the appointment of a trustee in bankruptcy of the Petitioners; and
 - c. the foregoing rights and remedies of the Interim Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Petitioners or the Property.
8. The Interim Lender, in such capacity, shall be treated as unaffected in any plan of arrangement or compromise filed by the Petitioners under the CCAA, or any proposal filed by the Petitioners under the *Bankruptcy and Insolvency Act* of Canada (the "BIA"), with respect to any advances made under the Definitive Documents.

AUTHORIZATION TO PAY OUT DOMAIN

9. The Petitioners are hereby authorized, empowered and directed to apply the first proceeds from drawings upon the Commitment Letter to repayment of amounts due to Domain in

respect of the New Loan Facility (as set out in the FARIO and as amended by Order of the Court pronounced on February 14, 2022) in the principal amount of \$16,500,00.00 plus any accrued interest and fees payable to Domain thereunder.

VALIDITY AND PRIORITY OF CHARGES

10. Upon repayment in full of Domain pursuant to paragraph 9, above:

a. the priorities of the Administration Charge and the Interim Lender's Charge, as among them, shall be as follows:

i. First – Administration Charge (to the maximum amount of \$100,000);

ii. Second – Interim Lender's Charge; and

b. paragraphs 37-40 of the FARIO shall be replaced with the following:

37. Any security documentation evidencing, or the filing, registration or perfection of, the Administration Charge and the Interim Lender's Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be effective as against the Property and shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered or perfected subsequent to the Charges coming into existence, notwithstanding any failure to file, register or perfect any such Charges.

38. Each of the Charges shall constitute a mortgage, security interest, assignment by way of security and charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, mortgages, charges and encumbrances and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**"), in favour of any Person, save and except those claims contemplated by section 11.8(8) of the CCAA.

39. Except as otherwise expressly provided herein, or as may be approved by this Court, the Petitioner shall not grant or suffer to exist any Encumbrances over any Property that rank in priority to, or *pari passu* with the Charges, unless the Petitioner obtains the prior written consent of the Monitor, the Interim Lender and the beneficiaries of the Administration Charge.

40. The Administration Charge, the Commitment Letter, the Definitive Documents and the Interim Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the Interim Lender shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, mortgage, security agreement, debenture, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Petitioner; and notwithstanding any provision to the contrary in any Agreement:

- (a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the Commitment Letter or the Definitive Documents shall create or be deemed to constitute a breach by the Petitioner of any Agreement to which it is a party;
 - (b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Petitioner entering into the Commitment Letter, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and
 - (c) the payments made by the Petitioner pursuant to this Order, the Commitment Letter or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.;
- c. the Interim Lender shall be entitled to the same information and consultation as the New Lenders pursuant to paragraphs 25(c) and 28 of the FARIO; and
- d. notwithstanding any provision to the contrary in the FARIO, the obligations of the Petitioners to 129 and Numberco shall be fully subordinated to those of the Petitioners to the Interim Lender and 129 and Numberco shall not be entitled to exercise any rights and remedies as against the Petitioners without the consent of the Interim Lender.

STAY EXTENSION

11. The stay of proceedings provided for in the Initial Order pronounced in this action on May 29, 2020, as amended and restated on June 8, 2020, and further extended by Orders of this Court pronounced February 24, 2021, April 16, 2021, June 11, 2021, and further extended by the Order of the Court of Appeal (Court of Appeal File No. CA-47585) pronounced as of September 22, 2021, and by Order of this Court pronounced April 29, 2022 is hereby continued and extended to and including September 30, 2022.

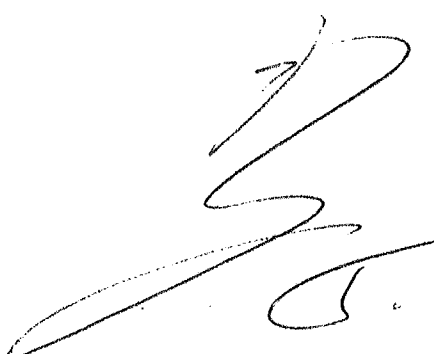
GENERAL

12. Endorsement of this Order by counsel appearing on this application other than counsel for the Petitioners is hereby dispensed with.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:



Signature of David Gruber
Lawyer for the Petitioners



BY THE COURT

REGISTRAR



Schedule "A"

(List of Counsel)

[illegible]

No. S-205095
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
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IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF
PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE DEVELOPMENT
LIMITED PARTNERSHIP

ORDER MADE AFTER APPLICATION

BENNETT JONES LLP

Barristers and Solicitors
2500 – 666 Burrard Street
Vancouver, B.C. V6C 2X8

Tel: 604-891-7500

Fax: 604-891-5100

Attn: David E. Gruber

File No. 90034.3

FORCE FILED



No. S-205095
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IN THE SUPREME COURT OF BRITISH COLUMBIA

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IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF
PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE DEVELOPMENT
LIMITED PARTNERSHIP

NOTICE OF APPLICATION

Names of applicants: Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership

To: The Service List

TAKE NOTICE that an application will be made by the applicants to Madam Justice Fitzpatrick at the courthouse at 800 Smith Street Vancouver BC V6Z 2E1 on June 17, 2022 at 10:00 a.m., for the order set out in Part 1 below.

PART 1: ORDERS SOUGHT

1. A Claims Process Order substantially in the form attached as **Schedule "A"** hereto, approving a claims procedure (the "**Claims Procedure**");
2. A Meeting Order substantially in the form attached as **Schedule "B"** hereto, providing for the following relief:
 - (a) abridging the time for service of this notice of application, to the extent necessary;
 - (b) authorizing the Applicants to file a plan of arrangement (the "**Plan**") and present it to creditors for voting;

- (c) authorizing and directing the Applicants to convene a meeting of their creditors to vote on the Plan.

3. Such further and other relief as this Honourable Court may deem just.

PART 2: FACTUAL BASIS

4. The Applicants, Evergreen House Development Limited Partnership and its general partner, Port Capital Development (EV) Inc., own the "**Terrace House Project**". The Terrace House Project consists of an ongoing development of a high-rise luxury residential strata development in the Coal Harbour neighbourhood, located at 1250 W Hastings St., Vancouver.

5. On May 29, 2020, the Applicants obtained an order in these proceedings (the "**Initial Order**") granting them various relief pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**").

6. At the comeback hearing on June 8, 2020, the Applicants obtained an Amended and Restated Initial Order (the "**ARIO**"). The ARIO included approval of an interim financing facility provided by Desjardins Financial Security Life Assurance Company ("**Desjardins**").

7. Pursuant to the Court approved sale investment and solicitation process ("**SISP**"), the Court approved a Bid Offer Agreement between the Applicants and Bosa Properties (OC) Inc. on December 1, 2020. The transaction contemplated by that agreement did not complete.

8. On February 24, 2021, the Court approved an increase in the Desjardins interim lending facility and an extension of the stay of proceedings.

9. Pursuant to the SISP, the Court approved the break fee contained in a Purchase and Sale Agreement between the Applicants and Landa Global Acquisitions Ltd. on April 16, 2021, which agreement included a provision that the Monitor engage in a final marketing phase.

10. On June 15, 2021, the Court dismissed the application of 1296371 B.C. Ltd. ("**129**") seeking a refinancing of the within proceeding in preference to a sale of the Applicants' assets, and instead approved a sale by way of reverse vesting order of the Applicants' assets and undertakings to Solterra Acquisitions Corp.

11. The following day the Court approved a further increase in the Desjardins interim lending facility and an extension of the stay of proceedings.

12. 1296371 B.C. Ltd. ("129") sought and obtained leave to appeal from the Court's June 15, 2021 orders.

13. On October 20, 2021, the Court of Appeal granted 129's appeal, and issued an order (the "**Refinancing Order**") which among other things:

- (a) approved the proposed refinancing transaction between the Applicants and the New Lenders (as defined therein);
- (b) authorized the payout of the Desjardins interim facility;
- (c) authorized a purchase and assignment of the loan and security of CMLS Financial Ltd. ("CMLS") by Domain Mortgage Corp; and
- (d) upon completion of the previous steps, reduced the Administration Charge under the ARIO and made certain other amendments to the ARIO; and
- (e) extended the stay of proceedings herein to and including April 30, 2022.

14. Later in October 2021, the transactions authorized by the Refinancing Order took place.

15. On February 15, 2022, the Court granted the Further Amended and Restated Initial Order ("**FARIO**") and approved an additional \$1.8 million tranche of the Domain facility to provide working capital to the Applicants for this proceeding.

16. On April 29, 2022 and May 13, 2022, the Court granted further extensions to the stay of proceedings. The most recent extension was to September 30, 2022. On May 13, 2022, the Court also approved interim financing from Mandate Management Corporation ("**Mandate**") in the amount of \$20 million.

17. The Applicants have been developing the Plan in consultation with the Monitor. Key aspects of the Plan include:

- (a) the security held by Domain Mortgage Corp, 129, 1260780 B.C. Ltd., and the Aviva Insurance Company of Canada remain unaffected by the Plan and subordinate to the new Mandate loan;
- (b) the claims of the Pre-sale Purchasers will be compromised and extinguished in exchange for consideration in the amount of \$10 and the Outside Date of each Pre-sale Purchaser's Agreement of Purchase and Sale will be amended to July 24, 2025;
- (c) the claims of Unsecured Creditors will be compromised and extinguished in exchange for (i) an Excess Profit Sharing Note; or (ii) a Convenience Cash Payment in an amount, that is the lesser of \$5000 or the amount of the Unsecured Claim of such Unsecured Creditor, as the case may be.

18. In order to conduct voting on the Applicants' Plan and to be able to make distributions thereunder, it is necessary to determine the quantum and classification of the claims being asserted against the Applicants and schedule a meeting for voting on the Applicants' Plan.

19. The Applicants have with the participation of the Monitor, developed the Claims Procedure for this purpose. It provides for a negative claims process, with a Claims Bar Date that is on July 8, 2022, 21 days after the date that this Application is to be heard.

20. Given the proposed negative claims process, the Applicants submit that the 21 day Claims Bar Date is reasonable. On August 8, 2022, one month after the Claims Bar Date, the Creditors Meeting would be held for voting by the two classes of creditors: Unsecured Creditors and Pre-Sale Purchasers.

PART 3: LEGAL BASIS

21. The Applicants rely on the CCAA, the Supreme Court Civil Rules and the inherent jurisdiction of this Honourable Court.

Claims Procedure Order

22. Section 11 of the CCAA provides the Court with the jurisdiction to make any order it considers appropriate including the ability to solicit and determine claims against the Applicants.

23. The Monitor approves the proposed procedures and order comprising the Claims Procedure.

24. The purpose of a claims process is to streamline a resolution of claims against the CCAA party in the most cost effective manner, assist the debtor company in determining the value of the claims against it and allow creditors to make informed decisions as to the alternatives presented to them.

Canwest Global Communications Re, 2011 ONSC 2215 at para. 40

25. British Columbia courts have on a number of occasions approved a “negative” or “reverse claims process” in meeting these goals, including where a claims package is issued to each known claimant by the Monitor setting out the quantum of that creditor's claim in accordance with the books and records of the company.

Quest University Canada (Re), 2020 BCSC 1845

Mountain Equipment Co-Operative (Re), 2020 BCSC 2037

26. The Applicants believe that the Claims Procedure will be effective, and is reasonable and appropriate. The Claims Procedure is designed to create a process that will allow for a timely and efficient review and confirmation or determination of the potential claims against the Applicants.

Meeting Order and Plan

27. The Court has jurisdiction to grant the Meeting Order pursuant to section 4 of the CCAA, which provides as follows:

Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class

of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

CCAA, section 4

28. The threshold for granting the Meeting Order is low. It is not up to the Court to second guess the probability of success of a proposed plan of arrangement. The Court should only decline to give preliminary approval and refuse to order a meeting of creditors if it is of the view that there is no hope the Plan would receive creditor approval or, if approved by the creditors, it would not be approved by the Court.

ScoZing Ltd., Re, 2009 NSSC 163, para. 7

29. There is no evidence supporting a finding that the Plan has no hope of being approved by the Affected Creditors. The Applicants believe that the proposed Plan represents the best outcome for their stakeholders in the circumstances.

30. The proposed Plan provides for the compromise of the claims of the Pre-Sale Purchasers and extension of the Outside Date. In the *Clover on Yonge Inc.* and the *Clover on Yong Limited Partnership CCAA Proceedings* a plan was sanctioned which provided for the compromise of pre-sale purchasers' claims.

Clover on Yonge Inc. and the Clover on Yonge Limited Partnership Sanction Order

Clover on Young Inc. and the Clover on Yonge Limited Partnership Endorsement

31. It has been recognized that section 11 of the CCAA authorizes the interference with contractual relationships.

Cansugar Inc. re Option Agreement, 2005 NBQB 199 ["**Cansugar**"] at paras. 24-29

32. Courts have previously granted the extension of dates prescribed in contracts.

Jameson House Properties Ltd. (Re), 2009 BCCA 339

Cansugar, supra

33. Having regard to all the circumstances, it is reasonable and appropriate to grant the Meeting Order.

PART 4: MATERIAL TO BE RELIED ON

34. At the hearing of this Application, the Applicants will rely on:

- (a) The Twelfth Report of the Monitor to be filed;
- (b) The Eleventh Report of the Monitor, filed;
- (c) The Tenth Report of the Monitor, filed; and
- (d) Such further material as counsel may advise and the Court may permit.

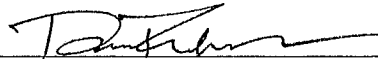
The applicants estimate that the application will take 1 day.

☒ This matter is not within the jurisdiction of a master. Madam Justice Fitzpatrick is seized of this proceeding.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated: June 15, 2022


Signature of David E. Gruber
Lawyer for the Applicants

THIS NOTICE OF APPLICATION is prepared and delivered by David E. Gruber of the firm Bennett Jones LLP, Barristers & Solicitors, counsel for the applicants, File No. 090034.00001, whose place of business and address for delivery is 2500 – 666 Burrard Street, Vancouver, British Columbia, V6C 2X8. Telephone: (604) 891-7500. Facsimile: (604) 891-5100. [gruberd@bennettjones.com]

To be completed by the court only:

Order made

- ☐ in the terms requested in paragraphs _____ of Part 1 of this notice of application
- ☐ with the following variations and additional terms:

Dated: _____

Signature of ☐ Judge ☐ Master

Appendix

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ other matters concerning document discovery
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☐ amend pleadings
- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts



FORM 32 (RULE 8-1(4))

No. S-205095
Vancouver Registry

In the Supreme Court of British Columbia

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

—AND—

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57, AS AMENDED

—AND—

IN THE MATTER OF A PLAN OF COMPROMISE AND
ARRANGEMENT OF PORT CAPITAL DEVELOPMENT
(EV) INC. and EVERGREEN HOUSE DEVELOPMENT
LIMITED PARTNERSHIP

NOTICE OF APPLICATION

Name of applicant: Domain Mortgage Corp.

To: The Service List

TAKE NOTICE that an application will be made by the applicant to Madam Justice Fitzpatrick at the courthouse at the Law Courts, 800 Smithe Street, Vancouver, British Columbia V6Z 2E1 on July 13, 2022 at 10:00 a.m. for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order terminating these proceedings under the *Companies' Creditors Arrangement Act* on such transitional terms as may be appropriate in the circumstances.

Part 2: FACTUAL BASIS

1. Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership (together, the "**Debtors**") own a high-rise luxury residential mixed-use strata development located at 1250 West Hastings Street in Vancouver, B.C. in the Coal Harbour neighbourhood (the "**Terrace House Project**").

2. This court granted an Initial Order under the *Companies' Creditors Arrangement Act* (the "**CCAA**") on May 29, 2020. Under the Initial Order, Ernst & Young Inc. (the "**Monitor**") was appointed Monitor and granted enhanced powers, including to consider restructuring opportunities and to administer a dual-track sale and investment solicitation process (the "**SISP**").
3. At the time the CCAA proceedings were commenced, the Debtors' senior secured creditor was CMLS Financial Ltd. ("**CMLS**"). CMLS had provided the construction loan for the Terrace House Project, but ceased making advances. Pursuant to a restated Initial Order made June 8, 2020, Desjardins Financial Security Life Assurance Company ("**Desjardins**") provided the Debtors with debtor-in-possession financing (the "**DIP Facility**").
4. The SISP resulted in three liquidation offers as well as an offer from 1296371 B.C. Ltd. ("**129**"), described as a "refinancing transaction." The 129 transaction, in short summary, contemplated monies being raised in sufficient amounts to repay the DIP Facility, effect a purchase and assignment of CMLS's loan and security, and provide the Debtors with working capital.
5. 129's offer was premised on the Debtors having "strong interest from lenders to provide new construction financing," but in order to secure such construction financing, the Debtors said, they required breathing room and control of the Terrace House Project. The Debtors' expectation was that, within a 6 month extension of the stay, they would be able to secure new construction financing and exit the CCAA proceeding.
6. By order made June 15, 2021, this court approved one of the liquidation offers and rejected 129's proposed transaction. By order made September 22, 2021, the Court of Appeal allowed an appeal of the June 15, 2021 order.
7. The Court of Appeal's order resulted in various amendments to the Initial Order, incorporated into a Further Amended and Restated Initial Order made in the CCAA proceeding on February 14, 2022, including:

- a) removal of the Monitor's enhanced powers and reversion of operational control of the Terrace House Project back to the Debtors;
 - b) a direction that the Debtors obtain loans from Domain Mortgage Corp. ("**Domain**"), 1260780 B.C. Ltd. ("**126**") and 129 (126 and 129, together, the "**Junior Lenders**") in accordance with the terms of a commitment letter dated July 30, 2021 (the "**Domain Commitment Letter**") in order to finance:
 - i) repayment of amounts owed to Desjardins under the DIP Facility; and
 - ii) the purchase and assignment of the CMLS loans,

(the "**Loan Facility**");
 - c) various orders in respect of Domain, its role in this CCAA proceeding and its rights under the Domain Commitment Letter and the Security (as defined below), including:
 - i) no further step may be taken by the Debtors in the CCAA proceeding without Domain's consent while the Loan Facility remains outstanding;
 - ii) no order may be made granting any security or charge priority over the Security (as defined below) without Domain's consent;
 - iii) upon an occurrence of default under the Domain Commitment Letter or the Security (as defined below), on five business days' notice Domain may exercise its rights and remedies against the Debtors, including to apply to the court for the appointment of a receiver; and
 - iv) Domain is to be unaffected in any plan of arrangement or proposal that may be advanced by the Debtors.
8. The refinancing transaction completed in October 2021. As a result, the DIP Facility was repaid, CMLS received payment for amounts owed to it, and CMLS's security was assigned to Domain.

9. As part of the Loan Facility, Domain funded two loan segments as follows:
 - a) a first loan segment in the principal amount of \$10.5 million, upon which interest currently accrues at the rate of 12% per annum, compounded monthly; and
 - b) a second loan segment in the principal amount of \$4.2 million, upon which interest currently accrues at the rate of 24% per annum, compounded monthly.
10. The balance of the Loan Facility, in the principal sum of \$10,549,060.03, was funded by the Junior Lenders. Promissory notes dated October 22, 2021 evidence the debts owed to the Junior Lenders (the “**Promissory Notes**”).
11. Pursuant to a Loan Administration, Participation and Standstill Agreement dated October 2021, Domain administers the loans on behalf of the lenders. Domain is entitled to, among other things, take such actions and exercise such rights, powers, privileges and remedies under the Domain Commitment Letter, as amended, and the Security (as defined below), including on behalf of the Junior Lenders, that it considers necessary or advisable in its sole discretion.
12. The Debtors’ obligations to Domain under the Domain Commitment Letter and the Promissory Notes are secured and supplemented by, among other things:
 - a) a mortgage and assignment of rents registered against the Terrace House Project under nos. CA7337616 and CA7337617, transferred under nos. CA9459739 and CA9459740, and modified under no. CA9459782 and further modified under CA9790630 (collectively, the “**Mortgage**”);
 - b) a general security agreement dated November 1, 2018 and registered in the Personal Property Registry under Base Registration No. 303506L, pursuant to which the Debtors have granted Domain a security interest in all present and after acquired personal property arising from, pertaining to, located on, or used in connection with the Terrace House Project (the “**GSA**”);
 - c) a guarantee dated November 1, 2018 signed by Macario Teodoro Reyes (“**Reyes**”) and Port Capital Development Inc. (the “**Corporate Guarantor**”)

(Reyes and the Corporate Guarantor, together, the “**Guarantors**”) pursuant to which those parties unconditionally and irrevocably guaranteed payment of all debts and liabilities, present or future, direct or indirect, absolute or contingent, owed by the Debtors to Domain;

- d) a cost overrun and completion guarantee dated November 1, 2018 signed by the Debtors and the Guarantors;
- e) an Environmental Warranty and Indemnity Agreement dated November 1, 2018 signed by the Debtors and the Guarantors;
- f) an Assignment of Unit Sales and Agreements and Deposits dated November 1, 2018 signed by the Debtors and the Guarantors;
- g) an Assignment of Material Contracts dated November 1, 2018 signed by the Debtors;
- h) an Assignment of Insurance dated November 1, 2018 signed by the Debtors;
- i) an Assignment of Term Deposits and Credit Balances dated November 1, 2018 signed by the Debtors; and
- j) an Assignment of Construction Contract dated November 26, 2018 signed by the Debtors,

(collectively, the “**Security**”).

13. Pursuant to the Court of Appeal’s September 22, 2021 order, the Security charges the Debtors’ Property (as defined in the CCAA orders) in priority to all other security interests, trusts, liens, mortgages, charges and encumbrances and claims of secured creditors, statutory or otherwise, other than the Administration Charge and claims contemplated by s. 11.8(8) of the CCAA.

14. The Mortgage and the GSA include provisions entitling Domain to the appointment of a receiver, upon the occurrence of an event of default, over the Terrace House Project and the Debtors' personal property.
15. On February 14, 2022 this court granted an order authorizing and empowering the Debtors to enter into a further credit facility with Domain on the terms and conditions of a commitment letter dated February 7, 2022 (the "**February 2022 Commitment Letter**"). Pursuant to the February 2022 Commitment Letter Domain advanced a third loan segment in the principal sum of \$1,800,000 (hereafter included within the defined term "Loan Facility"). Interest accrues on the third loan segment at the rate of 24% per annum, compounded monthly.
16. In the course of the CCAA proceeding, the Debtors identified Enso Holdings Ltd. ("**Enso**") as a potential development partner. It was contemplated that the Debtors and Enso would co-develop the Terrace House Project, with Enso becoming the majority general partner and providing its covenant and an equity investment to support the necessary construction financing to exit the CCAA proceedings. The Debtors and Enso negotiated a commitment letter dated April 19, 2022 with Mandate Management Corporation ("**Mandate**") for a proposed \$20 million mortgage loan (the "**Proposed Mandate Loan**"). The Proposed Mandate Loan was intended to repay the first, second and third loan segments funded by Domain under the Loan Facility and to provide the Debtors with working capital.
17. On or about May 12, 2022 the Monitor reported that the Proposed Mandate Loan was expected to close the week ended May 20, 2022 or soon thereafter. On the same day this court granted an order approving the Proposed Mandate Loan and extending the stay of proceedings under the CCAA to September 30, 2022.
18. The Monitor's Twelfth Report dated June 16, 2022 concluded that the failure of the Proposed Mandate Loan to close constituted a material adverse change in the Debtors' financial affairs. Now, a couple weeks later, the Proposed Mandate Loan has still not closed.

19. The Debtors have an immediate need for financing. Post-filing suppliers are not being paid. The Terrace House Project is subject to waste and in need of preservation and protection. The Debtors appear to have no reasonable prospect of implementing a plan for the reorganization of the Terrace House Project as contemplated by the orders granted in the CCAA proceeding.
20. The Loan Facility matured on July 1, 2022. The funds due thereunder have not been repaid. The Debtors are in default under the Domain Commitment Letter, the February 2022 Commitment Letter and the Security. Pursuant to the orders referred to above, Domain is entitled to exercise its rights and remedies against the Debtors, including for the appointment of a receiver, on five business days' notice.
21. As at July 4, 2022 the total sum due to Domain under the terms of the Domain Commitment Letter, the February 2022 Commitment Letter, the Promissory Notes and the Security is \$29,239,192.03, exclusive of costs and expenses and interest accrued thereafter. Per diem interest accrues at the current rate of \$15,808.32, before compounding. The highest and best offer obtained through the SISF for the purchase of the Terrace House Project would be insufficient to payout the indebtedness due and owing under the Loan Facility.
22. The Bowra Group Inc. ("**Bowra**") has consented to act as receiver and manager of the Debtors. Bowra has significant experience with assets of this nature. If appointed, it is expected that Bowra would undertake an expedited sales process.

Part 3: LEGAL BASIS

1. Domain makes separate but related applications to terminate the CCAA proceeding and appoint a receiver. Domain respectfully submits that, if the Proposed Mandate Loan does not fund, or an unconditional sale with a very short completion period does not materialize, then the CCAA proceeding serves no useful purpose and involves an additional layer of unnecessary costs.

The CCAA Proceeding

2. A primary purpose of the CCAA is to assist insolvent companies in developing and obtaining approval of compromises and arrangements with their creditors. By permitting insolvent companies an opportunity to avoid bankruptcy and a liquidation of assets, the hope is that jobs may be preserved and the social and economic costs associated with a liquidation of assets avoided.

Hong Kong Bank of Canada v. Chef Ready Foods Ltd., [1990] B.C.J. No. 2384 (C.A.)

3. If it becomes evident that a compromise or arrangement will not be forthcoming, or will not be approved, the debtor company's assets are typically liquidated. The Supreme Court of Canada commented on the various potential outcomes of CCAA proceedings in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para 14:

There are three ways of exiting CCAA proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the CCAA process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the CCAA proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the BIA or to place the debtor into receivership.

[emphasis added]

4. "Liquidating CCAAs" have become increasingly common. In appropriate circumstances, CCAA proceedings may be used to liquidate a debtor company's assets. However, in circumstances where the court is presented with competing options – a liquidation of assets in the context of a CCAA proceeding or through the enforcement of a creditor's security, such as a receivership – additional factors come into play. That is particularly so where, as here, the senior secured creditor is not subject to the court ordered stay and, by court order, is permitted to exercise its rights and remedies under its security on five business days' notice. This discussion will be returned to after a brief summary of the jurisdiction and general principles applicable to the appointment of a receiver.

Appointment of a Receiver

5. Pursuant to s. 243 of the *Bankruptcy and Insolvency Act* (the “BIA”), on the application of a secured creditor, the court may appoint a receiver. Similarly, pursuant to s. 39 of the *Law and Equity Act*, the court may appoint a receiver where it is just and convenient. Under Rule 10-2 the court may appoint a receiver in any proceeding either unconditionally or on terms.
6. Factors considered by the court in assessing whether it would be just and convenient to appoint a receiver include:
 - a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;
 - b) the risk to the security holder taking into consideration the size of the debtor’s equity in the assets and the need for protection or safeguarding of the assets;
 - c) the nature of the property;
 - d) the apprehended or actual waste of the debtor’s assets;
 - e) the preservation and protection of the property;
 - f) the balance of convenience to the parties;
 - g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
 - h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
 - i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
 - j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;

- k) the effect of the order upon the parties;
- l) the conduct of the parties;
- m) the length of time that a receiver may be in place;
- n) the cost to the parties;
- o) the likelihood of maximizing return to the parties; and
- p) the goal of facilitating the duties of the receiver.

Maple Trade Finance Inc. v. CY Oriental Holdings Ltd., BCSC 1527 at para 25

7. A creditor's right to appoint a receiver under its security is an important consideration. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, in circumstances where commercial parties have agreed to the appointment by contract, the remedy is not extraordinary and a number of policy considerations militate in favour of enforcement of the creditor's contractual right (e.g. certainty and security in transactions, freedom of contract, etc.).

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd., 2010 BCSC 477 at paras 50 and 75

Callidus Capital Corp. v. CarGap Inc., 2012 ONSC 163 at paras 43 and 44

Bank of Montreal v. Carnival National Leasing Limited, [2011] O.J. No. 671 (SCJ) at para 27

Farallon Investments Ltd. v. Bruce Pallett Fruit Farms Ltd., [1992] O.J. No. 330 (GD) at paras 2 – 6

Ward Western Holdings Corp. v. Brosseuk, 2021 BCSC 919 at para 55

CCAA or Receivership

8. The practical question is whether the Debtors' assets ought to be liquidated in the context of the CCAA proceeding or through a receivership. Domain respectfully submits a receivership is the appropriate forum. The fundamental objectives of the CCAA are no

longer capable of being met. The CCAA proceeding also involves additional layers of unnecessary costs.

9. The Debtors' primary asset is the Terrace House Project. While single purpose land development companies may meet the criteria for creditor protection under the CCAA, when faced with competing options, courts often conclude it is appropriate to permit mortgagees to enforce their security in the conventional manner. The Court of Appeal discussed some of the relevant considerations in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 at para 36:

36 Although the CCAA can apply to companies whose sole business is a single land development as long as the requirements set out in the CCAA are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

[emphasis added]

10. To similar effect are the comments made by the court in *Octagon Properties Group Ltd.*, [2009] A.J. No. 936 (QB) at para 17:

This is not a case where it is appropriate to grant relief under the CCAA. First, I accept the position of the majority of first mortgagees who say that it is highly unlikely that any compromise or arrangement proposed by Octagon would be acceptable to them. That position makes sense given the fact that if they are permitted to proceed with foreclosure procedures and taking into account the current estimates of value, for most mortgagees on most of their properties they will emerge reasonably unscathed. There is no incentive for them to agree to a compromise. On the other hand if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

[emphasis added]

11. A number of courts have made similar comments in reaching the same conclusion.

BCIMC Construction Fund Corp. v. Clover on Yonge Inc., 2020 ONSC 1953

Dondeb Inc., Re, 2012 ONSC 6087

Romspen Investment Corp. v. 6711162 Canada Inc., 2014 ONSC 2781

Marine Drive Properties Ltd., 2009 BCSC 1083

12. Of course, the underlying circumstances here go well beyond a mere competition between debtors wishing to enjoy the benefits of creditor protection under the CCAA and a secured creditor seeking to enforce its security. In addition to the factors discussed below, and apart from its contractual right to the appointment of a Receiver, the court expressly ordered that upon default and five business days' notice Domain could "exercise any and all of its rights and remedies against the [Debtors] or the Property...including...to apply to this Court of the appointment of a receiver...."
13. The parties' interests were balanced under the Court of Appeal's order and the Further Amended and Restated Initial Order. The Debtors were granted "breathing room" to secure a construction loan and exit the CCAA proceeding; however, as part of the *quid pro quo*, if an event of default were to occur, then that last gasp could be brought to a quick end by Domain. The Debtors have enjoyed considerably more time than they anticipated needing, including an extension of the maturity date under the Loan Facility. There is, apparently, no imminent refinancing. There is also no reasonable prospect of a plan of arrangement.
14. Factors militating in favour of terminating the CCAA proceeding and instead liquidating the Debtors' assets through a receivership include:
 - a) The CCAA proceeding has been extant for more than two years. Leaving aside the question of whether it is appropriate for debtors to use the extraordinary remedy of the CCAA to buy time to continue attempts to raise new funding at the expense of their creditors (*Marine Drive Properties Ltd. (Re)*, 2009 BCSC 145 at para 38), the Proposed Mandate Loan has not funded and there is no reasonable

prospect of the Debtors achieving a plan of arrangement. Also, the Debtors may continue their refinancing efforts during the course of a receivership – but they would do so while an officer of the court takes steps to protect the stakeholders’ interests.

- b) The Debtors have suffered a material adverse change in their financial affairs – they do not have access to funds and post-filing suppliers are going unpaid.
- c) The development of the Terrace House Project ceased long ago. The asset is subject to waste and requires preservation and protection.
- d) There is no operating business and no jobs to preserve.
- e) The Debtors cannot take a step in the CCAA proceeding without Domain’s consent.
- f) The Loan Facility has matured. The indebtedness has not been repaid. An event of default has thus occurred. The Debtors also failed to provide a current appraisal report, contrary to a post-renewal condition, representing a separate default.
- g) Domain is not subject to the court ordered stay of proceedings, has the contractual right to the appointment of a receiver and, by court order, Domain is entitled to exercise all of its rights and remedies on five business days’ notice.
- h) The outcome of the SISP represents the best available evidence regarding the value of the Terrace House Project. The secured debt exceeds the project’s apparent value. There is no equity for the Debtors or any subordinate creditor.
- i) Bowra has significant experience with assets of this nature. It has the experience and expertise to run an expedited sales process and maximize realizations.
- j) The receivership order sought includes a stay provision and a receivership would continue to provide a single forum for resolution of matters pertaining to the Debtors.

15. For the foregoing reasons, it is appropriate in the circumstances to terminate the CCAA proceeding and appoint Bowra as receiver and manager of all of the undertakings, property and assets of the Debtors.

Priority of Receiver's Borrowings and Fees and Disbursements

16. There is usually no question that the court may grant a receiver's charge in priority to all creditors in circumstances where, as here, the receiver is sought to be appointed in order to preserve and realize assets for the benefit of interested parties, including secured creditors. However, in the present case, claims of builders liens are registered against title. Section 21 of the *Builders Lien Act* provides:

21 A claim of lien filed under this Act takes effect from the time work began or the time the first material was supplied for which the lien is claimed, and it has priority over all judgments, executions, attachments and receiving orders recovered, issued or made after that date.

[emphasis added]

17. Subsections 32(1), (2), (5) and (6) of the *Builders Lien Act* state:

32(1) Subject to subsection (2), the amount secured in good faith by a registered mortgage as either a direct or contingent liability of the mortgagor has priority over the amount secured by a claim of lien.

(2) Despite subsection (1), an advance by a mortgagee that results in an increase in the direct or contingent liability of a mortgagor, or both, under a registered mortgage occurring after the time a claim of lien is filed ranks in priority after the amount secured by that claim of lien.

...

(5) Despite subsections (1) and (2) or any other enactment, if one or more claims of lien are filed in a land title office in relation to an improvement, a mortgagee may apply to the court for an order that one or more further advances under the mortgage are to have priority over the claims of lien.

(6) On an application by a mortgagee under subsection (5), the court must make the order if it is satisfied that

(a) the advances will be applied to complete the improvement, and

(b) the advances will result in an increased value of the land and the improvement at least equal to the amount of the proposed advances.

18. In *Bank of Montreal v. Peri Formwork Systems Inc.*, 2012 BCCA 4 a lien claimant successfully argued on appeal that the receiver's charge had wrongfully been granted priority over its lien. The Court of Appeal held that the Bank's loan to the receiver was not a "further advance" within s. 32(5) of the *Builders Lien Act* because it was a new loan and, therefore, subordinate in priority to the lien in accordance with s. 32(2).
19. *Peri Formwork* does not apply on the facts here. Domain is prepared to fund the receivership under the existing Mortgage. This would not be a "new loan". Further advances under the existing mortgage would fall squarely within s. 32(5).
20. Furthermore, and in any event, for reasons that are not made apparent on the face of the decision, the Court of Appeal in *Peri Formwork* did not consider ss. 31(1) or 243(6) of the BIA (the provisions were also not considered in *Yorkshire Trust Co. v. Canusa Construction Ltd.*, [1984] B.C.J. No. 1689 (C.A.), where the receiver was appointed under the *Law and Equity Act*). Those sections clothe the court with jurisdiction to order that receiver's borrowings be repaid in priority to creditors' claims and to grant a receiver's charge for fees and disbursements in priority to any or all secured creditors:

31(1) With the permission of the court, an interim receiver, a receiver within the meaning of subsection 243(2) or a trustee may make necessary or advisable advances, incur obligations, borrow money and give security on the debtor's property in any amount, on any terms and on any property that may be authorized by the court and those advances, obligations and money borrowed must be repaid out of the debtor's property in priority to the creditors' claims.

...

243(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

21. It is respectfully submitted that, to the extent either s. 21 or s. 32(5) and/or (6) of the *Builders Lien Act* purport to circumscribe the court's power to grant priority to receiver's borrowings and/or fees and disbursements, those sections directly conflict with the above

provisions of the BIA and, thus, are rendered inoperative in accordance with the paramountcy doctrine. That was the conclusion reached in *Royal Bank of Canada v. Reid-Built Homes Ltd.*, 2018 ABQB 124 at para 134; rev'd in part 2019 ABCA 109 (the chambers judge refused to subordinate the City's claim for unpaid property taxes to the receiver's charge and was overturned on that issue on appeal – the Court of Appeal commented favourably on the chambers judge's analysis with respect to the relevant issue).

General

22. Domain will rely on Rules 1-3, 2-1, 10-2, 13-5, 14-1 and 16-1 and the law of contract, the *Law and Equity Act*, R.S.B.C. 1996, c. 253 including s. 39, the BIA including ss. 31(1), 243(1) and 243(6), the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 including s. 66, the *Builders Lien Act* including ss. 21 and 32, the CCAA including s. 11 and the inherent jurisdiction of the court.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Lisa Ward made July 5, 2022 (filed in petition proceeding).
2. Affidavit #1 of E. Halliday made July 5, 2022 (filed in petition proceeding).
3. Eleventh Report of the Monitor dated May 12, 2022.
4. Twelfth Report of the Monitor dated June 16, 2022.
5. Initial Order made May 29, 2020.
6. Court of Appeal Order made September 22, 2021.
7. Further Amended and Restated Initial Order made February 14, 2022.
8. Order Increasing Domain Facility made February 14, 2022.

The applicant estimates that the application will take 1 hour.

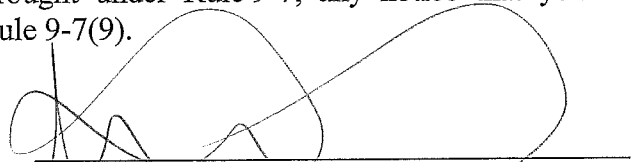
- ☐ This matter is within the jurisdiction of a master.
- ☒ This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- a) file an application response in Form 33,

- b) file the original of every affidavit, and of every other document, that
 - i) you intend to refer to at the hearing of this application, and
 - ii) has not already been filed in the proceedings, and
- c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - i) a copy of the filed application response;
 - ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: July 5, 2022


Signature of lawyer for Domain Mortgage
Corp.,
Scott H. Stephens

To be completed by the court only:

Order made

- ☐ in the terms requested in paragraphs _____ of Part 1 of this notice of application
- ☐ with the following variations and additional terms:

Date: _____

Signature of [] Judge [] Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ other matters concerning document discovery
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☐ amend pleadings

- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts
- ☐ none of the above

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

JUL 05 2022

FORM 66
(RULE 16-1(2))

S-225423

No. _____
Vancouver Registry



IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

DOMAIN MORTGAGE CORP.

Petitioner

and

EVERGREEN HOUSE DEVELOPMENT LIMITED
PARTNERSHIP and PORT CAPITAL DEVELOPMENT (EV)
INC.

Respondents

PETITION TO THE COURT

ON NOTICE TO: the respondents and the parties on the Service List in the CCAA proceeding commenced in BCSC, Vancouver Registry No. S-205095

This proceeding is brought for the relief set out in Part 1 below, by the person named as petitioner in the style of proceedings above.

If you intend to respond to this petition, you or your lawyer must

- a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- b) serve on the petitioner(s)
 - i) 2 copies of the filed response to petition, and
 - ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to the petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner,

- a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- c) if you were served with the petition anywhere else, within 49 days after that service, or
- d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: Law Courts, 800 Smithe Street, Vancouver, BC V6Z 2E1
(2)	The ADDRESS FOR SERVICE of the petitioner(s) is: Owen Bird Law Corporation P.O. Box 49130 Three Bentall Centre 2900-595 Burrard Street Vancouver, BC V7X 1J5 (Attention: Scott H. Stephens) Fax number address for service (if any) of the petitioner: N/A E-mail address for service (if any) of the petitioner: N/A
(3)	The name and office address of the petitioner's lawyer is: Scott H. Stephens Owen Bird Law Corporation P.O. Box 49130 Three Bentall Centre 2900-595 Burrard Street Vancouver, BC V7X 1J5

CLAIM OF THE PETITIONER

Part 1: ORDER SOUGHT

1. A receivership order substantially in the form attached as Schedule “A” or in such other form as may be sought at the hearing of the petition.
2. Such further and other relief as this court may deem just.

Part 2: FACTUAL BASIS

1. Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership (together, the “**Debtors**”) own a high-rise luxury residential mixed-use strata development located at 1250 West Hastings Street in Vancouver, B.C. in the Coal Harbour neighbourhood (the “**Terrace House Project**”).
2. This court granted an Initial Order under the *Companies’ Creditors Arrangement Act* (the “**CCAA**”) on May 29, 2020. Under the Initial Order, Ernst & Young Inc. (the “**Monitor**”) was appointed Monitor and granted enhanced powers, including to consider restructuring opportunities and to administer a dual-track sale and investment solicitation process (the “**SISP**”).
3. At the time the CCAA proceedings were commenced, the Debtors’ senior secured creditor was CMLS Financial Ltd. (“**CMLS**”). CMLS had provided the construction loan for the Terrace House Project, but ceased making advances. Pursuant to a restated Initial Order made June 8, 2020, Desjardins Financial Security Life Assurance Company (“**Desjardins**”) provided the Debtors with debtor-in-possession financing (the “**DIP Facility**”).
4. The SISP resulted in three liquidation offers as well as an offer from 1296371 B.C. Ltd. (“**129**”), described as a “refinancing transaction.” The 129 transaction, in short summary, contemplated monies being raised in sufficient amounts to repay the DIP Facility, effect a purchase and assignment of CMLS’s loan and security, and provide the Debtors with working capital.

5. 129's offer was premised on the Debtors having "strong interest from lenders to provide new construction financing," but in order to secure such construction financing, the Debtors said, they required breathing room and control of the Terrace House Project. The Debtors' expectation was that, within a 6 month extension of the stay, they would be able to secure new construction financing and exit the CCAA proceeding.
6. By order made June 15, 2021, this court approved one of the liquidation offers and rejected 129's proposed transaction. By order made September 22, 2021, the Court of Appeal allowed an appeal of the June 15, 2021 order.
7. The Court of Appeal's order resulted in various amendments to the Initial Order, incorporated into a Further Amended and Restated Initial Order made in the CCAA proceeding on February 14, 2022, including:
 - a) removal of the Monitor's enhanced powers and reversion of operational control of the Terrace House Project back to the Debtors;
 - b) a direction that the Debtors obtain loans from Domain Mortgage Corp. ("**Domain**"), 1260780 B.C. Ltd. ("**126**") and 129 (126 and 129, together, the "**Junior Lenders**") in accordance with the terms of a commitment letter dated July 30, 2021 (the "**Domain Commitment Letter**") in order to finance:
 - i) repayment of amounts owed to Desjardins under the DIP Facility; and
 - ii) the purchase and assignment of the CMLS loans,

(the "**Loan Facility**");
 - c) various orders in respect of Domain, its role in this CCAA proceeding and its rights under the Domain Commitment Letter and the Security (as defined below), including:
 - i) no further step may be taken by the Debtors in the CCAA proceeding without Domain's consent while the Loan Facility remains outstanding;

- ii) no order may be made granting any security or charge priority over the Security (as defined below) without Domain's consent;
 - iii) upon an occurrence of default under the Domain Commitment Letter or the Security (as defined below), on five business days' notice Domain may exercise its rights and remedies against the Debtors, including to apply to the court for the appointment of a receiver; and
 - iv) Domain is to be unaffected in any plan of arrangement or proposal that may be advanced by the Debtors.
- 8. The refinancing transaction completed in October 2021. As a result, the DIP Facility was repaid, CMLS received payment for amounts owed to it, and CMLS's security was assigned to Domain.
- 9. As part of the Loan Facility, Domain funded two loan segments as follows:
 - a) a first loan segment in the principal amount of \$10.5 million, upon which interest currently accrues at the rate of 12% per annum, compounded monthly; and
 - b) a second loan segment in the principal amount of \$4.2 million, upon which interest currently accrues at the rate of 24% per annum, compounded monthly.
- 10. The balance of the Loan Facility, in the principal sum of \$10,549,060.03, was funded by the Junior Lenders. Promissory notes dated October 22, 2021 evidence the debts owed to the Junior Lenders (the "**Promissory Notes**").
- 11. Pursuant to a Loan Administration, Participation and Standstill Agreement dated October 2021, Domain administers the loans on behalf of the lenders. Domain is entitled to, among other things, take such actions and exercise such rights, powers, privileges and remedies under the Domain Commitment Letter, as amended, and the Security (as defined below), including on behalf of the Junior Lenders, that it considers necessary or advisable in its sole discretion.

12. The Debtors' obligations to Domain under the Domain Commitment Letter and the Promissory Notes are secured and supplemented by, among other things:
- a) a mortgage and assignment of rents registered against the Terrace House Project under nos. CA7337616 and CA7337617, transferred under nos. CA9459739 and CA9459740, and modified under no. CA9459782 and further modified under CA9790630 (collectively, the "**Mortgage**");
 - b) a general security agreement dated November 1, 2018 and registered in the Personal Property Registry under Base Registration No. 303506L, pursuant to which the Debtors have granted Domain a security interest in all present and after acquired personal property arising from, pertaining to, located on, or used in connection with the Terrace House Project (the "**GSA**");
 - c) a guarantee dated November 1, 2018 signed by Macario Teodoro Reyes ("**Reyes**") and Port Capital Development Inc. (the "**Corporate Guarantor**") (Reyes and the Corporate Guarantor, together, the "**Guarantors**") pursuant to which those parties unconditionally and irrevocably guaranteed payment of all debts and liabilities, present or future, direct or indirect, absolute or contingent, owed by the Debtors to Domain;
 - d) a cost overrun and completion guarantee dated November 1, 2018 signed by the Debtors and the Guarantors;
 - e) an Environmental Warranty and Indemnity Agreement dated November 1, 2018 signed by the Debtors and the Guarantors;
 - f) an Assignment of Unit Sales and Agreements and Deposits dated November 1, 2018 signed by the Debtors and the Guarantors;
 - g) an Assignment of Material Contracts dated November 1, 2018 signed by the Debtors;
 - h) an Assignment of Insurance dated November 1, 2018 signed by the Debtors;

- i) an Assignment of Term Deposits and Credit Balances dated November 1, 2018 signed by the Debtors; and
- j) an Assignment of Construction Contract dated November 26, 2018 signed by the Debtors,

(collectively, the “**Security**”).

- 13. Pursuant to the Court of Appeal’s September 22, 2021 order, the Security charges the Debtors’ Property (as defined in the CCAA orders) in priority to all other security interests, trusts, liens, mortgages, charges and encumbrances and claims of secured creditors, statutory or otherwise, other than the Administration Charge and claims contemplated by s. 11.8(8) of the CCAA.
- 14. The Mortgage and the GSA include provisions entitling Domain to the appointment of a receiver, upon the occurrence of an event of default, over the Terrace House Project and the Debtors’ personal property.
- 15. On February 14, 2022 this court granted an order authorizing and empowering the Debtors to enter into a further credit facility with Domain on the terms and conditions of a commitment letter dated February 7, 2022 (the “**February 2022 Commitment Letter**”). Pursuant to the February 2022 Commitment Letter Domain advanced a third loan segment in the principal sum of \$1,800,000 (hereafter included within the defined term “Loan Facility”). Interest accrues on the third loan segment at the rate of 24% per annum, compounded monthly.
- 16. In the course of the CCAA proceeding, the Debtors identified Enso Holdings Ltd. (“**Enso**”) as a potential development partner. It was contemplated that the Debtors and Enso would co-develop the Terrace House Project, with Enso becoming the majority general partner and providing its covenant and an equity investment to support the necessary construction financing to exit the CCAA proceedings. The Debtors and Enso negotiated a commitment letter dated April 19, 2022 with Mandate Management Corporation (“**Mandate**”) for a proposed \$20 million mortgage loan (the “**Proposed Mandate Loan**”). The Proposed Mandate Loan was intended to repay the first, second

and third loan segments funded by Domain under the Loan Facility and to provide the Debtors with working capital.

17. On or about May 12, 2022 the Monitor reported that the Proposed Mandate Loan was expected to close the week ended May 20, 2022 or soon thereafter. On the same day this court granted an order approving the Proposed Mandate Loan and extending the stay of proceedings under the CCAA to September 30, 2022.
18. The Monitor's Twelfth Report dated June 16, 2022 concluded that the failure of the Proposed Mandate Loan to close constituted a material adverse change in the Debtors' financial affairs. Now, a couple weeks later, the Proposed Mandate Loan has still not closed.
19. The Debtors have an immediate need for financing. Post-filing suppliers are not being paid. The Terrace House Project is subject to waste and in need of preservation and protection. The Debtors appear to have no reasonable prospect of implementing a plan for the reorganization of the Terrace House Project as contemplated by the orders granted in the CCAA proceeding.
20. The Loan Facility matured on July 1, 2022. The funds due thereunder have not been repaid. The Debtors are in default under the Domain Commitment Letter, the February 2022 Commitment Letter and the Security. Pursuant to the orders referred to above, Domain is entitled to exercise its rights and remedies against the Debtors, including for the appointment of a receiver, on five business days' notice.
21. As at July 4, 2022 the total sum due to Domain under the terms of the Domain Commitment Letter, the February 2022 Commitment Letter, the Promissory Notes and the Security is \$29,239,192.03, exclusive of costs and expenses and interest accrued thereafter. Per diem interest accrues at the current rate of \$15,808.32, before compounding. The highest and best offer obtained through the SISP for the purchase of the Terrace House Project would be insufficient to payout the indebtedness due and owing under the Loan Facility.

22. The Bowra Group Inc. (“**Bowra**”) has consented to act as receiver and manager of the Debtors. Bowra has significant experience with assets of this nature. If appointed, it is expected that Bowra would undertake an expedited sales process.

Part 3: LEGAL BASIS

1. Domain makes separate but related applications to terminate the CCAA proceeding and appoint a receiver. Domain respectfully submits that, if the Proposed Mandate Loan does not fund, or an unconditional sale with a very short completion period does not materialize, then the CCAA proceeding serves no useful purpose and involves an additional layer of unnecessary costs.

The CCAA Proceeding

2. A primary purpose of the CCAA is to assist insolvent companies in developing and obtaining approval of compromises and arrangements with their creditors. By permitting insolvent companies an opportunity to avoid bankruptcy and a liquidation of assets, the hope is that jobs may be preserved and the social and economic costs associated with a liquidation of assets avoided.

Hong Kong Bank of Canada v. Chef Ready Foods Ltd., [1990] B.C.J. No. 2384 (C.A.)

3. If it becomes evident that a compromise or arrangement will not be forthcoming, or will not be approved, the debtor company’s assets are typically liquidated. The Supreme Court of Canada commented on the various potential outcomes of CCAA proceedings in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para 14:

There are three ways of exiting CCAA proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the CCAA process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the CCAA proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the BIA or to place the debtor into receivership.

[emphasis added]

4. “Liquidating CCAAs” have become increasingly common. In appropriate circumstances, CCAA proceedings may be used to liquidate a debtor company’s assets. However, in circumstances where the court is presented with competing options – a liquidation of assets in the context of a CCAA proceeding or through the enforcement of a creditor’s security, such as a receivership – additional factors come into play. That is particularly so where, as here, the senior secured creditor is not subject to the court ordered stay and, by court order, is permitted to exercise its rights and remedies under its security on five business days’ notice. This discussion will be returned to after a brief summary of the jurisdiction and general principles applicable to the appointment of a receiver.

Appointment of a Receiver

5. Pursuant to s. 243 of the *Bankruptcy and Insolvency Act* (the “BIA”), on the application of a secured creditor, the court may appoint a receiver. Similarly, pursuant to s. 39 of the *Law and Equity Act*, the court may appoint a receiver where it is just and convenient. Under Rule 10-2 the court may appoint a receiver in any proceeding either unconditionally or on terms.
6. Factors considered by the court in assessing whether it would be just and convenient to appoint a receiver include:
 - a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;
 - b) the risk to the security holder taking into consideration the size of the debtor’s equity in the assets and the need for protection or safeguarding of the assets;
 - c) the nature of the property;
 - d) the apprehended or actual waste of the debtor’s assets;
 - e) the preservation and protection of the property;
 - f) the balance of convenience to the parties;

- g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
- h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
- i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
- j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;
- k) the effect of the order upon the parties;
- l) the conduct of the parties;
- m) the length of time that a receiver may be in place;
- n) the cost to the parties;
- o) the likelihood of maximizing return to the parties; and
- p) the goal of facilitating the duties of the receiver.

Maple Trade Finance Inc. v. CY Oriental Holdings Ltd., BCSC 1527 at para 25

7. A creditor's right to appoint a receiver under its security is an important consideration. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, in circumstances where commercial parties have agreed to the appointment by contract, the remedy is not extraordinary and a number of policy considerations militate in favour of enforcement of the creditor's contractual right (e.g. certainty and security in transactions, freedom of contract, etc.).

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd., 2010 BCSC 477 at paras 50 and 75

Callidus Capital Corp. v. CarGap Inc., 2012 ONSC 163 at paras 43 and 44

Bank of Montreal v. Carnival National Leasing Limited, [2011] O.J. No. 671 (SCJ) at para 27

Farallon Investments Ltd. v. Bruce Pallett Fruit Farms Ltd., [1992] O.J. No. 330 (GD) at paras 2 – 6

Ward Western Holdings Corp. v. Brosseuk, 2021 BCSC 919 at para 55

CCAA or Receivership

8. The practical question is whether the Debtors' assets ought to be liquidated in the context of the CCAA proceeding or through a receivership. Domain respectfully submits a receivership is the appropriate forum. The fundamental objectives of the CCAA are no longer capable of being met. The CCAA proceeding also involves additional layers of unnecessary costs.
9. The Debtors' primary asset is the Terrace House Project. While single purpose land development companies may meet the criteria for creditor protection under the CCAA, when faced with competing options, courts often conclude it is appropriate to permit mortgagees to enforce their security in the conventional manner. The Court of Appeal discussed some of the relevant considerations in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 at para 36:

36 Although the CCAA can apply to companies whose sole business is a single land development as long as the requirements set out in the CCAA are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

[emphasis added]

10. To similar effect are the comments made by the court in *Octagon Properties Group Ltd.*, [2009] A.J. No. 936 (QB) at para 17:

This is not a case where it is appropriate to grant relief under the CCAA. First, I accept the position of the majority of first mortgagees who say that it is highly unlikely that any compromise or arrangement proposed by Octagon would be acceptable to them. That position makes sense given the fact that if they are permitted to proceed with foreclosure procedures and taking into account the current estimates of value, for most mortgagees on most of their properties they will emerge reasonably unscathed. There is no incentive for them to agree to a compromise. On the other hand if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

[emphasis added]

11. A number of courts have made similar comments in reaching the same conclusion.

BCIMC Construction Fund Corp. v. Clover on Yonge Inc., 2020 ONSC 1953

Dondeb Inc., Re, 2012 ONSC 6087

Romspen Investment Corp. v. 6711162 Canada Inc., 2014 ONSC 2781

Marine Drive Properties Ltd., 2009 BCSC 1083

12. Of course, the underlying circumstances here go well beyond a mere competition between debtors wishing to enjoy the benefits of creditor protection under the CCAA and a secured creditor seeking to enforce its security. In addition to the factors discussed below, and apart from its contractual right to the appointment of a Receiver, the court expressly ordered that upon default and five business days' notice Domain could "exercise any and all of its rights and remedies against the [Debtors] or the Property...including...to apply to this Court of the appointment of a receiver...."
13. The parties' interests were balanced under the Court of Appeal's order and the Further Amended and Restated Initial Order. The Debtors were granted "breathing room" to secure a construction loan and exit the CCAA proceeding; however, as part of the *quid pro quo*, if an event of default were to occur, then that last gasp could be brought to a quick end by Domain. The Debtors have enjoyed considerably more time than they anticipated needing, including an extension of the maturity date under the Loan Facility.

There is, apparently, no imminent refinancing. There is also no reasonable prospect of a plan of arrangement.

14. Factors militating in favour of terminating the CCAA proceeding and instead liquidating the Debtors' assets through a receivership include:
 - a) The CCAA proceeding has been extant for more than two years. Leaving aside the question of whether it is appropriate for debtors to use the extraordinary remedy of the CCAA to buy time to continue attempts to raise new funding at the expense of their creditors (*Marine Drive Properties Ltd. (Re)*, 2009 BCSC 145 at para 38), the Proposed Mandate Loan has not funded and there is no reasonable prospect of the Debtors achieving a plan of arrangement. Also, the Debtors may continue their refinancing efforts during the course of a receivership – but they would do so while an officer of the court takes steps to protect the stakeholders' interests.
 - b) The Debtors have suffered a material adverse change in their financial affairs – they do not have access to funds and post-filing suppliers are going unpaid.
 - c) The development of the Terrace House Project ceased long ago. The asset is subject to waste and requires preservation and protection.
 - d) There is no operating business and no jobs to preserve.
 - e) The Debtors cannot take a step in the CCAA proceeding without Domain's consent.
 - f) The Loan Facility has matured. The indebtedness has not been repaid. An event of default has thus occurred. The Debtors also failed to provide a current appraisal report, contrary to a post-renewal condition, representing a separate default.
 - g) Domain is not subject to the court ordered stay of proceedings, has the contractual right to the appointment of a receiver and, by court order, Domain is entitled to exercise all of its rights and remedies on five business days' notice.

- h) The outcome of the SISP represents the best available evidence regarding the value of the Terrace House Project. The secured debt exceeds the project's apparent value. There is no equity for the Debtors or any subordinate creditor.
 - i) Bowra has significant experience with assets of this nature. It has the experience and expertise to run an expedited sales process and maximize realizations.
 - j) The receivership order sought includes a stay provision and a receivership would continue to provide a single forum for resolution of matters pertaining to the Debtors.
15. For the foregoing reasons, it is appropriate in the circumstances to terminate the CCAA proceeding and appoint Bowra as receiver and manager of all of the undertakings, property and assets of the Debtors.

Priority of Receiver's Borrowings and Fees and Disbursements

16. There is usually no question that the court may grant a receiver's charge in priority to all creditors in circumstances where, as here, the receiver is sought to be appointed in order to preserve and realize assets for the benefit of interested parties, including secured creditors. However, in the present case, claims of builders liens are registered against title. Section 21 of the *Builders Lien Act* provides:

21 A claim of lien filed under this Act takes effect from the time work began or the time the first material was supplied for which the lien is claimed, and it has priority over all judgments, executions, attachments and receiving orders recovered, issued or made after that date.

[emphasis added]

17. Subsections 32(1), (2), (5) and (6) of the *Builders Lien Act* state:

32(1) Subject to subsection (2), the amount secured in good faith by a registered mortgage as either a direct or contingent liability of the mortgagor has priority over the amount secured by a claim of lien.

(2) Despite subsection (1), an advance by a mortgagee that results in an increase in the direct or contingent liability of a mortgagor, or both, under a registered mortgage occurring after the time a claim of lien is filed ranks in priority after the amount secured by that claim of lien.

...

(5) Despite subsections (1) and (2) or any other enactment, if one or more claims of lien are filed in a land title office in relation to an improvement, a mortgagee may apply to the court for an order that one or more further advances under the mortgage are to have priority over the claims of lien.

(6) On an application by a mortgagee under subsection (5), the court must make the order if it is satisfied that

(a) the advances will be applied to complete the improvement, and

(b) the advances will result in an increased value of the land and the improvement at least equal to the amount of the proposed advances.

18. In *Bank of Montreal v. Peri Formwork Systems Inc.*, 2012 BCCA 4 a lien claimant successfully argued on appeal that the receiver's charge had wrongfully been granted priority over its lien. The Court of Appeal held that the Bank's loan to the receiver was not a "further advance" within s. 32(5) of the *Builders Lien Act* because it was a new loan and, therefore, subordinate in priority to the lien in accordance with s. 32(2).
19. *Peri Formwork* does not apply on the facts here. Domain is prepared to fund the receivership under the existing Mortgage. This would not be a "new loan". Further advances under the existing mortgage would fall squarely within s. 32(5).
20. Furthermore, and in any event, for reasons that are not made apparent on the face of the decision, the Court of Appeal in *Peri Formwork* did not consider ss. 31(1) or 243(6) of the BIA (the provisions were also not considered in *Yorkshire Trust Co. v. Canusa Construction Ltd.*, [1984] B.C.J. No. 1689 (C.A.), where the receiver was appointed under the *Law and Equity Act*). Those sections clothe the court with jurisdiction to order that receiver's borrowings be repaid in priority to creditors' claims and to grant a receiver's charge for fees and disbursements in priority to any or all secured creditors:

31(1) With the permission of the court, an interim receiver, a receiver within the meaning of subsection 243(2) or a trustee may make necessary or advisable advances, incur obligations, borrow money and give security on the debtor's property in any amount, on any terms and on any property that may be authorized by the court and those advances, obligations and money borrowed must be repaid out of the debtor's property in priority to the creditors' claims.

...

243(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

21. It is respectfully submitted that, to the extent either s. 21 or s. 32(5) and/or (6) of the *Builders Lien Act* purport to circumscribe the court's power to grant priority to receiver's borrowings and/or fees and disbursements, those sections directly conflict with the above provisions of the BIA and, thus, are rendered inoperative in accordance with the paramountcy doctrine. That was the conclusion reached in *Royal Bank of Canada v. Reid-Built Homes Ltd.*, 2018 ABQB 124 at para 134; rev'd in part 2019 ABCA 109 (the chambers judge refused to subordinate the City's claim for unpaid property taxes to the receiver's charge and was overturned on that issue on appeal – the Court of Appeal commented favourably on the chambers judge's analysis with respect to the relevant issue).

General

22. Domain will rely on Rules 1-3, 2-1, 10-2, 13-5, 14-1 and 16-1 and the law of contract, the *Law and Equity Act*, R.S.B.C. 1996, c. 253 including s. 39, the BIA including ss. 31(1), 243(1) and 243(6), the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 including s. 66, the *Builders Lien Act* including ss. 21 and 32, the CCAA including s. 11 and the inherent jurisdiction of the court.

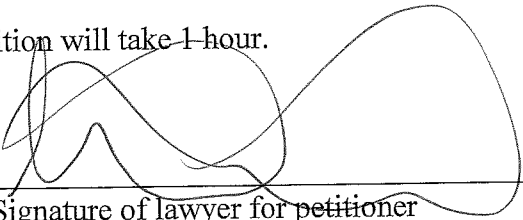
Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Lisa Ward made July 5, 2022.
2. Affidavit #1 of E. Halliday made July 5, 2022.
3. Eleventh Report of the Monitor dated May 12, 2022.
4. Twelfth Report of the Monitor dated June 16, 2022.
5. Initial Order made May 29, 2020.
6. Court of Appeal Order made September 22, 2021.
7. Further Amended and Restated Initial Order made February 14, 2022.

8. Order Increasing Domain Facility made February 14, 2022.

The petitioner estimates that the hearing of the petition will take 1 hour.

Date: July 5, 2022



Signature of lawyer for petitioner
Scott H. Stephens

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs _____ of Part 1 of this notice of application.

☐ with the following variations and additional terms:

Date: _____

Signature of ☐ Judge ☐ Master

Schedule A''

No. _____
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

DOMAIN MORTGAGE CORP.

Petitioner

and

EVERGREEN HOUSE DEVELOPMENT LIMITED
PARTNERSHIP and PORT CAPITAL DEVELOPMENT (EV)
INC.

Respondents

ORDER MADE AFTER APPLICATION

BEFORE THE HONOURABLE)

JUSTICE)

FITZPATRICK)

DD 13/MM/JUL/YEAR 2022

ON THE APPLICATION of ~~Plaintiff/Applicant~~ Domain Mortgage Corp. for an Order pursuant to Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA"), ~~and/or~~ Section 39 of the *Law and Equity Act*, R.S.B.C. 1996 c. 253, as amended (the "LEA"), and Rule 10-2 appointing RECEIVER'S NAME The Bowra Group Inc. as Receiver and Manager ~~Receiver and/or Receiver and Manager~~ (in such capacity, the "Receiver") without security, of all of the assets, undertakings and property of Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership (together, the "Debtors") DEBTOR'S NAME (the "Debtor") acquired for, or used in relation to a business carried on by the Debtor Debtors, coming on for hearing this day at Vancouver, , British Columbia.

AND ON READING the Affidavit #1 of L. Ward, affidavit of E. Halliday, the consent of The Bowra Group Inc. # of NAME sworn DATE and the consent of RECEIVER'S NAME to act as the Receiver and the other materials filed herein and in the CCAA proceeding commenced in the Supreme Court of British Columbia, Vancouver Registry No. S-205095 (the "CCAA Proceeding");- AND ON HEARING Scott H. Stephens , Counsel for the petitioner NAME and other counsel as listed on Schedule "A" hereto, and no one else appearing, although duly served.

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THIS COURT ORDERS AND DECLARES that:

APPOINTMENT

1. The time for service of the petition, notice of hearing, affidavit #1 of L. Ward and affidavit #1 of E. Halliday is abridged such that the petition is properly returnable today and service upon any interested party other than those parties on the Service List in the CCAA Proceeding is hereby dispensed with.
- 1.2. Pursuant to Section 243(1) of the BIA, ~~and/or~~ Section 39 of the LEA and Rule 10-2, The Bowra Group Inc. [RECEIVER'S NAME] is appointed Receiver, without security, of all of the assets, undertakings and property of the DebtorDebtors, including all proceeds (the "Property").

RECEIVER'S POWERS

- 2.3. The Receiver is empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:
 - (a) to take possession of and exercise control over the Property and any and all receipts and disbursements arising out of or from the Property;
 - (b) to receive, preserve and protect the Property, or any part or parts thereof, including, but not limited to, changing locks and security codes, relocation of Property, engaging independent security personnel, taking physical inventories and placing insurance coverage;
 - (c) to manage, operate and carry on the business of the DebtorDebtors, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the DebtorDebtors;
 - (d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including, without limitation, those conferred by this Order;
 - (e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the DebtorDebtors or any part or parts thereof;
 - (f) to receive and collect all monies and accounts now owed or hereafter owing to the DebtorDebtors and to exercise all remedies of the DebtorDebtors in collecting these amounts, including, without limitation, enforcement of any security held by the DebtorDebtors;

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- (g) to settle, extend or compromise any indebtedness owing to the ~~Debtor~~Debtors; |
- (h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the ~~Debtor~~Debtors, for any purpose pursuant to this Order; |
- (i) to undertake environmental or workers' health and safety assessments of the Property and operations of the ~~Debtor~~Debtors; |
- (j) to initiate, manage and direct all legal proceedings now pending or hereafter pending (including appeals or applications for judicial review) in respect of the ~~Debtor~~Debtors, the Property or the Receiver, including initiating, prosecuting, continuing, defending, settling or compromising the proceedings;
- (k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver considers appropriate;
- (l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business:
 - (i) without the approval of this Court in respect of a single transaction for consideration up to ~~\$10,000~~-\$, provided that the aggregate consideration for all such transactions does not exceed ~~\$100,000~~ \$; and |
 - (ii) with the approval of this Court in respect of any transaction in which the individual or aggregate purchase price exceeds the limits set out in subparagraph (i) above,

and in each such case notice under Section 59(10) of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 shall not be required;

- (m) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers, free and clear of any liens or encumbrances;
- (n) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver considers appropriate on all matters relating to the Property and the receivership, and to share information, subject to confidentiality terms as the Receiver considers appropriate;
- (o) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;
- (p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if

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considered necessary or appropriate by the Receiver, in the name of the ~~Debtor~~Debtors;

- (q) to enter into agreements with any ~~trustee in bankruptcy~~Licensed Insolvency Trustee appointed in respect of the ~~Debtor~~Debtors, including, without limitation, the ability to enter into occupation agreements for any property owned or leased by the ~~Debtor~~Debtors;
- (r) to exercise any shareholder, partnership, joint venture or other rights which the ~~Debtor~~Debtors may have; and
- (s) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations; and
- ~~(s)~~(t) to receive further advances under the petitioner's mortgage for the purposes of carrying on the Receiver's duties pursuant hereto, which advances from the petitioner to the Receiver shall be secured by the petitioner's mortgage, in priority to all other advances made thereunder, and repayable to the petitioner in full priority to the claims of all other creditors, whether secured or unsecured, including persons who have registered or may register Claims of Builders Lien against the Property, pursuant to s. 32(5) of the *Builders Lien Act*, S.B.C. 1997, c. 45 and ss. 31(1) and 243(6) of the BIA, excepting only the Administration Charge (as defined in the orders made in the CCAA Proceeding) which shall continue to have the priority determined in the orders made in the CCAA Proceeding (the "**Administration Charge**").

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

- 3.4. Notwithstanding any provisions of and the issuance of this Receivership Order, the Receiver (whether in the name of the Receiver or in the name of and on behalf of the Debtors) and the Debtors shall be authorized and directed to take all steps and execute such documents as may be necessary or desirable to complete, comply with, assist in and satisfy the obligations of the Debtors in connection with the termination of the CCAA Proceeding and the order made therein concurrent with this order.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

- 4.5. Each of (i) the ~~Debtor~~Debtors; (ii) all of the ~~Debtor~~Debtors's current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf; and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order, including Ernst & Young Inc. (the "**Monitor**") in its capacity as the Monitor appointed by the court in the CCAA Proceeding (collectively, "**Persons**" and each a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and

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shall deliver all such Property (excluding Property subject to liens the validity of which is dependent on maintaining possession) to the Receiver upon the Receiver's request.

5.6. All Persons, other than governmental authorities, shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the DebtorDebtors, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (collectively, the "Records") in that Person's possession or control. Upon request, governmental authorities shall advise the Receiver of the existence of any Records in that Person's possession or control.

6.7. Upon request, all Persons shall provide to the Receiver or permit the Receiver to make, retain and take away copies of the Records and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities, provided however that nothing in paragraphs 4, 5 or 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to solicitor client privilege or statutory provisions prohibiting such disclosure. Without limiting the foregoing, the Monitor shall provide to the Receiver or permit the Receiver to make, retain and take away copies of all Records in its possession, including all documents received and/or generated through the sale and investment solicitation process in the CCAA proceeding, including the contents of any data room, whether or not any such Records were or are considered confidential in nature and/or filed with the court pursuant to a sealing order.

7.8. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by an independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may require including, without limitation, providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE RECEIVER

8.9. No proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

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NO PROCEEDINGS AGAINST THE ~~Debtor~~DEBTORS OR THE PROPERTY

~~9.10.~~ No Proceeding against or in respect of the ~~Debtor~~Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the ~~Debtor~~Debtors or the Property are stayed and suspended pending further Order of this Court; provided, however, that nothing in this Order shall prevent any Person from commencing a Proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such Proceeding is not commenced before the expiration of the stay provided by this paragraph and provided that no further step shall be taken in respect of the Proceeding except for service of the initiating documentation on the ~~Debtor~~Debtors and the Receiver.

NO EXERCISE OF RIGHTS OR REMEDIES

~~10.11.~~ All rights and remedies (including, without limitation, set-off rights) against the ~~Debtor~~Debtors, the Receiver, or affecting the Property, are stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that nothing in this Order shall (i) empower the Receiver or the ~~Debtor~~Debtors to carry on any business which the ~~Debtor~~Debtors is not lawfully entitled to carry on, (ii) affect the rights of any regulatory body as set forth in section 69.6(2) of the BIA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien. This stay and suspension shall not apply in respect of any "eligible financial contract" as defined in the BIA.

NO INTERFERENCE WITH THE RECEIVER

~~11.12.~~ No Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the ~~Debtor~~Debtors, without written consent of the Receiver or leave of this Court. Nothing in this Order shall prohibit any party to an eligible financial contract from closing out and terminating such contract in accordance with its terms.

CONTINUATION OF SERVICES

~~12.13.~~ All Persons having oral or written agreements with the ~~Debtor~~Debtors or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the ~~Debtor~~Debtors are restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and the Receiver shall be entitled to the continued use of the ~~Debtor~~Debtors' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the ~~Debtor~~Debtors or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

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RECEIVER TO HOLD FUNDS

~~13.~~14. All funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever including, without limitation, the sale of all or any of the Property and the collection of any accounts receivable, in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the “**Post-Receivership Accounts**”) and the monies standing to the credit of such Post-Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further order of this Court.

EMPLOYEES

~~14.~~15. Subject to the employees’ right to terminate their employment, all employees of the ~~Debtor~~Debtors shall remain the employees of the ~~Debtor~~Debtors until such time as the Receiver, on the ~~Debtor~~Debtors’s behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities of the ~~Debtor~~Debtors, including any successor employer liabilities as referred to in Section 14.06(1.2) of the BIA, other than amounts the Receiver may specifically agree in writing to pay or in respect of obligations imposed specifically on receivers by applicable legislation, including sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*, S.C. 2005, c.47. The Receiver shall be liable for any employee-related liabilities, including wages, severance pay, termination pay, vacation pay, and pension or benefit amounts relating to any employees that the Receiver may hire in accordance with the terms and conditions of such employment by the Receiver.

PERSONAL INFORMATION

~~15.~~16. Pursuant to Section 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 or Section 18(1)(o) of the *Personal Information Protection Act*, S.B.C. 2003, c. 63, the Receiver may disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a “**Sale**”). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the ~~Debtor~~Debtors, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

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LIMITATION ON ENVIRONMENTAL LIABILITIES

~~16.17.~~ Nothing in this Order shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release, or deposit of a substance contrary to any federal, provincial or other law relating to the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination (collectively "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation.

~~17.18.~~ The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless the Receiver is actually in possession.

~~18.19.~~ Notwithstanding anything in federal or provincial law, the Receiver is not personally liable in that position for any environmental condition that arises or environmental damage that occurred:

- (a) before the Receiver's appointment; or,
- (b) after the Receiver's appointment, unless it is established that the condition arose or the damage occurred as a result of the Receiver's gross negligence or wilful misconduct.

~~19.20.~~ Notwithstanding anything in federal or provincial law, but subject to paragraph 197 of this Order, where an order is made which has the effect of requiring the Receiver to remedy any environmental condition or environmental damage affecting the Property, if the Receiver complies with the BIA section 14.06(4), the Receiver is not personally liable for the failure to comply with the order and is not personally liable for any costs that are or would be incurred by any Person in carrying out the terms of the order.

LIMITATION ON THE RECEIVER'S LIABILITY

~~20.21.~~ The Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except:

- (a) any gross negligence or wilful misconduct on its part; or
- (b) amounts in respect of obligations imposed specifically on receivers by applicable legislation.

Nothing in this Order shall derogate from the protections afforded the Receiver by Section 14.06 of the BIA or by any other applicable legislation.

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RECEIVER'S ACCOUNTS

~~21,22.~~ The Receiver and its legal counsel, if any, are granted a charge (the "**Receiver's Charge**") on the Property as security for the payment of their fees and disbursements, in each case at their standard rates, in respect of these proceedings, whether incurred before or after the making of this Order. The Receiver's Charge shall form a ~~first~~ charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, ~~but excepting only the Administration Charge, and~~ subject to Sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

~~22,23.~~ The Receiver and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are referred to a judge of the Supreme Court of British Columbia and may be heard on a summary basis.

~~24.~~ Prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands;

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

(b) in payment of any charges for taxes, utilities, or insurance premiums which relate to any of the Property; and

~~23.(c)~~ in reduction and/or repayment of the amounts owing under the petitioner's mortgage.

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FUNDING OF THE RECEIVERSHIP

~~24,25.~~ The Receiver is authorized and empowered to borrow monies, standing in the place and stead of the Debtors, from the petitioner on the terms and conditions of its mortgage, by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed \$ (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as the Receiver deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. ~~In addition to being secured by the petitioner's mortgage, the~~ The whole of the Property shall be and is charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies ~~borrowed~~ advanced to the Receiver by the petitioner, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the ~~Administration Charge, the~~ Receiver's Charge and the charges as set out in Sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

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~~25.26.~~ Neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall not be enforced without leave of this Court.

~~26.~~ The Receiver is authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

~~27.~~ The monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

ALLOCATION

~~28.27.~~ To the extent not secured by and repaid in accordance with the terms of the petitioner's mortgage, Any interested party may apply to this Court on notice to any other party likely to be affected for an order allocating the Receiver's Charge and Receiver's Borrowings Charge amongst the Property.

SERVICE AND NOTICE OF MATERIALS

~~29.28.~~ The Receiver shall establish and maintain a website in respect of these proceedings at: <https://www.bowragroup.com/engagements> [WEB ADDRESS] (the "**Website**") and shall post there as soon as practicable:

- (a) all materials prescribed by statute or regulation to be made publicly available, including pursuant to Rule 10-2 of the *Supreme Court Civil Rules*; and,
- (b) all applications, reports, affidavits, orders and other materials filed in these proceedings by or on behalf of the Receiver, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

~~30.29.~~ Any Person who is served with a copy of this Order and that wishes to be served with any future application or other materials in these proceedings must provide to counsel for each of the Receiver and the ~~Applicant-petitioner~~ a demand for notice in the form attached as Schedule B (the "**Demand for Notice**"). The Receiver and the ~~Applicant-petitioner~~ need only provide further notice in respect of these proceedings to Persons that have delivered a properly completed Demand for Notice. The failure of any Person to provide a properly completed Demand for Notice releases the Receiver and the ~~Applicant-petitioner~~ from any requirement to provide further notice in respect of these proceedings until such Person delivers a properly completed Demand for Notice.

~~31.30.~~ The Receiver shall maintain a service list identifying all parties that have delivered a properly completed Demand for Notice (the "**Service List**"). The Receiver shall post and maintain an up-to-date form of the Service List on the Website.

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~~32.~~^{31.} Any interested party, including the Receiver, may serve any court materials in these proceedings by facsimile or by emailing a PDF or other electronic copy of such materials to the numbers or addresses, as applicable, set out on the Service List. Any interested party, including the Receiver, may serve any court materials in these proceedings by mail to any party on the Service List that has not provided a facsimile number or email address, and materials delivered by mail shall be deemed received five (5) days after mailing.

~~33.~~^{32.} Notwithstanding paragraph 31 of this Order, service of the Petition ~~[OR the Notice of Application]~~ and any affidavits filed in support shall be made on the Federal and British Columbia Crowns in accordance with the *Crown Liability and Proceedings Act*, R.S.C. 1985, c.C-50 and its regulations for the Federal Crown and the *Crown Proceedings Act*, R.S.B.C. 1996 c.89 in respect of the British Columbia Crown.

~~34.~~^{33.} The Receiver and its counsel are authorised to serve or distribute this Order, any other orders and any other materials as may be reasonably required in these proceedings, including any notices or other correspondence, by forwarding copies by facsimile or by email to the ~~Debtor~~^{Debtors}'s creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of any legal or juridical obligation and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*.

GENERAL

~~35.~~^{34.} Any interested party may apply to this Court to vary or amend this Order on not less than seven (7) clear business days' notice to the Service List and to any other party who may be affected by the variation or amendment, or upon such other notice, if any, as this Court may order.

~~36.~~^{35.} The Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

~~37.~~^{36.} Nothing in this Order shall prevent the Receiver from acting as a ~~trustee in bankruptcy~~^{Licensed Insolvency Trustee of the Debtor} ~~Debtors or either of them.~~

~~38.~~^{37.} This Court requests the aid, recognition and assistance of any court, tribunal, regulatory or administrative body having jurisdiction, wherever located, to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All such courts, tribunals and regulatory and administrative bodies are respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

~~39.~~^{38.} The Receiver is authorized and empowered to apply to any court, tribunal or regulatory or administrative body, wherever located, for recognition of this Order and for assistance in carrying out the terms of this Order and the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

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~~40.39.~~ The petitioner ~~[Plaintiff/Applicant]~~ shall have its costs of this motion, up to and including entry and service of this Order, as provided for by the terms of the ~~[Plaintiff/Applicant]~~ petitioner's security or, if not so provided by the ~~[Plaintiff/Applicant]~~ petitioner's security, then on an ~~substantial~~-indemnity basis to be paid by the Receiver from the ~~Debtor~~ Debtors' estate with such priority and at such time as this Court may determine.

~~41.40.~~ Endorsement of this Order by counsel appearing on this application other than the ~~[Plaintiff/Applicant]~~ petitioner is dispensed with.

THE FOLLOWING PARTIES APPROVE OF THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

APPROVED BY:

Signature of ~~[type of print name]~~ Scott H.
Stephens
lawyer for ~~[Plaintiff/Applicant]~~ the petitioner.
Domain Mortgage Corp.

BY THE COURT

DISTRICT REGISTRAR

SCHEDULE "A"

Counsel/Person Appearing	Party Represented

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT \$ _____

1. THIS IS TO CERTIFY that [RECEIVER'S NAME], the [Receiver and/or Receiver and Manager] (the "Receiver") of all of the assets, undertakings and properties of [DEBTOR/DEBTORS'S NAME] acquired for, or used in relation to a business carried on by the Debtor/Debtors, including all proceeds thereof (collectively, the "Property") appointed by Order of the Supreme Court of British Columbia and/or the Supreme Court of British Columbia (In Bankruptcy and Insolvency) (the "Court") dated the _____ day of _____, 2011 (the "Order") made in SCBC Action No. _____ and/or SCBC Action No. _____/Estate No. _____ has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of \$ _____, being part of the total principal sum of \$ _____ which the Receiver is authorized to borrow under and pursuant to the Order.
2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily] [monthly] not in advance on the _____ day of each month after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of _____ from time to time.
3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property;

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in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of the Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at _____.
5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.
6. The charge securing this certificate shall operate to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.
7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum under this Certificate in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 201_____.

[RECEIVER'S NAME], solely in its
capacity as Receiver of the Property, and not
in its personal capacity

Per: _____
Name: _____
Title: _____

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Schedule "B"

Demand for Notice

TO: ~~{Name of Applicant}~~ Domain Mortgage Corp.
c/o ~~{Name of Counsel to the Applicant}~~ Owen Bird Law Corporation
Attention: Scott H. Stephens
Email: sstephens@owenbird.com

AND TO: ~~{Name of Receiver}~~ The Bowra Group Inc.
c/o ~~{Name of Counsel to the Receiver}~~ DLA Piper (Canada) LLP
Attention: Colin Brousson
Email: colin.brousson@dlapiper.com

Re: In the matter of the Receivership of Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership ~~{DEBTOR}~~

I hereby request that notice of all further proceedings in the above Receivership be sent to me in the following manner:

1. By email, at the following address (or addresses):

OR

2. By facsimile, at the following facsimile number (or numbers):

OR

3. By mail, at the following address:

Name of Creditor: _____

Name of Counsel (if any): _____

Creditor's Contact Address: _____

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Creditor's Contact Phone Number: _____

Action No.

IN THE SUPREME COURT OF BRITISH
COLUMBIA

BETWEEN:

[PLAINTIFF/PETITIONER]

Plaintiff/Petitioner

- and -

[DEFENDANT/RESPONDENT]

Defendant/Respondent

AND:

Action No.

Estate No.

IN THE SUPREME COURT OF BRITISH
COLUMBIA
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE RECEIVERSHIP OF

[THE DEBTOR/DEBTORS] |

B.C. MODEL RECEIVERSHIP ORDER VERSION
NO. 3, _____, 2015



FORM 32 (RULE 8-1(4))

No. S-205095
Vancouver Registry

In the Supreme Court of British Columbia

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

—AND—

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57, AS AMENDED

—AND—

IN THE MATTER OF A PLAN OF COMPROMISE AND
ARRANGEMENT OF PORT CAPITAL DEVELOPMENT
(EV) INC. and EVERGREEN HOUSE DEVELOPMENT
LIMITED PARTNERSHIP

NOTICE OF APPLICATION

Name of applicant: Domain Mortgage Corp.

To: The Service List

TAKE NOTICE that an application will be made by the applicant to Madam Justice Fitzpatrick at the courthouse at the Law Courts, 800 Smithe Street, Vancouver, British Columbia V6Z 2E1 on July 13, 2022 at 10:00 a.m. for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order terminating these proceedings under the *Companies' Creditors Arrangement Act* on such transitional terms as may be appropriate in the circumstances.

Part 2: FACTUAL BASIS

1. Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership (together, the "**Debtors**") own a high-rise luxury residential mixed-use strata development located at 1250 West Hastings Street in Vancouver, B.C. in the Coal Harbour neighbourhood (the "**Terrace House Project**").

2. This court granted an Initial Order under the *Companies' Creditors Arrangement Act* (the "**CCAA**") on May 29, 2020. Under the Initial Order, Ernst & Young Inc. (the "**Monitor**") was appointed Monitor and granted enhanced powers, including to consider restructuring opportunities and to administer a dual-track sale and investment solicitation process (the "**SISP**").
3. At the time the CCAA proceedings were commenced, the Debtors' senior secured creditor was CMLS Financial Ltd. ("**CMLS**"). CMLS had provided the construction loan for the Terrace House Project, but ceased making advances. Pursuant to a restated Initial Order made June 8, 2020, Desjardins Financial Security Life Assurance Company ("**Desjardins**") provided the Debtors with debtor-in-possession financing (the "**DIP Facility**").
4. The SISP resulted in three liquidation offers as well as an offer from 1296371 B.C. Ltd. ("**129**"), described as a "refinancing transaction." The 129 transaction, in short summary, contemplated monies being raised in sufficient amounts to repay the DIP Facility, effect a purchase and assignment of CMLS's loan and security, and provide the Debtors with working capital.
5. 129's offer was premised on the Debtors having "strong interest from lenders to provide new construction financing," but in order to secure such construction financing, the Debtors said, they required breathing room and control of the Terrace House Project. The Debtors' expectation was that, within a 6 month extension of the stay, they would be able to secure new construction financing and exit the CCAA proceeding.
6. By order made June 15, 2021, this court approved one of the liquidation offers and rejected 129's proposed transaction. By order made September 22, 2021, the Court of Appeal allowed an appeal of the June 15, 2021 order.
7. The Court of Appeal's order resulted in various amendments to the Initial Order, incorporated into a Further Amended and Restated Initial Order made in the CCAA proceeding on February 14, 2022, including:

- a) removal of the Monitor's enhanced powers and reversion of operational control of the Terrace House Project back to the Debtors;
 - b) a direction that the Debtors obtain loans from Domain Mortgage Corp. ("**Domain**"), 1260780 B.C. Ltd. ("**126**") and 129 (126 and 129, together, the "**Junior Lenders**") in accordance with the terms of a commitment letter dated July 30, 2021 (the "**Domain Commitment Letter**") in order to finance:
 - i) repayment of amounts owed to Desjardins under the DIP Facility; and
 - ii) the purchase and assignment of the CMLS loans,

(the "**Loan Facility**");
 - c) various orders in respect of Domain, its role in this CCAA proceeding and its rights under the Domain Commitment Letter and the Security (as defined below), including:
 - i) no further step may be taken by the Debtors in the CCAA proceeding without Domain's consent while the Loan Facility remains outstanding;
 - ii) no order may be made granting any security or charge priority over the Security (as defined below) without Domain's consent;
 - iii) upon an occurrence of default under the Domain Commitment Letter or the Security (as defined below), on five business days' notice Domain may exercise its rights and remedies against the Debtors, including to apply to the court for the appointment of a receiver; and
 - iv) Domain is to be unaffected in any plan of arrangement or proposal that may be advanced by the Debtors.
8. The refinancing transaction completed in October 2021. As a result, the DIP Facility was repaid, CMLS received payment for amounts owed to it, and CMLS's security was assigned to Domain.

9. As part of the Loan Facility, Domain funded two loan segments as follows:
 - a) a first loan segment in the principal amount of \$10.5 million, upon which interest currently accrues at the rate of 12% per annum, compounded monthly; and
 - b) a second loan segment in the principal amount of \$4.2 million, upon which interest currently accrues at the rate of 24% per annum, compounded monthly.
10. The balance of the Loan Facility, in the principal sum of \$10,549,060.03, was funded by the Junior Lenders. Promissory notes dated October 22, 2021 evidence the debts owed to the Junior Lenders (the “**Promissory Notes**”).
11. Pursuant to a Loan Administration, Participation and Standstill Agreement dated October 2021, Domain administers the loans on behalf of the lenders. Domain is entitled to, among other things, take such actions and exercise such rights, powers, privileges and remedies under the Domain Commitment Letter, as amended, and the Security (as defined below), including on behalf of the Junior Lenders, that it considers necessary or advisable in its sole discretion.
12. The Debtors’ obligations to Domain under the Domain Commitment Letter and the Promissory Notes are secured and supplemented by, among other things:
 - a) a mortgage and assignment of rents registered against the Terrace House Project under nos. CA7337616 and CA7337617, transferred under nos. CA9459739 and CA9459740, and modified under no. CA9459782 and further modified under CA9790630 (collectively, the “**Mortgage**”);
 - b) a general security agreement dated November 1, 2018 and registered in the Personal Property Registry under Base Registration No. 303506L, pursuant to which the Debtors have granted Domain a security interest in all present and after acquired personal property arising from, pertaining to, located on, or used in connection with the Terrace House Project (the “**GSA**”);
 - c) a guarantee dated November 1, 2018 signed by Macario Teodoro Reyes (“**Reyes**”) and Port Capital Development Inc. (the “**Corporate Guarantor**”)

(Reyes and the Corporate Guarantor, together, the “**Guarantors**”) pursuant to which those parties unconditionally and irrevocably guaranteed payment of all debts and liabilities, present or future, direct or indirect, absolute or contingent, owed by the Debtors to Domain;

- d) a cost overrun and completion guarantee dated November 1, 2018 signed by the Debtors and the Guarantors;
- e) an Environmental Warranty and Indemnity Agreement dated November 1, 2018 signed by the Debtors and the Guarantors;
- f) an Assignment of Unit Sales and Agreements and Deposits dated November 1, 2018 signed by the Debtors and the Guarantors;
- g) an Assignment of Material Contracts dated November 1, 2018 signed by the Debtors;
- h) an Assignment of Insurance dated November 1, 2018 signed by the Debtors;
- i) an Assignment of Term Deposits and Credit Balances dated November 1, 2018 signed by the Debtors; and
- j) an Assignment of Construction Contract dated November 26, 2018 signed by the Debtors,

(collectively, the “**Security**”).

13. Pursuant to the Court of Appeal’s September 22, 2021 order, the Security charges the Debtors’ Property (as defined in the CCAA orders) in priority to all other security interests, trusts, liens, mortgages, charges and encumbrances and claims of secured creditors, statutory or otherwise, other than the Administration Charge and claims contemplated by s. 11.8(8) of the CCAA.

14. The Mortgage and the GSA include provisions entitling Domain to the appointment of a receiver, upon the occurrence of an event of default, over the Terrace House Project and the Debtors' personal property.
15. On February 14, 2022 this court granted an order authorizing and empowering the Debtors to enter into a further credit facility with Domain on the terms and conditions of a commitment letter dated February 7, 2022 (the "**February 2022 Commitment Letter**"). Pursuant to the February 2022 Commitment Letter Domain advanced a third loan segment in the principal sum of \$1,800,000 (hereafter included within the defined term "Loan Facility"). Interest accrues on the third loan segment at the rate of 24% per annum, compounded monthly.
16. In the course of the CCAA proceeding, the Debtors identified Enso Holdings Ltd. ("**Enso**") as a potential development partner. It was contemplated that the Debtors and Enso would co-develop the Terrace House Project, with Enso becoming the majority general partner and providing its covenant and an equity investment to support the necessary construction financing to exit the CCAA proceedings. The Debtors and Enso negotiated a commitment letter dated April 19, 2022 with Mandate Management Corporation ("**Mandate**") for a proposed \$20 million mortgage loan (the "**Proposed Mandate Loan**"). The Proposed Mandate Loan was intended to repay the first, second and third loan segments funded by Domain under the Loan Facility and to provide the Debtors with working capital.
17. On or about May 12, 2022 the Monitor reported that the Proposed Mandate Loan was expected to close the week ended May 20, 2022 or soon thereafter. On the same day this court granted an order approving the Proposed Mandate Loan and extending the stay of proceedings under the CCAA to September 30, 2022.
18. The Monitor's Twelfth Report dated June 16, 2022 concluded that the failure of the Proposed Mandate Loan to close constituted a material adverse change in the Debtors' financial affairs. Now, a couple weeks later, the Proposed Mandate Loan has still not closed.

19. The Debtors have an immediate need for financing. Post-filing suppliers are not being paid. The Terrace House Project is subject to waste and in need of preservation and protection. The Debtors appear to have no reasonable prospect of implementing a plan for the reorganization of the Terrace House Project as contemplated by the orders granted in the CCAA proceeding.
20. The Loan Facility matured on July 1, 2022. The funds due thereunder have not been repaid. The Debtors are in default under the Domain Commitment Letter, the February 2022 Commitment Letter and the Security. Pursuant to the orders referred to above, Domain is entitled to exercise its rights and remedies against the Debtors, including for the appointment of a receiver, on five business days' notice.
21. As at July 4, 2022 the total sum due to Domain under the terms of the Domain Commitment Letter, the February 2022 Commitment Letter, the Promissory Notes and the Security is \$29,239,192.03, exclusive of costs and expenses and interest accrued thereafter. Per diem interest accrues at the current rate of \$15,808.32, before compounding. The highest and best offer obtained through the SISF for the purchase of the Terrace House Project would be insufficient to payout the indebtedness due and owing under the Loan Facility.
22. The Bowra Group Inc. ("**Bowra**") has consented to act as receiver and manager of the Debtors. Bowra has significant experience with assets of this nature. If appointed, it is expected that Bowra would undertake an expedited sales process.

Part 3: LEGAL BASIS

1. Domain makes separate but related applications to terminate the CCAA proceeding and appoint a receiver. Domain respectfully submits that, if the Proposed Mandate Loan does not fund, or an unconditional sale with a very short completion period does not materialize, then the CCAA proceeding serves no useful purpose and involves an additional layer of unnecessary costs.

The CCAA Proceeding

2. A primary purpose of the CCAA is to assist insolvent companies in developing and obtaining approval of compromises and arrangements with their creditors. By permitting insolvent companies an opportunity to avoid bankruptcy and a liquidation of assets, the hope is that jobs may be preserved and the social and economic costs associated with a liquidation of assets avoided.

Hong Kong Bank of Canada v. Chef Ready Foods Ltd., [1990] B.C.J. No. 2384 (C.A.)

3. If it becomes evident that a compromise or arrangement will not be forthcoming, or will not be approved, the debtor company's assets are typically liquidated. The Supreme Court of Canada commented on the various potential outcomes of CCAA proceedings in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para 14:

There are three ways of exiting CCAA proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the CCAA process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the CCAA proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the BIA or to place the debtor into receivership.

[emphasis added]

4. "Liquidating CCAAs" have become increasingly common. In appropriate circumstances, CCAA proceedings may be used to liquidate a debtor company's assets. However, in circumstances where the court is presented with competing options – a liquidation of assets in the context of a CCAA proceeding or through the enforcement of a creditor's security, such as a receivership – additional factors come into play. That is particularly so where, as here, the senior secured creditor is not subject to the court ordered stay and, by court order, is permitted to exercise its rights and remedies under its security on five business days' notice. This discussion will be returned to after a brief summary of the jurisdiction and general principles applicable to the appointment of a receiver.

Appointment of a Receiver

5. Pursuant to s. 243 of the *Bankruptcy and Insolvency Act* (the “BIA”), on the application of a secured creditor, the court may appoint a receiver. Similarly, pursuant to s. 39 of the *Law and Equity Act*, the court may appoint a receiver where it is just and convenient. Under Rule 10-2 the court may appoint a receiver in any proceeding either unconditionally or on terms.
6. Factors considered by the court in assessing whether it would be just and convenient to appoint a receiver include:
 - a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;
 - b) the risk to the security holder taking into consideration the size of the debtor’s equity in the assets and the need for protection or safeguarding of the assets;
 - c) the nature of the property;
 - d) the apprehended or actual waste of the debtor’s assets;
 - e) the preservation and protection of the property;
 - f) the balance of convenience to the parties;
 - g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
 - h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
 - i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
 - j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;

- k) the effect of the order upon the parties;
- l) the conduct of the parties;
- m) the length of time that a receiver may be in place;
- n) the cost to the parties;
- o) the likelihood of maximizing return to the parties; and
- p) the goal of facilitating the duties of the receiver.

Maple Trade Finance Inc. v. CY Oriental Holdings Ltd., BCSC 1527 at para 25

7. A creditor's right to appoint a receiver under its security is an important consideration. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, in circumstances where commercial parties have agreed to the appointment by contract, the remedy is not extraordinary and a number of policy considerations militate in favour of enforcement of the creditor's contractual right (e.g. certainty and security in transactions, freedom of contract, etc.).

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd., 2010 BCSC 477 at paras 50 and 75

Callidus Capital Corp. v. CarGap Inc., 2012 ONSC 163 at paras 43 and 44

Bank of Montreal v. Carnival National Leasing Limited, [2011] O.J. No. 671 (SCJ) at para 27

Farallon Investments Ltd. v. Bruce Pallett Fruit Farms Ltd., [1992] O.J. No. 330 (GD) at paras 2 – 6

Ward Western Holdings Corp. v. Brosseuk, 2021 BCSC 919 at para 55

CCAA or Receivership

8. The practical question is whether the Debtors' assets ought to be liquidated in the context of the CCAA proceeding or through a receivership. Domain respectfully submits a receivership is the appropriate forum. The fundamental objectives of the CCAA are no

longer capable of being met. The CCAA proceeding also involves additional layers of unnecessary costs.

9. The Debtors' primary asset is the Terrace House Project. While single purpose land development companies may meet the criteria for creditor protection under the CCAA, when faced with competing options, courts often conclude it is appropriate to permit mortgagees to enforce their security in the conventional manner. The Court of Appeal discussed some of the relevant considerations in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 at para 36:

36 Although the CCAA can apply to companies whose sole business is a single land development as long as the requirements set out in the CCAA are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

[emphasis added]

10. To similar effect are the comments made by the court in *Octagon Properties Group Ltd.*, [2009] A.J. No. 936 (QB) at para 17:

This is not a case where it is appropriate to grant relief under the CCAA. First, I accept the position of the majority of first mortgagees who say that it is highly unlikely that any compromise or arrangement proposed by Octagon would be acceptable to them. That position makes sense given the fact that if they are permitted to proceed with foreclosure procedures and taking into account the current estimates of value, for most mortgagees on most of their properties they will emerge reasonably unscathed. There is no incentive for them to agree to a compromise. On the other hand if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

[emphasis added]

11. A number of courts have made similar comments in reaching the same conclusion.

BCIMC Construction Fund Corp. v. Clover on Yonge Inc., 2020 ONSC 1953

Dondeb Inc., Re, 2012 ONSC 6087

Romspen Investment Corp. v. 6711162 Canada Inc., 2014 ONSC 2781

Marine Drive Properties Ltd., 2009 BCSC 1083

12. Of course, the underlying circumstances here go well beyond a mere competition between debtors wishing to enjoy the benefits of creditor protection under the CCAA and a secured creditor seeking to enforce its security. In addition to the factors discussed below, and apart from its contractual right to the appointment of a Receiver, the court expressly ordered that upon default and five business days' notice Domain could "exercise any and all of its rights and remedies against the [Debtors] or the Property...including...to apply to this Court of the appointment of a receiver...."
13. The parties' interests were balanced under the Court of Appeal's order and the Further Amended and Restated Initial Order. The Debtors were granted "breathing room" to secure a construction loan and exit the CCAA proceeding; however, as part of the *quid pro quo*, if an event of default were to occur, then that last gasp could be brought to a quick end by Domain. The Debtors have enjoyed considerably more time than they anticipated needing, including an extension of the maturity date under the Loan Facility. There is, apparently, no imminent refinancing. There is also no reasonable prospect of a plan of arrangement.
14. Factors militating in favour of terminating the CCAA proceeding and instead liquidating the Debtors' assets through a receivership include:
 - a) The CCAA proceeding has been extant for more than two years. Leaving aside the question of whether it is appropriate for debtors to use the extraordinary remedy of the CCAA to buy time to continue attempts to raise new funding at the expense of their creditors (*Marine Drive Properties Ltd. (Re)*, 2009 BCSC 145 at para 38), the Proposed Mandate Loan has not funded and there is no reasonable

prospect of the Debtors achieving a plan of arrangement. Also, the Debtors may continue their refinancing efforts during the course of a receivership – but they would do so while an officer of the court takes steps to protect the stakeholders’ interests.

- b) The Debtors have suffered a material adverse change in their financial affairs – they do not have access to funds and post-filing suppliers are going unpaid.
- c) The development of the Terrace House Project ceased long ago. The asset is subject to waste and requires preservation and protection.
- d) There is no operating business and no jobs to preserve.
- e) The Debtors cannot take a step in the CCAA proceeding without Domain’s consent.
- f) The Loan Facility has matured. The indebtedness has not been repaid. An event of default has thus occurred. The Debtors also failed to provide a current appraisal report, contrary to a post-renewal condition, representing a separate default.
- g) Domain is not subject to the court ordered stay of proceedings, has the contractual right to the appointment of a receiver and, by court order, Domain is entitled to exercise all of its rights and remedies on five business days’ notice.
- h) The outcome of the SISP represents the best available evidence regarding the value of the Terrace House Project. The secured debt exceeds the project’s apparent value. There is no equity for the Debtors or any subordinate creditor.
- i) Bowra has significant experience with assets of this nature. It has the experience and expertise to run an expedited sales process and maximize realizations.
- j) The receivership order sought includes a stay provision and a receivership would continue to provide a single forum for resolution of matters pertaining to the Debtors.

15. For the foregoing reasons, it is appropriate in the circumstances to terminate the CCAA proceeding and appoint Bowra as receiver and manager of all of the undertakings, property and assets of the Debtors.

Priority of Receiver's Borrowings and Fees and Disbursements

16. There is usually no question that the court may grant a receiver's charge in priority to all creditors in circumstances where, as here, the receiver is sought to be appointed in order to preserve and realize assets for the benefit of interested parties, including secured creditors. However, in the present case, claims of builders liens are registered against title. Section 21 of the *Builders Lien Act* provides:

21 A claim of lien filed under this Act takes effect from the time work began or the time the first material was supplied for which the lien is claimed, and it has priority over all judgments, executions, attachments and receiving orders recovered, issued or made after that date.

[emphasis added]

17. Subsections 32(1), (2), (5) and (6) of the *Builders Lien Act* state:

32(1) Subject to subsection (2), the amount secured in good faith by a registered mortgage as either a direct or contingent liability of the mortgagor has priority over the amount secured by a claim of lien.

(2) Despite subsection (1), an advance by a mortgagee that results in an increase in the direct or contingent liability of a mortgagor, or both, under a registered mortgage occurring after the time a claim of lien is filed ranks in priority after the amount secured by that claim of lien.

...

(5) Despite subsections (1) and (2) or any other enactment, if one or more claims of lien are filed in a land title office in relation to an improvement, a mortgagee may apply to the court for an order that one or more further advances under the mortgage are to have priority over the claims of lien.

(6) On an application by a mortgagee under subsection (5), the court must make the order if it is satisfied that

(a) the advances will be applied to complete the improvement, and

(b) the advances will result in an increased value of the land and the improvement at least equal to the amount of the proposed advances.

18. In *Bank of Montreal v. Peri Formwork Systems Inc.*, 2012 BCCA 4 a lien claimant successfully argued on appeal that the receiver's charge had wrongfully been granted priority over its lien. The Court of Appeal held that the Bank's loan to the receiver was not a "further advance" within s. 32(5) of the *Builders Lien Act* because it was a new loan and, therefore, subordinate in priority to the lien in accordance with s. 32(2).
19. *Peri Formwork* does not apply on the facts here. Domain is prepared to fund the receivership under the existing Mortgage. This would not be a "new loan". Further advances under the existing mortgage would fall squarely within s. 32(5).
20. Furthermore, and in any event, for reasons that are not made apparent on the face of the decision, the Court of Appeal in *Peri Formwork* did not consider ss. 31(1) or 243(6) of the BIA (the provisions were also not considered in *Yorkshire Trust Co. v. Canusa Construction Ltd.*, [1984] B.C.J. No. 1689 (C.A.), where the receiver was appointed under the *Law and Equity Act*). Those sections clothe the court with jurisdiction to order that receiver's borrowings be repaid in priority to creditors' claims and to grant a receiver's charge for fees and disbursements in priority to any or all secured creditors:

31(1) With the permission of the court, an interim receiver, a receiver within the meaning of subsection 243(2) or a trustee may make necessary or advisable advances, incur obligations, borrow money and give security on the debtor's property in any amount, on any terms and on any property that may be authorized by the court and those advances, obligations and money borrowed must be repaid out of the debtor's property in priority to the creditors' claims.

...

243(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

21. It is respectfully submitted that, to the extent either s. 21 or s. 32(5) and/or (6) of the *Builders Lien Act* purport to circumscribe the court's power to grant priority to receiver's borrowings and/or fees and disbursements, those sections directly conflict with the above

provisions of the BIA and, thus, are rendered inoperative in accordance with the paramountcy doctrine. That was the conclusion reached in *Royal Bank of Canada v. Reid-Built Homes Ltd.*, 2018 ABQB 124 at para 134; rev'd in part 2019 ABCA 109 (the chambers judge refused to subordinate the City's claim for unpaid property taxes to the receiver's charge and was overturned on that issue on appeal – the Court of Appeal commented favourably on the chambers judge's analysis with respect to the relevant issue).

General

22. Domain will rely on Rules 1-3, 2-1, 10-2, 13-5, 14-1 and 16-1 and the law of contract, the *Law and Equity Act*, R.S.B.C. 1996, c. 253 including s. 39, the BIA including ss. 31(1), 243(1) and 243(6), the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 including s. 66, the *Builders Lien Act* including ss. 21 and 32, the CCAA including s. 11 and the inherent jurisdiction of the court.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Lisa Ward made July 5, 2022 (filed in petition proceeding).
2. Affidavit #1 of E. Halliday made July 5, 2022 (filed in petition proceeding).
3. Eleventh Report of the Monitor dated May 12, 2022.
4. Twelfth Report of the Monitor dated June 16, 2022.
5. Initial Order made May 29, 2020.
6. Court of Appeal Order made September 22, 2021.
7. Further Amended and Restated Initial Order made February 14, 2022.
8. Order Increasing Domain Facility made February 14, 2022.

The applicant estimates that the application will take 1 hour.

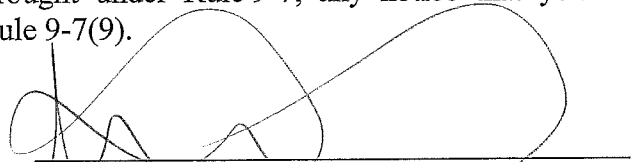
- ☐ This matter is within the jurisdiction of a master.
- ☒ This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- a) file an application response in Form 33,

- b) file the original of every affidavit, and of every other document, that
 - i) you intend to refer to at the hearing of this application, and
 - ii) has not already been filed in the proceedings, and
- c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - i) a copy of the filed application response;
 - ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: July 5, 2022


Signature of lawyer for Domain Mortgage
Corp.,
Scott H. Stephens

To be completed by the court only:

Order made

- ☐ in the terms requested in paragraphs _____ of Part 1 of this notice of application
- ☐ with the following variations and additional terms:

Date: _____

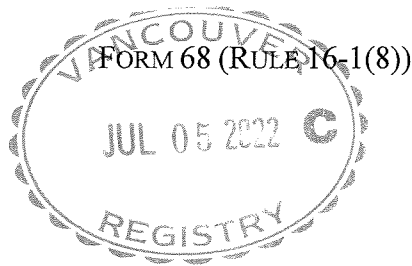
Signature of [] Judge [] Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ other matters concerning document discovery
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☐ amend pleadings

- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts
- ☐ none of the above



S-225423

No. _____
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

DOMAIN MORTGAGE CORP.

Petitioner

and

EVERGREEN HOUSE DEVELOPMENT LIMITED
PARTNERSHIP and PORT CAPITAL DEVELOPMENT (EV)
INC.

Respondents

NOTICE OF HEARING

To: the respondents and all parties on the Service List in the CCAA proceeding commenced in BCSC, Vancouver Registry No. S-205095

TAKE NOTICE that the petition of Domain Mortgage Corp. dated July 5, 2022 will be heard by Justice Fitzpatrick at the courthouse at Law Courts, 800 Smithe Street, Vancouver, BC V6Z 2E1, on July 13, 2022 at 10:00 a.m.

1. Date of hearing

Pursuant to an order of the Court of Appeal made September 22, 2021 Domain is entitled to apply for the appointment of a receiver on 5 business days' notice. Justice Fitzpatrick reserved July 13, 2022 for the hearing of the petition.

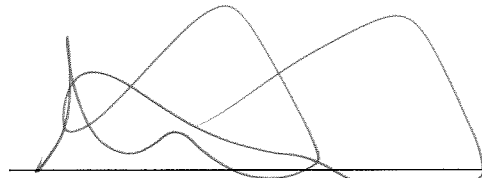
2. Duration of hearing

The petitioner estimates the hearing will take 1 hour. The petition respondents have not yet given a time estimate.

3. Jurisdiction

This matter is not within the jurisdiction of a master.

Date: July 5, 2022



Signature of lawyer for the petitioner, Domain
Mortgage Corp.
Scott H. Stephens

Contact information for the parties and their lawyers is as follows:

Counsel to Domain Mortgage Corp.:

Scott H. Stephens
Owen Bird Law Corporation
P.O. Box 49130 Three Bentall Centre
2900-595 Burrard Street
Vancouver, BC V7X 1J5
Telephone: 604-691-7521
Fax: 604-688-4447
Email: sstephens@owenbird.com



NO. S-205095
VANCOUVER REGISTRY

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

- AND -

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,
S.B.C. 2002, C. 57, AS AMENDED

- AND -

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF
PORT CAPITAL DEVELOPMENT (EV) INC. AND EVERGREEN HOUSE DEVELOPMENT
LIMITED PARTNERSHIP

NOTICE OF APPLICATION

Name of Applicant: Aviva Insurance Company of Canada

To: The Service List

TAKE NOTICE that an application will be made by the Applicant to the Honourable Madam Justice Fitzpatrick at the Courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia on **July 13, 2022, at 10:00 a.m.** for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An Order abridging the time for service such that this Application is returnable on July 13, 2022 and that service upon any interested party, other than those parties on the service list maintained by the Petitioners and Ernst & Young Inc., in its capacity as court-appointed Monitor of the Petitioners (the "**Monitor**") in these proceedings is hereby dispensed with; and
2. An Order that the Monitor's powers be enhanced as follows:
 - a. the Monitor be directed to commence and administer a simplified sale and investment solicitation process (the "**Simplified SISP**"), where the Monitor will, for a period of three weeks, invite offers from the six qualified bidders under the original sale and investment solicitation process herein (the "**Original SISP**"), identified in the

Monitor's Fifth Report to the Court as the "**Qualified Offerors**", or such other parties as the Monitor may determine.

- b. to implement and administer the Simplified SISP attached hereto as Schedule "A";
- c. to seek approval of the Court for a sale of all or any part of the Property, following the conclusion of the timelines set out in the Simplified SISP; and
- d. to perform such other duties or take any steps reasonably incidental to the exercise of any powers and obligations conferred upon the Monitor by this order or any further order of the Court.

Part 2: FACTUAL BASIS

- 3. The Petitioners Port Capital Development (EV) Inc. (the "**General Partner**") and Evergreen House Development Limited Partnership ("**Evergreen LP**"), own the "**Terrace House Project**", which consists of an ongoing development of a high-rise luxury residential strata development in the Coal Harbour neighborhood, located at 1250 West Hastings Street, Vancouver.
- 4. The General Partner is the Bare Trustee that holds title to the real property owned by the Petitioner, legally described as:

PARCEL IDENTIFIER: 006-721-397
 LOT 18, EXCEPT THAT PART OF THE CANADIAN PACIFIC RAILWAY
 RIGHT-OF-WAY AS DESCRIBED IN ABSOLUTE FEE PARCELS BOOK,
 VOLUME 9, FOLIO 317, NO. 1154C, AND EXCEPT THE SOUTH 7 FEET
 NOW ROAD, BLOCK 29 DISTRICT LOT 185 PLAN 92

- 5. Aviva Insurance Company of Canada ("**Aviva**") holds the second ranking secured claim against the assets that are the subject of these proceedings. That security secured obligations of the debtors in excess of \$8 million.

Summary of Proceeding

- 6. On May 29, 2020, the Petitioners sought and obtained creditor protection under the *Companies' Creditors Arrangement Act*, RSC 1985 c. C-36, as amended (the "**CCAA Proceedings**") and the Honourable Madam Justice Fitzpatrick granted the Initial Order (the "**Initial Order**"), which established, among other things, a stay of proceedings (the "**Stay of Proceedings**") effective until June 8, 2020. Ernest & Young, Inc. (the "**Monitor**") was appointed as Monitor of the Petitioners in these CCAA proceedings by the Initial Order.
- 7. Among other things, the Initial Order granted the Monitor enhanced powers, to execute control over the Petitioners, including the ability to execute control over the Petitioners. explore restructuring opportunities for the Terrace House Project and administer a "dual-

track” sale and investment solicitation process (the “**SISP**”) to obtain an equity investment, a refinancing or alternatively a sale of the Terrace House.

8. The Stay of Proceedings has been extended to September 30, 2022, by various Orders of this Court dated June 8, 2022, February 24, 2021, April 16, 2021, June 11, 2021, and further extended by the Order of the Court of Appeal (Court of Appeal File No. CA-4585) pronounced as of September 22, 2021, and by further Orders of this Court pronounced April 29, 2022 and May 13, 2022.
9. Pursuant to the terms of the ARIO, the Monitor ran an extensive SISP process, but that process did not result in a completed sale or investment transaction. It is the opinion of Aviva that it is not necessary to incur the costs and time to administer a further extended SISP process and that, in the circumstances, a shortened, simplified SISP process will be as effective and more efficient.
10. The Monitor’s original SISP process is summarized in the Monitor’s Fifth Report dated April 13, 2021. The report sets out that the Monitor:
 - a. “solicited the Terrace House Project to approximately 670 potential bidders, including local, national and international strategic and financial parties and real estate developers;
 - b. “retained CBRE Limited in a limited capacity to market the Terrace House Project to its investor network in Asia as well as a newspaper advertisement that was published in a Hong Kong newspaper, the South China Morning Post;
 - c. “populated an electronic data room (the “**Data Room**”) with key financial, corporate, operational and other information including construction drawings, consultant reports and other business documents relevant to the Terrace House Project for Prospective Parties to evaluate following the signing of a CA; and
 - d. “short-listed six (6) “**Qualified Offerors**” to participate in Phase II of the SISP and provided those parties a period of approximately six (6) weeks to acquire or refinance the Terrace House Project (those parties which submitted the offers, the “**Qualified Offerors**”).
 - e. “The Monitor received six (6) Phase II Offers from the Qualified Offerors (the “**Phase II Bids**”) and filed copies of these offers under seal in a Confidential Supplement to the November 27, 2020 Third Report;
 - f. “Following consultation with the Secured Creditors, the Monitor executed a “Bid Offer Agreement” on behalf of the Petitioners with Bosa Properties (OC) Inc. (the

“**Bid Offeror**”). The execution of the Bid Offer Agreement was approved by this Honourable Court on December 1, 2020.

- g. “The Bid Offer Agreement provided the Bid Offeror to February 16, 2021 (the “**Due Diligence Period**”) to complete a satisfactory feasibility study and due diligence analysis (the “**Feasibility Study**”) relating to the economics of the Terrace House Project, and to obtain construction financing.”
11. The Monitor’s Fourth Report describes that on February 16, 2021, the Bid Offeror provided the Monitor with a feasibility study (the “**Confidential Feasibility Study**”) on the Terrace House Project, and put forward a proposal that varied from the Bid Offer that was not acceptable to CMLS. Accordingly, the Monitor in consultation with CMLS did not advance Bid Offer to a definitive agreement.
12. After the Bid Offer had failed to materialize into a definitive agreement, on April 16, 2021, the Court approved the Monitor entering into a purchase and sale agreement (the “**Landa PSA**”) with Landa Global Acquisitions Ltd. (“**Landa**”) which provided for the opportunity for third parties to submit competing bids. If no competitive proposals were received that were deemed superior to the Landa PSA, the Court would then be asked to grant an approval and vesting order in favour of Landa.
13. On June 15, 2021, the Petitioners sought and were granted an Order (the “**Order Approving Sale**”) approving the Purchase and Sale Agreement dated for reference June 4, 2021 (the “**Sale Agreement**”), made between the Petitioners and Solterra Acquisitions Corp (“**Solterra**”), for the purchase of the Terrace House Project.
14. On September 22, 2021, 1296371 B.C. Ltd. (“**129**”) appealed the Order Approving Sale to the British Columbia Court of Appeal (the “**BCCA**”). By way of an Order dated September 22, 2022 (the “**BCCA Order**”), the BCCA set aside the Order Approving Sale and granted an Order approving an offer (the “**129 Offer**”) submitted by 1296371 B.C. Ltd. (“**129**”) to purchase and take assignment of the loan and security held by CMLS and to repay the Construction Loan and the Original DIP Lender.
15. The BCCA Order further removed the Enhanced Powers granted to the Monitor and reverted operational control of the Terrace House Project back to the Petitioners.

The Mandate Loan

16. As set out in the Receiver’s Twelfth Report to the Court:
 - a. “The 129 Offer was completed in three tranches with \$14,700,000 provided by Domain Facility Corp. (“**Domain**”) (the “**Initial Domain Loan**”), \$8,399,060

provided by 129 and \$2,150,000 provided by 1260780 B.C. Ltd. ("**126**" and together with 129, the "**Junior Lender**"). 126 and 129 are related to the Petitioners."

- b. "The Initial Domain loan matured on May 1, 2022, however the Petitioners obtained an extension of the maturity date to July 1, 2022 for an extension fee of \$98,000."
 - c. "The Initial Domain Loan was almost entirely used to complete the 129 Offer and left very little cash available to the Petitioners to pay for working capital and site preservation expenses. To fund these costs through to the expiry of the current Stay Period, on February 15, 2022 this Honourable Court granted the Further Amended and Restated Initial Order ("**FARIO**") and approved an additional \$1,800,000 tranche to the Domain facility (the "**Second Domain Loan**" and collectively with the Initial Domain Loan, the "**Domain Facility**") to provide working capital to the Petitioners for this proceeding."
 - d. ".... the Petitioners have identified a development partner, Enso Holdings Ltd. ("**Enso**") that has agreed with the Petitioners that it will co-develop the Terrace House Project, become the majority General Partner, and provide its covenant and an equity investment to support the necessary construction financing to exit these proceedings. The Petitioners together with Enso negotiated a commitment letter dated April 19, 2022 (the "**Initial Mandate Commitment Letter**") with Mandate Management Corporation ("**Mandate**") which was attached to the Monitor's Tenth Report, for a proposed \$20,000,000 mortgage financing (the "Proposed Mandate Loan") to repay the Domain Facility and provide working capital for these CCAA Proceedings."
17. On May 13, 2022, this Honourable Court granted an order approving the Proposed Mandate Loan and extending the Stay of Proceedings to September 30, 2022. The Proposed Mandate Loan has not yet completed and has not yet funded.
 18. As the Proposed Mandate Loan has not yet funded, Aviva Insurance Company of Canada ("**Aviva**") is seeking an Order that a new, but simplified, sales process be implemented, in which the Monitor will, for a period of 3 weeks, invite bids from the Qualified Offerors under the Original SISP.

PART 3: LEGAL BASIS

19. The Petitioners have been unable to obtain financing to repay the Domain Facility, and the Domain Facility is in default. Domain is seeking to have a receiver appointed to, among other things, market and sell the Petitioner's assets and undertakings.
20. Pursuant to the Original SISP, the Monitor fully exposed these assets and undertakings to the market, and identified the parties most likely to acquire those asset and undertakings.

21. Aviva is of the view that a further SISP or marketing process administered by a receiver will not likely identify any interested parties not already known to the Monitor, and will not generate a significantly higher sale price. Conversely, a further SISP or marketing process administered by a receiver will incur significant professional and interest costs.
22. It is Aviva's position that the stakeholders will benefit most from a simplified SISP process where the Monitor is tasked with contacting the six parties already identified, and asking them to submit definitive bids within three weeks to acquire the Petitioners' assets and undertakings.
23. The Petitioners will rely upon sections 11 and 36 of the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. 36, as amended, the Supreme Court Rules, the orders made herein by Madam Justice Fitzpatrick, and the inherent jurisdiction of this Honourable Court.

Part 4: MATERIAL TO BE RELIED ON

Previous Court Orders

24. Initial Order pronounced May 29, 2020;
25. Amended and Restated Initial Order pronounced June 8, 2020;
26. Further Amended and Restated Order pronounced February 14, 2022;
27. Order made After Application pronounced May 13, 2022

Monitor's Reports to the Court

28. Monitor's Third Report to the Court, dated November 27, 2020;
29. Monitor's Fourth Report to the Court, dated February 23, 2021;
30. Monitor's Fifth Report to the Court, dated April 13, 2021;
31. Monitor's Sixth Report to the Court, dated May 20, 2021
32. Monitor's Twelfth Report to the Court, dated June 16, 2022
33. Such further and other material as counsel may advise and this Honourable Court may permit.

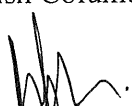
The Applicants estimate that the application will take 1 hour.

☒ This matter is not within the jurisdiction of a Master. **Madam Justice Fitzpatrick is seized of this proceeding.**

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this Notice of Application, you must, within 5 business days after service of this Notice of Application or, if this application is brought under Rule 9-7, within 8 business days after service of this Notice of Application.

1. file an Application Response in Form 33,
2. file the original of every affidavit, and every other document, that
 - a. you intend to refer to at the hearing of this application, and
 - b. has not already been filed in the proceeding, and
3. serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - a. a copy of the filed Application Response;
 - b. a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - c. if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated at the City of Vancouver, in the Province of British Columbia, this 7th day of July, 2022.



Lawson Lundell LLP
Solicitors for the Applicants

Filed by:

William L. Roberts
Lawson Lundell LLP
1600 – 925 West Georgia Street
Vancouver, British Columbia, V6C 3L2
Telephone: 604-685-3456
Email for Application: wroberts@lawsonlundell.com.

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs _____
of Part 1 of this Notice of Application

☐ with the following variations and additional terms:

Date:

Signature of ☐ Judge ☐ Master

APPENDIX

The following information is provided for data collection purposes only and is of no legal effect.

THIS APPLICATION INVOLVES THE FOLLOWING:

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ other matters concerning document discovery
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☐ amend pleadings
- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts

Schedule "A"

SIMPLIFIED SALE AND INVESTMENT SOLICITATION PROCESS

INTRODUCTION

Pursuant to a Companies' Creditor Arrangement Act, R.S.C. 1985, c. C – 36 ("**CCAA**") initial order (as may be amended from time to time, the "**Initial Order**") of the Supreme Court of British Columbia (the "**Court**") dated May 29, 2020 in Action No. VLC-S-S-205095, Vancouver Registry (the "**CCAA Proceeding**") in regard to Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership (collectively the "**Debtor**"), Ernst & Young, Inc. was appointed as monitor (in such capacity, the "**Monitor**") in the CCAA Proceeding and was granted certain Enhanced Monitor's Powers (as defined in the Initial Order) including the power to implement the Simplified Sale and Investment Solicitation Plan set out herein (the "**SSISP**") with regard to the assets of the Debtor being chiefly the development property having a legal description of PID: 006-721-397 Lot 18, Except that part of the Canadian Pacific Railway Right-of-Way as described in Absolute Fee Parcel Book, Volume 9, Folio 317, No. 1154C, and Except the South 7 Feet now Road, Block 29 District Lot 185 Plan 92 and the Debtor.

The Monitor administered an earlier SISF that resulted in six Qualified Bidders (the "**Qualified Bidders**") being identified, but that SISF did not result in a court-approved sale.

Accordingly, the Monitor intends to conduct this SSISP in consultation with Domain Mortgage Corp. and Aviva Insurance Company of Canada (collectively, the "**Secured Creditors**") and the Debtor. The SSISP is intended to efficiently solicit interest in a sale of, or investment in, the assets and/or the businesses of the Debtor from the Qualified Bidders or such other parties as the Monitor may identify.

OPPORTUNITY AND SSISP SUMMARY

1. The SSISP is intended to solicit interest in, and opportunities for, a sale of, or investment in, all or part of the Debtor's business and the Property (the "**Opportunity**").
2. The SSISP will provide for the solicitation of interest for:
 - (a) the sale of the Property (as defined in the Initial Order). Interested parties may submit proposals to acquire all, substantially all or a portion of the Property of the Debtor (a "**Sale Proposal**"); and
 - (b) the investment in the business operations (the "**Business**") of the Debtor on a going concern basis. Such proposals may take the form of an investment in or proposals to restructure, reorganize or refinance the Business (an "**Investment Proposal**").
3. Except to the extent otherwise set forth in a definitive sale or investment agreement with a successful bidder, any Sale Proposal or any Investment Proposal will be on an "*as is, where is*" basis and without surviving representations or warranties of any kind, nature, or description by the Monitor or any of its affiliates, agents, advisors or estates, and, in the event of a sale, all of the right, title and interest of the Debtor in and to the Property to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests therein and thereon pursuant to Court orders, except as otherwise provided in such Court orders.

4. As described more fully in this SSISP, the Monitor will solicit offers from the Qualified Bidders, to be submitted substantially in the accordance with the form of agreement provided by the Monitor and within two weeks of the date of this SSISP

TIMELINE

5. The following table sets out the target dates under the SSISP:

Target Dates	Target Dates
Bid Deadline	August 3, 2022
Court Approval Date (subject to Court availability)	August 10, 2022
Outside Closing Date	August 29, 2022

6. The target dates set forth above may be adjusted in the sole discretion of the Monitor after consultation with the Secured Creditors and the Debtor.
7. The Monitor shall confirm with each Qualified Bidder who wishes to submit a bid that each such Qualified Bidder:
- (a) remains bound by the terms of the non-disclosure agreement previously executed by that Qualified Bidder;
 - (b) that the Monitor makes no representation or warranty as to the accuracy or completeness of the information contained in the CIM, the Data Room (as defined below), or otherwise made available pursuant to the SSISP or otherwise, except to the extent expressly contemplated in any definitive sale or investment agreement with a Successful Bidder (as defined below) ultimately executed and delivered by the Monitor;
8. The Monitor, with the assistance of the Debtor, will gather and review all required due diligence material to be provided to interested parties and shall establish a secure, electronic data room (the "**Data Room**"), which will be maintained and administered by the Monitor during the SSISP;
9. The Monitor, in consultation with the Secured Creditors and the Debtor, will develop a draft form of asset purchase agreement and draft form of investment agreement (collectively, the "**Agreement Form**"); and

OFFER SUBMISSION AND EVALUATION STAGE

Submission Phase

10. Potential Bidders must rely solely on their own independent review, investigation and/or inspection of all information and of the Property and Business in connection with their participation in the SSISP and any transaction they enter into with the Monitor.
11. Qualified Bidders who advise the Monitor or its Agent (if any) that they wish to submit an offer will be provided with a copy of the Agreement Form.
12. A Qualified Bidder who wishes to pursue the Opportunity further must deliver an Offer, substantially in the form of the Agreement Form, to the Monitor or its Agent (if any), so as to be received by not later than 5:00 PM (Vancouver time) on or before **August 3, 2022**, or such later date as the Monitor may determine after consultation with the Secured Creditors and the Debtor

(the "**Bid Deadline**"). If the Bid Deadline is extended by the Monitor, it shall provide notice of such extension and the revised Bid Deadline to each Qualified Bidder.

13. An Offer submitted in accordance with above paragraph will be considered a qualified Offer (a "**Qualified Offer**") only if:
 - (a) it is submitted on or before the relevant Bid Deadline by a Qualified Bidder;
 - (b) in the case of a Sale Proposal, it identifies or contains the following:
 - (i) it is substantially in the form of the Agreement Form;
 - (ii) the purchase price, in Canadian dollars, including details of any liabilities to be assumed by the Qualified Bidder and any assumptions supporting the valuation;
 - (iii) a description of the Property that is expected to be subject to the transaction and any of the Property expected to be excluded;
 - (iv) a specific indication of the financial capability, together with evidence of such capability, of the Qualified Bidder and the expected structure and financing of the transaction;
 - (v) the offer is unconditional, save for Court approval, and will remain open for acceptance and Court Approval for at least six weeks; and
 - (vi) any other terms or conditions of the Sale Proposal that the Qualified Bidder believes are material to the transaction;
 - (c) in the case of an Investment Proposal, it identifies or contains the following:
 - (i) it is substantially in the form of the Agreement Form;
 - (ii) a description of how the Qualified Bidder proposes to structure the proposed investment in the Business;
 - (iii) the aggregate amount of the equity and/or debt investment to be made in the Business or in the Debtor in Canadian dollars;
 - (iv) the underlying assumptions regarding the pro forma capital structure;
 - (v) a specific indication of the sources of capital for the Qualified Bidder and the structure and financing of the transaction;
 - (vi) the offer is unconditional, save for Court approval, and will remain open for acceptance and Court Approval for at least six weeks; and
 - (vii) any other terms or conditions of the Investment Proposal that the Qualified Bidder believes are material to the transaction;
 - (d) in the case of either a Sale Proposal or an Investment Proposal, it contains such other information as reasonably requested by the Monitor.
14. The Monitor may, in consultation with the Secured Creditors waive compliance with any one or more of the requirements specified above and deem such non-compliant bids to be a Qualified Agreement. For the avoidance of doubt, the completion of any Sale Proposal or Investment

Proposal shall be subject to the approval of the Court and the requirement of approval of the Court may not be waived.

Phase 2: Selection of Successful Bidder

15. Following the Bid Deadline, the Monitor will, in consultation with the Secured Creditors and the Debtor, assess the Qualified Offers and shall determine which Qualified Offer or Offers shall be put before the Court for approval. In making that assessment, the Monitor shall consider all factors it considers relevant.
16. The Monitor shall immediately thereafter set an application to seek Court approval of one of those the Accepted Offers.
17. The Monitor, in consultation with the Debtor and the Secured Creditors, may conduct an auction among two or more of the Qualified Bidders and bring the highest auction bid to Court for approval.

Sale Approval Motion Hearing

18. At the hearing of the motion to approve a Qualified Offer (the "**Sale Approval Application**") the Monitor shall seek, among other things, approval from the Court to accept a Qualified Offer and to complete the underlying transaction.

Confidentiality and Access to Information

19. Participants and prospective participants in the SSISP shall not be permitted to receive any information that is not made generally available to all Qualified Bidders.
20. It is not currently contemplated that any director, officer or senior management employee of the Debtor as of the date of the Initial Order ("**Management**") will have any interest in any Qualified Bidder, including any economic, employment, contractual or other interest in such Qualified Bidder. If any Management has or acquires any such interest in a Qualified Bidder, it shall promptly disclose such interest to the Monitor. Upon being informed of such interest, the Monitor shall take such actions as it deems appropriate to preserve the integrity of the SSISP in light of such interest, which actions may include placing restrictions on the information disclosed to such person in connection with the SSISP and competing bids and bidders.

NO. S-205095
VANCOUVER REGISTRY

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

- AND -

IN THE MATTER OF THE BUSINESS
CORPORATIONS ACT,
S.B.C. 2002, C. 57, AS AMENDED

- AND -

IN THE MATTER OF A PLAN OF
COMPROMISE AND ARRANGEMENT OF
PORT CAPITAL DEVELOPMENT (EV) INC.
AND EVERGREEN HOUSE DEVELOPMENT
LIMITED PARTNERSHIP

NOTICE OF APPLICATION



Barristers & Solicitors
1600 Cathedral Place
925 West Georgia Street
Vancouver, BC V6C 3L2
Phone: (604) 685-3456
Attention: William L. Robererts
Email: wroberts@lawsonlundell.com



No. VLC-S-S205095
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,
S.B.C. 2002, c.57, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF
PORT CAPITAL DEVELOPMNT (EV) INC. and EVERGREEN HOUSE DEVELOPMENT
LIMITED PARTNERSHIP

NOTICE OF APPLICATION

Name of applicant: Ernst & Young Inc. ("EY"), in its capacity as Court-appointed monitor of Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership (collectively, the "**Petitioners**") in this proceeding (in such capacity, the "**Monitor**")

To: The CCAA Service List

TAKE NOTICE that an application will be made by the Monitor to Justice Fitzpatrick at the courthouse at 800 Smithe Street, Vancouver, British Columbia on July 13, 2022 at 9:45 am for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. The Monitor seeks the following orders on this application:
 - (a) an order abridging the time for service of this notice of application such that it is properly returnable on July 13, 2022;
 - (b) approving the activities of the Monitor as set fourth in the Proposed Monitor's Report dated May 28, 2020, the Monitor's First Report to Court, dated June 5, 2020, the Monitor's Second Report to Court, dated August 27, 2020, the Monitor's Third Report to Court, dated November 27, 2020 and the Confidential Supplement thereto, the Monitor's Fourth Report to Court, dated February 23, 2021, the Monitor's Fifth Report to Court, dated April 13, 2021, the Monitor's Sixth Report to Court, dated May 20, 2021, the Monitor's Confidential Seventh Report to Court, dated June 8, 2021, and the Monitor's Eighth Report to Court, dated December 14, 2022, the Monitor's Ninth Report to Court dated February 11, 2022, the

Monitor's Tenth Report to Court dated April 28, 2022, the Monitor's Eleventh Report to Court dated May 12, 2022, the Monitor's Twelfth Report to Court dated June 16, 2022 and the Monitor's Thirteenth Report to Court (to be filed) (collectively, the "**Monitor's Reports**").

- (c) an order approving the Monitor's fees and disbursements properly incurred in connection with this proceeding from the period from April 27, 2020 to June 30, 2022; and
- (d) an order approving the fees and disbursements of the Monitor's counsel, Blake, Cassels & Graydon LLP ("**Blakes**"), properly incurred in connection with this proceeding for the period from May 14, 2020 to June 30, 2022.

2. The Monitor further requests such other relief as this Honourable Court may deem to be just and appropriate in the circumstances.

Part 2: FACTUAL BASIS

Monitor's Appointment and Activities

1. On May 29, 2020, this Court granted an initial order (the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, C-36, as amended (the "**CCAA**").
2. Pursuant to the Initial Order, as amended by an Amended and Restated Initial Order granted June 8, 2020 (the "**ARIO**") and a Further Amended and Restated Initial Order granted February 15, 2022 (the "**FARIO**"), EY was appointed as Monitor, an officer of this Court, to monitor the business and financial affairs of the Petitioners, with the powers and obligations set out in the CCAA, the Initial Order, the ARIO, the FARIO, and subsequent orders of this Court.
3. Pursuant to sections 28-32 of the Initial Order, the Monitor was provided with enhanced powers to execute control over the Petitioners, explore restructuring opportunities for the Terrace House Project, and administer a sales investment and solicitation process (the "**SISP**") to obtain an equity investment, a refinancing or alternatively a sale of the Terrace House Project.
4. Blakes was engaged by the Monitor in accordance with paragraph 23(h) of the Initial Order to advise the Monitor respecting the exercise of its powers and performance of its obligations.
5. The activities undertaken by the Monitor and its legal counsel in the discharge of the Monitor's powers and obligations are described in the reports that have been periodically submitted by the Monitor to this Court.
6. As described in the Proposed Monitor's Report to this Court dated May 28, 2020 (the "**Proposed Monitor's Report**") in the period prior to May 28, 2020 the Monitor undertook the following activities, among others (with capitalized terms having the meaning ascribed to them in the Proposed Monitor's Report):

- (a) consulted with the Petitioners and the Secured Creditors on a path forward to a consensual CCAA filing;
- (b) provided an analysis as to the causes of the Petitioners' insolvency;
- (c) reviewed the Petitioners' assets and liabilities;
- (d) developed the Proposed SISF;
- (e) managed the cash flows of the Petitioners;
- (f) assisted the Petitioners to identify a lender to provide DIP financing to the Petitioners; and
- (g) prepared the Proposed Monitor's Report, including the analysis and recommendations therein.

7. As described in the Monitor's First Report to this Court dated June 5, 2020 (the "**First Report**") in the period from May 28, 2020 to June 5, 2020, the Monitor undertook the following activities, among others (with capitalized terms having the meaning ascribed to them in the First Report):

- (a) completed the notice and service requirements pursuant to the Initial Order and section 23 of the CCAA;
- (b) managed the cash flows of the Petitioners;
- (c) reviewed terms submitted by prospective DIP lenders and provided an update and recommendation to the Court with respect to the Petitioners' efforts to obtain DIP financing;
- (d) administered Phase 1 of the SISF;
- (e) responded in a timely manner to inquiries from various parties including suppliers, creditors, the LPs, legal advisors, and other third parties; and
- (f) prepared the First Report, including the analysis and recommendations therein.

8. As described in the Monitor's Second Report to this Court dated August 27, 2020 (the "**Second Report**") in the period from June 5, 2020 to August 27, 2020, the Monitor undertook, among others, the following activities, among others (with capitalized terms having the meaning ascribed to them in the Second Report):

- (a) worked with the Petitioners to freeze all vendor payable balances effective the date of the Initial Order and set-up new accounts with suppliers for the post-filing activity;

- (b) met with management as well as employees the Petitioners and the Port Capital Group to: a) explain the Monitor's role in a CCAA proceeding; b) to advise them of their rights and obligations during the CCAA proceedings; and c) explain the Stay Period;
- (c) met with and had frequent communication with representatives of the investors in the Terrace House Project (the "LPs") to discuss various matters concerning the Terrace Project and the within proceedings;
- (d) managed the cash flows of the Petitioners, prepared reporting packages and corresponded with the DIP Lender with respect to the DIP Facility;
- (e) obtained an extension of property and third-party liability insurance for the Terrace House Project;
- (f) administered the Phase I of the SISP;
- (g) responded in a timely manner to inquiries from various parties including suppliers, creditors, the LPs, legal advisors, and other third parties; and
- (h) prepared the Second Report, including the analysis and recommendations therein.

9. As described in the Monitor's Third Report to this Court dated November 27, 2020 (the "**Third Report**") in the period from August 27, 2020 to November 27, 2022 the Monitor undertook the following activities, among others (with capitalized terms having the meaning ascribed to them in the Third Report):

- (a) managed the site preservation of the Terrace House Project, including payment to vendors and suppliers with respect to post-filing activity;
- (b) managed the cash flows of the Petitioners, prepared reporting packages and corresponded with the DIP Lender with respect to the DIP Facility;
- (c) obtained an extension of property and third-party liability insurance for the Terrace House Project;
- (d) administered Phase II of the SISP;
- (e) attended and participated in numerous meetings and telephone discussions with the Terrace House Project's Secured Creditors;
- (f) responded to numerous inquiries from various financial stakeholders of the Terrace House Project as well as other third parties; and
- (g) prepared the Third Report and a Confidential Supplement to the Third Report, including the analysis and recommendations therein.

10. As described in the Monitor's Fourth Report to this Court dated February 24, 2021 (the **"Fourth Report"**) in the period from November 27, 2020 to February 24, 2021 the Monitor undertook the following activities, among others (with capitalized terms having the meaning ascribed to them in the Fourth Report):

- (a) managed the site preservation of the Terrace House Project, including payment to vendors and suppliers with respect to post-filing activity;
- (b) managed the cash flows of the Petitioners, prepared reporting packages and corresponded with the DIP Lender with respect to the DIP Facility;
- (c) obtained an extension of property insurance for the Terrace House Project;
- (d) assisted with due diligence procedures of the Selected Offeror pursuant to the Bid Offer Agreement;
- (e) reviewed and considered the Confidential Feasibility Study;
- (f) participated in meetings and telephone discussions with the Terrace House Project's Secured Creditors;
- (g) responded to numerous inquiries from various financial stakeholders of the Terrace House Project as well as other third parties; and
- (h) prepared the Fourth Report, including the analysis and recommendations therein.

11. As described in the Monitor's Fifth Report to this Court dated April 13, 2021 (the **"Fifth Report"**) in the period from February 24, 2021 to April 13, 2021 the Monitor undertook the following activities, among others (with capitalized terms having the meaning ascribed to them in the Fifth Report):

- (a) managed the site preservation of the Terrace House Project, including payment to vendors and suppliers with respect to post-filing activity;
- (b) managed the cash flows of the Petitioners, prepared reporting packages and corresponded with the DIP Lender with respect to the DIP Facility;
- (c) reviewed the Revised Landa Offer with CMLS and executed the Landa PSA with Landa;
- (d) conducted the Final Marketing Phase of the SISP;
- (e) responded in a timely manner to inquiries from various parties including suppliers, creditors, the LPs, legal advisors, and other third parties; and
- (f) prepared the Fifth Report and a Confidential Supplement to the Fifth Report, including the analysis and recommendations therein.

12. As described in the Monitor's Sixth Report to this Court dated May 20, 2021 (the "**Sixth Report**") in the period from April 13, 2021 to May 20, 2021 the Monitor undertook the following activities, among others (with capitalized terms having the meaning ascribed to them in the Sixth Report):

- (a) managed the site preservation of the Terrace House Project, including payment to vendors and suppliers with respect to post-filing activity;
- (b) managed the cash flows of the Petitioners, prepared reporting packages and corresponded with the DIP Lender with respect to the DIP Facility;
- (c) obtained Court approval of the Landa SPA;
- (d) administered the Final Marketing Phase of the SISP, seeking additional bids for the Terrace House Project;
- (e) reviewed each of the Final Process Offers with the Secured Creditors and selected the Solterra Offer as a Superior Offer to the Landa SPA
- (f) executed the Solterra PSA;
- (g) responded in a timely manner to inquiries from various parties including suppliers, creditors, the LPs, legal advisors, and other third parties; and
- (h) prepared the Sixth Report and a Confidential Supplement to the Sixth Report, including the analysis and recommendations therein.

13. As described in the Monitor's Confidential Seventh Report to this Court dated June 8, 2021 (the "**Confidential Seventh Report**") in the period from May 20, 2021 to June 8, 2021 the Monitor undertook the activities described in that confidential report with respect to the revised offers received for the Terrace House Project ahead of the June 8, 2021 hearing to approve the Solterra PSA.

14. As described in the Monitor's Eighth Report to this Court dated December 14, 2021 (the "**Eight Report**") in the period from May 20, 2021 to December 14, 2021 the Monitor undertook, among others, the following activities, among others (with capitalized terms having the meaning ascribed to them in the Eight Report):

- (a) managed the site preservation of the Terrace House Project, including payment to vendors and suppliers with respect to post-filing activity;
- (b) managed the cash flows of the Petitioners and prepared reporting packages and corresponded with the DIP Lender with respect to the DIP Facility;
- (c) assisted the Petitioners in obtaining a six month extension of property insurance for the Terrace House Project to March 31, 2022

- (d) obtained an extension of the Building Permit issued by the City of Vancouver to January 12, 2022;
- (e) upon the removal of the Monitor's Enhanced Powers as ordered by the BCCA, transitioned the day-to-day operations of the Terrace House Project back to the Petitioners and transferred the remaining DIP Loan funds held in trust by the Monitor to the Petitioners, less a reserve held by the Monitor for outstanding professional fees;
- (f) held discussions with the Petitioners, 129, and legal counsel to 129 on a periodic basis to discuss, inter alia, the following:
 - (i) the Revised 129 Offer, including the repayment of the Secured Loan and the closing and funding of the Revised 129 Offer, as more thoroughly described herein; and
 - (ii) the ongoing responsibilities of the Petitioners within these CCAA Proceedings, including compliance with the ARIO;
- (g) participated in the completion of the Revised 129 Offer;
- (h) participated in meetings and telephone discussions with the Petitioners' Secured Creditors;
- (i) responded to numerous inquiries from various financial stakeholders of the Terrace House Project as well as other third parties;
- (j) communicated with Aviva with respect to the Second Domain Loan; and
- (k) prepared the Eighth Report, including the analysis and recommendations therein.

15. As described in the Monitor's Ninth Report to this Court dated February 11, 2022 (the "**Ninth Report**") in the period from December 14, 2021 to February 11, 2022 the Monitor undertook the following activities, among others (with capitalized terms having the meaning ascribed to them in the Ninth Report):

- (a) managed the cash flows of the Petitioners;
- (b) participated in meetings and telephone discussions with the Petitioners' Secured Creditors;
- (c) responded to numerous inquiries from various financial stakeholders of the Terrace House Project as well as other third parties;
- (d) reviewed and considered the terms of the Second Domain Loan; and
- (e) prepared the Ninth Report, including the analysis and recommendations therein.

16. As described in the Monitor's Tenth Report to this Court dated April 28, 2022 (the "**Tenth Report**") in the period from February 11, 2022 to April 28, 2022 the Monitor undertook the following activities, among others (with capitalized terms having the meaning ascribed to them in the Tenth Report):

- (a) managed the cash flows of the Petitioners;
- (b) participated in meetings and telephone discussions with the Petitioners' Secured Creditors;
- (c) responded to numerous inquiries from various financial stakeholders of the Terrace House Project as well as other third parties;
- (d) reviewed and consider the terms of the Proposed Mandate Loan;
- (e) in consultation with the Petitioners, developed a preliminary restructuring timetable and timetable to exit the CCAA proceedings; and
- (f) prepared the Tenth Report, including the analysis and recommendations therein.

17. As described in the Monitor's Eleventh Report to this Court dated May 12, 2022 (the "**Eleventh Report**") in the period from April 28, 2022 to May 12, 2022, the Monitor undertook the following activities, among others (with capitalized terms having the meaning ascribed to them in the Eleventh Report):

- (a) managed the cash flows of the Petitioners;
- (b) participated in meetings and telephone discussions with the Petitioners' Secured Creditors;
- (c) responded to numerous inquiries from various financial stakeholders of the Terrace House Project as well as other third parties;
- (d) reviewed and considered the terms of the Revised Mandate Commitment Letter;
- (e) monitored the Petitioners' post-filing obligations and correspondence with their suppliers; and
- (f) prepared the Eleventh Report, including the analysis and recommendations therein.

18. As described in the Monitor's Twelfth Report to this Court dated June 16, 2022 (the "**Twelfth Report**") in the period from May 12, 2022 to June 16, 2022, the Monitor undertook the following activities, among others (with capitalized terms having the meaning ascribed to them in the Twelfth Report):

- (a) managed the cash flows of the Petitioners;

- (b) participated in meetings and telephone discussions with the Petitioners' Secured Creditors;
- (c) responded to numerous inquiries from various financial stakeholders of the Terrace House Project as well as other third parties;
- (d) consulted with the relevant parties with respect to the Proposed Mandate Loan and reported to the Court regarding a material adverse change with respect to the closing of the Proposed Mandate Loan;
- (e) corresponded with the Petitioners' Post-Filing Suppliers; and
- (f) prepared the Twelfth Report, including the analysis and recommendations therein.

19. The activities undertaken by the Monitor in the period from June 16, 2022 to July 11, 2022 shall be described in the Monitor's Thirteenth Report to this Court (to be filed).

20. Blakes, in its capacity as independent legal counsel to the Monitor, advised the Monitor on all legal aspects of the activities described in the Monitor's Reports and, among other things, attended and made submissions to this Court at approximately 13 separate hearings, and to the Court of Appeal at 3 separate hearings.

Fees of the Monitor and Monitor's Counsel

21. In completing the activities described in the Monitor's Reports for the period from April 27, 2020 to June 30, 2022, the Monitor incurred approximately 2083 of work representing approximately \$962,423 in professional fees. After accounting for taxes and disbursements, the total costs of the Monitor for the relevant period are \$1,018,859.10.

22. In advising the Monitor in connection with the activities described in the Monitor's Reports for the period from May 14, 2022 to June 30, 2022, Blakes incurred approximately 550 hours of work representing \$360,915 in professional fees. After accounting for taxes and disbursements, the total costs of Blakes for the relevant period are \$404,639.57.

23. The work performed by the Monitor and its legal counsel was done pursuant to, and in accordance with, the terms of the Initial Order, the ARIO, the FARIO and the other orders of this Court and the Court of Appeal made in these proceedings.

Part 3: LEGAL BASIS

1. Paragraph 35 of the ARIO provides that:

...the Monitor and its legal counsel shall pass their accounts from time to time, and for this propose the accounts of ... the Monitor and its legal counsel are hereby referred to a judge of the Supreme Court of British Columbia who may determine the manner in which such accounts are to be passed, including by hearing the matter on a summary basis or referring the matter to a Registrar of this court.

2. On an application to approve the fees of a monitor and its counsel in a CCAA proceeding, the analysis is:

[...] no different than that in a receivership or bankruptcy. The question is whether the fees are fair and reasonable in all of the circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the CCAA process. As with any inquiry, the evidence proffered will be important in making those determinations.

Re Nortel Networks Corporation et al, 2017 ONSC 673, para. 13, citing *Winalta Inc. (Re)*, 2011 ABQB 399, at para 30.

3. This Court has referenced with approval the following relevant considerations when considering whether the fees of a court-appointed officers in insolvency proceedings are fair and reasonable in the circumstances:

- (a) the nature, extent, and value of the assets;
- (b) complications and difficulties encountered by the court officer;
- (c) degree of assistance provided by petitioner;
- (d) time spent by the court officer;
- (e) the court officer's knowledge, experience, and skill;
- (f) the court officer's diligence and thoroughness;
- (g) responsibilities assumed;
- (h) results of the court officer's efforts; and
- (i) cost of comparable services when performed in a prudent and economical manner.

Redcorp Ventures Ltd. (Re), 2016 BCSC 188, at para 23, citing *Bank of Montreal v. Nican Trading Co.* (1990), 1990 CanLII 454 (BC CA).

Re Nortel Networks Corporation et al, 2017 ONSC 673, para. 14.

4. Similar factors are considered on the assessment of the legal accounts of counsel to the court officer, including:

- (a) the time expended;
- (b) the complexity of the proceeding;

- (c) the degree of responsibility assumed by the lawyers;
- (d) the amount of money involved, including the amount of proceeds after payments to the creditors;
- (e) the degree and skill of the lawyers involved;
- (f) the results achieved; and
- (g) the client's expectations as to the fee.

Redcorp Ventures Ltd. (Re), 2016 BCSC 188, at para 33.

5. In applying the above factors, it is not necessary for the Court to go through the supporting documentation for the fees "line by line" to determine what the appropriate fees are. The value provided should pre-dominate the consideration of what a fair and reasonable amount is appropriate.

Re Nortel Networks Corporation et al, 2017 ONSC 673, para. 21.

6. To provide the court with a proper evidentiary basis for assessing the fees subject to the approval application, the accounts subject to the approval application should:

- (a) be verified by affidavit;
- (b) contain sufficient evidence to permit the court to conclude that the fees incurred for services rendered were at the standard rate of charges of the monitor and of the monitor's counsel; and
- (c) provide a sufficient description of the services rendered to permit the court to determine whether the liability for fees was "properly incurred".

Redcorp Ventures Ltd. (Re), supra, at paras 26 and 32

7. The Monitor submits that its fees are fair and reasonable in the circumstances of a CCAA proceeding involving, among other things, secured claims in excess of \$40 million, the assumption of the Monitor of expanded powers, a lengthy and complex sales process, a significant number of contested court hearings including three contested hearings before the Court of Appeal, and various other complex legal and factual issues requiring consideration by the Monitor.

8. In the circumstances, the Monitor submits:

- (a) that its professional fees and disbursements were properly incurred;

- (b) the services were performed by the Monitor in a prudent and economical manner and that the resulting fees charged by the Monitor are fair and reasonable in all of the circumstances
- (c) the work completed by the Monitor was delegated to the appropriate professionals within EY with the appropriate seniority and appropriate hourly rates; and
- (d) the Monitor's fees in this matter are consistent with fees charged by other insolvency firms of a similar size for work of a similar nature and complexity.

9. Similarly, the Monitor submits:

- (a) Blakes' professional fees and disbursements were properly incurred;
- (b) the services were performed by Blakes in a prudent and economical manner and the resulting fees charged by Blakes are fair and reasonable in all of the circumstances
- (c) the work completed by Blakes was delegated to the appropriate professionals within Blakes with the appropriate seniority and hourly rates;
- (d) Blakes' fees in this matter are consistent with the market for similar firms with the capacity to handle a file of comparable size and complexity; and
- (e) Blakes' invoices were provided to the Monitor when rendered, and all have been approved by the Monitor.

10. The Monitor further relies on the CCAA, the *Supreme Court Civil Rules*, and the inherent jurisdiction of this Honourable Court.

Approval of Activities

11. Approval of the Monitor's activities is appropriate in these circumstances because such approval will, among other things:

- (a) bring the Monitor's activities in issue before this Court, providing an opportunity for the concerns of the Court, the Petitioner, and/or other stakeholders to be addressed;
- (b) provide certainty and finality to processes in these CCAA proceedings and activities undertaken, all parties having been given an opportunity to raise specific objections and concerns;
- (c) enable the Court, tasked with supervising the CCAA process, to satisfy itself that the Monitor's court-mandated activities have been conducted in a prudent and diligent manner;

- (d) provide protection for the Monitor, not otherwise provided by the CCAA; and
- (e) protect from potential delay and increased costs that would be caused by:
 - (i) re-litigation of steps taken to date; and
 - (ii) potential indemnity claims by the Monitor.

Target Canada Co. (Re), 2015 ONSC 7574, at paras 12 and 23

12. The approval sought by the Monitor is not a general approval of its activities but is the approval of the specific activities taken by the Monitor as detailed in the Monitor's Reports filed with this Court.

Part 4: MATERIAL TO BE RELIED ON

1. The Proposed Monitor's Report dated May 28, 2020;
2. The Monitor's First Report to Court, dated June 5, 2020;
3. The Monitor's Second Report to Court, dated August 27, 2020;
4. The Monitor's Third Report to Court, dated November 27, 2020 (and the Confidential Supplement thereto);
5. The Monitor's Fourth Report to Court, dated February 23, 2021;
6. The Monitor's Fifth Report to Court, dated April 13, 2021;
7. The Monitor's Sixth Report to Court, dated May 20, 2021;
8. The Monitor's Confidential Seventh Report to Court, dated June 8, 2021;
9. The Monitor's Eighth Report to Court, dated December 14, 2022;
10. The Monitor's Ninth Report to Court dated February 11, 2022;
11. The Monitor's Tenth Report to Court dated April 28, 2022;
12. The Monitor's Eleventh Report to Court dated May 12, 2022;
13. The Monitor's Twelfth Report to Court dated June 16, 2022;
14. The Monitor's Thirteenth Report to Court, to be filed;
15. Affidavit #1 of Michael Bell, made July 11 2022;
16. Affidavit #1 of Peter Rubin, made July 11, 2022; and

17. Such further material as counsel may advise and this Honourable Court may permit.

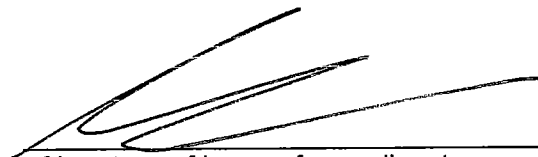
The applicant estimates that the application will take 10 minutes.

This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: July 11, 2022



Signature of lawyer for applicant
Peter Bychawski

Blake, Cassels & Graydon LLP
Barristers and Solicitors
Suite 2600, Three Bentall Centre
595 Burrard Street PO Box 49314
Vancouver, BC V7X 1L3
Email: peter.bychawski@blakes.com
Telephone: 604.631.4218

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs of Part 1 of this notice of application

☐ with the following variations and additional terms:

Date: _____

Signature of ☐ Judge ☐ Master

APPENDIX

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☐ amend pleadings
- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts

**NO. VLC-S-S205095
VANCOUVER REGISTRY**

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,
S.B.C. 2002, c.57, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF
PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE DEVELOPMENT
LIMITED PARTNERSHIP

THIRTEENTH REPORT OF THE MONITOR

ERNST & YOUNG INC.

July 11, 2022

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THIRTEENTH REPORT OF THE MONITOR

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INTRODUCTION AND SUMMARY OF THE WITHIN PROCEEDINGS

Background

1. Port Capital Development (EV) Inc. (the “**General Partner**”) and Evergreen House Development Limited Partnership (“**Evergreen LP**”), (each a “**Petitioner**”, and collectively, the “**Petitioners**”) own a real estate development project called the “**Terrace House Project**”.
2. The Terrace House Project is a high-rise luxury residential strata development located at 1250 West Hastings St. (Coal Harbour area), Vancouver, BC. It is a 19-storey mixed-use development, providing a total of 20 residential units and 2 commercial retail units (“**CRU**”), above a 3-level underground parkade. The Terrace House Property is unique in that its primary structural material is timber.
3. The General Partner is the Bare Trustee that holds title to the real property owned by the Petitioners with a legal description as follows:

PID: 006-721-397; LOT 18, EXCEPT THAT PART OF THE CANADIAN PACIFIC RAILWAY RIGHT-OF-WAY AS DESCRIBED IN ABSOLUTE FEE PARCELS BOOK, VOLUME 9, FOLIO 317, NO. 1154C, AND EXCEPT THE SOUTH 7 FEET NOW ROAD, BLOCK 29 DISTRICT LOT 185 PLAN 92

4. The Petitioners are subsidiaries of the “**Port Capital Group**”, which is in the business of real estate development and management primarily in British Columbia. Mr. Macario (Tobi) Reyes is Port Capital Group’s principal.
5. The Petitioners initially sought and obtained creditor protection under the CCAA on May 29, 2022 (the “**CCAA Filing Date**”) pursuant to an Order (the “**Initial Order**”) which also, *inter alia*:
 - a) appointed Ernst & Young Inc. (“**EY**”) as monitor of the Petitioners (the “**Monitor**”) in these CCAA proceedings (the “**CCAA Proceedings**”); and

b) granted the Monitor “**Enhanced Powers**” to execute control over the Petitioners and to explore restructuring opportunities for the Terrace House Project and administer a “dual-track” sale and investment solicitation process (the “**SISP**”) to obtain an equity investment, a refinancing or alternatively a sale of the Terrace House.

6. At the onset of these CCAA Proceedings, CMLS Financial Ltd (“**CMLS**”) was the Terrace House Project’s construction lender pursuant to a commitment letter dated July 4, 2019 (the “**Construction Loan**”). The Construction Loan was secured by, among other things, a first ranking mortgage against the Terrace House Project.
7. Desjardins Financial Security Life Assurance Company (the “**Original DIP Lender**”) provided the Petitioners access to a debtor-in-possession financing facility (the “**Original DIP Facility**”) to finance the within proceedings.
8. Aviva Insurance Company of Canada (“**Aviva**”) provided a “**Deposit Protection Insurance Facility**” to permit the Petitioners to have access to the pre-sale purchasers’ deposits monies for the payment of project costs. The Deposit Protection Insurance Facility is secured by, amongst other things, a second ranking mortgage against the Terrace House Project. Approximately \$14.7 million is currently owing pursuant to Aviva’s insurance deposit facility.

The Original SISP conducted by the Monitor

9. Following the commencement of the within CCAA Proceedings, the Monitor undertook a two (2) phased SISP (the “**Original SISP**”) as approved by this Honourable Court.
10. A summary of the marketing of the Terrace House Property by the Monitor in the Original SISP is as follows:
 - a) solicited the Terrace House Project to approximately 670 potential bidders, including local, national and international strategic and financial parties and real

estate developers resulting in forty-two (42) parties signing non-disclosure agreements (“**NDA**”) to evaluate the investment opportunity;

- b) retained CBRE Limited in a limited capacity to market the Terrace House Project to its investor network in Asia as well as a newspaper advertisement that was published in a Hong Kong newspaper, the South China Morning Post; and
- c) populated an electronic data room (the “**Data Room**”) with key financial, corporate, operational and other information including construction drawings, consultant reports and other business documents relevant to the Terrace House Project for Prospective Parties to evaluate following the signing of a CA.

11. The Monitor received six (6) offers at the end of the two-phased SISP and filed copies of these offers under seal in a Confidential Supplement to the November 27, 2020 Third Report.

Approval of the Bosa Bid Offer Agreement

12. Following consultation with the CMLS and Aviva, the Monitor executed a bid from Bosa Properties (the “**Bosa Bid Offer Agreement**”) on behalf of the Petitioners with Bosa. The execution of the Bosa Bid Offer Agreement was approved by this Honourable Court on December 1, 2020. On February 16, 2021, Bosa provided the Monitor with the Confidential Feasibility Study on the Terrace House Project and put forward a waterfall proposal that varied from the Bosa Bid Offer Agreement; and accordingly, the Monitor in consultation with CMLS did not advance the Bosa Bid Offer Agreement to a definitive agreement.

Approval of the Landa PSA

13. On April 13, 2021, the Monitor filed its “**Fifth Report**” in which it sought the approval of a Purchase and Sale Agreement with Landa Global Acquisition Inc. (the “**Landa PSA**”) for a purchase price in the amount of \$19 million. The Landa PSA allowed the Monitor to conduct a further marketing period for the Terrace Project (the “**Final Marketing Phase**”) to solicit

superior cash bids (a “**Superior Offer**”) to the Landa PSA. The Monitor described the Final Marketing Phase as a hybrid between a Stalking Horse procedure and Sealed Bid procedure.

Approval of the Original Solterra PSA

14. On April 19, 2021, the Monitor distributed a letter which described the Final Marketing Process (the “**Final Process Letter**”) to eight parties who expressed interest in an acquisition or investment in the Terrace House in the SISP approved by this Honourable Court. The Final Process Letter, amongst other things, updated parties on the SISP and sought cash bids on or before Friday, May 7, 2021.
15. The Monitor received two (2) bids in the Final Marketing Phase. An offer from Solterra Acquisition Corp. (“**Solterra**”) for a Purchase Price in the amount of \$21 million and an offer from 1296371 B.C. Ltd. (“**129**”) to approve a new loan facility to purchase and take assignment of the loan and security held by CMLS (the “**Original 129 Offer**”) and to repay the DIP Lender. 129 is a Related Party to the Petitioners and is controlled by Mr. Reyes.
16. On May 20, 2021, the Petitioners (as directed by the Monitor) applied to this Honourable Court for an order approving, inter alia, a purchase and sale agreement between Solterra and the Petitioners (the “**Original Solterra PSA**”).
17. On May 24, 2021, Landa submitted a revised offer for the Property increasing its offer price from \$19 million to \$21,500,000.
18. At a hearing on May 25, 2021, this Honourable Court advised that if any parties wished to submit further offers, they should provide them to the Monitor on or before to 12:00pm on June 4, 2021.
19. On June 4, 2021, the Monitor received three additional revised offers:
 - a) a second revised offer from Landa for \$22,000,000;

- b) a back-up offer submitted by Solterra (for \$23,666,666 plus an additional purchase price addition in certain scenarios) (the “**Backup Solterra PSA**”) on a without prejudice basis given that Solterra intended to preserve its rights to argue that its Original Solterra PSA (for \$21,000,000) should be approved notwithstanding the delivery of the Backup Solterra PSA; and
- c) a revised offer from 129 filed in the form of a cross-application to the Petitioners’ application to approve the Original Solterra PSA (the “**Revised 129 Offer**”).

The Approval of the Backup Solterra PSA and Appeal filed by 129

- 20. On June 15, 2021, this Honourable Court made an order (the “**June 15 Order**”), which *inter alia*:
 - a) approved the Backup Solterra PSA in the amount of \$23.67 million and granted the associated approval and vesting orders; and
 - b) dismissed the application by 129 seeking the approval of the Revised 129 Offer.
- 21. On August 4, 2021, 129 sought leave to appeal the June 15 Order made by this Honourable Court (the “**129 Leave Motion**”). The 129 Leave Motion was opposed by CMLS, the DIP Lender, Solterra, Centura Building Systems (2013) Ltd. (“**Centura**”) (a lien claimant and related party to Solterra) and the Petitioners. Aviva supported the 129 Leave Motion.
- 22. On August 20, 2021, the BCCA granted 129 leave to appeal the June 15 Order and stayed the closing of the transaction contemplated by the Backup Solterra PSA pending the hearing of the appeal. The BCCA also directed that the appeal be heard before a five-justice division.
- 23. The 129 Appeal was opposed by CMLS, the DIP Lender, Solterra and Centura who each filed Reply Facta; although CMLS and the DIP Lender later changed their positions and supported the 129 Appeal during the hearing of the appeal . Aviva supported the 129 Leave Motion. The Monitor did not take a position on the 129 Appeal.

24. On September 22, 2021, the BCCA issued a memorandum advising stakeholders of its decision (the “**BCCA Memorandum**”). The BCCA Memorandum allowed the 129 Appeal and advised that reasons for judgment would be forthcoming but were “unlikely to be issued prior to September 30, 2021”. The BCCA Memorandum advised that the BCCA was setting aside the June 15 Order and approving the Revised 129 Offer. The BCCA also removed the Enhanced Powers granted to the Monitor and reverted operational control of the Terrace House Project back to the Petitioners.

The Domain Facility

25. On October 28, 2021, the Petitioners completed the Revised 129 Offer to purchase and take assignment of the loan and security held by CMLS and to repay the Construction Loan and the Original DIP Lender. The Revised 129 Offer was financed by way of a new loan (the “**Domain Facility**”) which is comprised of three loans ranked in priority as follows:
- a) \$14,700,000 provided by Domain Facility Corp. (“**Domain**”) (the “**Initial Domain Loan**”);
 - b) \$8,399,060 provided by 129 (the “**129 Loan**”); and
 - c) \$2,150,000 provided by 1260780 B.C. Ltd. (“**126**” and together with 129, the “**Junior Lender**”).
26. Domain, 129 and 126 are the (“**Lenders**”) pursuant to the Domain Facility. Domain is the “**Senior Lender**” and it administers the loans on behalf of the Lenders, including 126 and 129 (the “**Junior Lenders**”) pursuant to a Loan Administration, Participation and Standstill Agreement.
27. 129 derived almost all of its funding from the release of seven (7) purchase pre-sale deposits (the “**Deposits**”) amounting to \$8,005,201 that were held in trust by Dentons Canada LLP at

the time. A list of the Deposits was attached as Exhibit “C” to the Second Affidavit of Mr. Reyes filed in the within CCAA Proceedings.

28. The Deposits were released to 129 pursuant to an Irrevocable Direction to Pay (the “**Direction**”) signed by each respective “**Deposit Holder**”, a copy of which is attached hereto as **Appendix “A”**. The Direction states that the Domain Loan would remain on title and would be repaid once new construction financing is obtained. On the registration of new construction financing, 129 would release the funds, including the Deposits, back into the Terrace House Project and the Deposit Holder would be credited with a deposit against a condominium unit in the Terrace House project.
29. The Monitor understands that Mr. Reyes’ mother was one of the Deposit Holders in the amount of \$2.8 million and that she agreed to assign this Deposit to Aviva; and as such, Aviva represents 35% of the 129 Loan. 129 appears to be the “**Fulcrum Creditor**” in the within proceedings.
30. 126 is controlled by Mr. Reyes’ mother and is related to the Petitioners. 126 subrogated its priority position to Aviva with respect to the Deposit Protection Insurance Facility.
31. The Domain Facility originally matured on May 1, 2022; however the Petitioners obtained an extension of the maturity date to July 1, 2022 for an extension fee of \$98,000.

The Second Domain Loan

32. The Domain Facility was almost entirely used to complete the 129 Offer and left very little cash available to the Petitioners to pay for working capital and site preservation expenses. To fund these costs through to the expiry of the current Stay Period, on February 15, 2022 this Honourable Court granted the Further Amended and Restated Initial Order (“**FARIO**”) and approved an additional \$1,800,000 tranche to the Domain facility (the “**Second Domain Loan**”

and collectively with the Initial Domain Loan, the “**Domain Facility**”) to provide working capital to the Petitioners for this proceeding.

Estimated Current Debt Stack

33. The Monitor estimates the current secured debt stack against the Terrace House Project, ranking in order of priority, as:

Secured Creditor	Amount	Cumulative
Domain Facility Corp (as at June 30):		
- Initial Domain Loan	\$14,700,000	\$14,700,000
- Second Domain Loan	<u>\$1,800,000</u>	<u>\$1,800,000</u>
	\$16,500,000	\$16,500,000
1296371 B.C. Ltd. (before interest that has accrued)	\$8,399,060	\$24,899,060
Aviva Insurance Company of Canada (“ Aviva ”) – Deposit Insurance Protection Policy (See Note #1)	\$14,700,000	\$39,599,060
1260780 B.C. Ltd. (before interest that has accrued)	\$2,150,000	\$41,749,060
Note #1: Aviva has insured \$14.7 million of Pre-Sale deposits that were released into the Terrace House Project. Aviva’s claim is contingent on those Pre-Sale buyers filing claims to recover their deposits should the Petitioners fail to complete the Terrace House Project and deliver those units to the Pre-Sale Purchasers. Aviva also represents approximately 35% of the 129 Secured Charge.		

The Proposed Mandate Loan to repay the Domain Facility

34. The Tenth Report filed April 28, 2022 described that the Petitioners identified a development partner, Enso Holdings Ltd. (“**Enso**”), to co-develop the Terrace House Project, become the majority General Partner, and provide its covenant and an equity investment to support the necessary construction financing to exit these proceedings. The Petitioners together with

Enso negotiated a commitment letter dated April 19, 2022 (the “**Initial Mandate Commitment Letter**”) with Mandate Management Corporation (“**Mandate**”) which was attached to the Monitor’s Tenth Report, for a proposed \$20,000,000 mortgage financing (the “**Proposed Mandate Loan**”) to repay the Domain Facility and provide working capital for these CCAA Proceedings.

35. On May 12, 2022, this Honourable Court granted an order approving the Proposed Mandate Loan and extending the Stay of Proceedings to September 30, 2022.

Plan of Arrangement filed by the Petitioners

36. On June 15, 2022, the Petitioners circulated materials which included a proposed plan of compromise and arrangement (the “**Proposed Plan**”) and filed a motion (the “**Plan Motion**”) with this Honourable Court (returnable June 17, 2022) requesting an order(s) that: a) authorize and direct the Petitioners to convene a meeting (the “**Meeting**”) of their creditors (the “**Affected Creditors**”) to vote on the Proposed Plan (the “**Meeting Order**”); and b) approve a claims process (the “**Proposed Claims Process**”) to determine the claims of creditors (“**Claims**”) and establish a claims bar date by which creditors must file a proof of their claim in these CCAA proceedings.
37. On June 16, 2022, the Monitor filed its “**Twelfth Report**” in which it reported a Material Adverse Change noting that a) the Proposed Mandate Loan had not closed, b) the relief sought by the Petitioners is premature, c) there was no evidence that the Petitioners are capable of implementing the Proposed Plan without the funding that would be derived through the Proposed Mandate Loan, and d) it would be appropriate for the Petitioners to re-set a hearing on notice to the Service List to consider the relief sought if and when the Proposed Mandate Loan closed.
38. A hearing to consider the Plan Motion has been adjourned to July 13, 2022.

Failure to Close the Proposed Mandate Loan

39. On June 16, 2022, the Monitor issued its Twelfth Report which stated that the Proposed Mandate Loan had not yet closed and issued a Material Adverse Change.
40. On July 4, 2022, the Monitor wrote the Service List to confirm that the Proposed Mandate Loan has not closed and was not expected to close and the Petitioners were in default on the Domain Facility. A copy of this correspondence is attached hereto as **Appendix “B”**.
41. The Petitioners advise the Monitor that they are in discussions with two parties with respect to a financing that will repay the Domain Facility although those discussion have not yet produced an unconditional financing proposal.
42. The Monitor remains of the view that the Plan Motion should not proceed given the Petitioners do not possess sufficient liquidity to meet their unpaid post-filing and ongoing obligations and fund the within CCAA proceedings.

Post-Filing Payables

43. The Petitioners have provided the Monitor with an outstanding payables listing (the “**Post-Filing AP Listing**”) which estimates that \$413,196 is owing to its vendors for post-CCAA filing obligations as at July 6, 2022 (the “**Post-Filing Suppliers**”). The Monitor notes that there are further amounts owing to the Monitor, the Monitor’s Counsel and the Petitioners’ Counsel that are outstanding and not reflected in the Post-Filing AP Listing. A copy of the Post-Filing AP Listing is attached hereto as **Appendix “C”**.
44. The 2022 property taxes for the Terrace House Project remain unpaid and are included within the Post-Filing AP Listing.

Competing Motions for the Disposition of the Terrace House Project

45. On July 5, 2022, Domain filed a motion (the “**Receivership Motion**”) with this Honourable Court seeking, *inter alia*, order(s) to:
- a) terminate the CCAA Proceedings; and
 - b) appoint the Bowra Group as receiver and manager (the “**Proposed Receiver**”) to take possession and run a process to sell the Terrace House Project to repay Domain and the Petitioners’ other Secured Creditors (to the extent that proceeds allow).
46. The Receivership Motion is supported by an affidavit filed by Ms. Lisa Ward (the “**Ward Affidavit**”), the Vice President, Risk Management, of Domain Mortgage Corp.
47. On July 7, 2022, Aviva filed a motion (the “**SSISP Motion**”) with this Honourable Court seeking, *inter alia*, order(s) to enhance the powers of the Monitor to:
- a) direct and commence and administer a simplified sale and investment solicitation process (the “**SSISP**”) for a period of three (3) weeks (the “**SSISP Period**”) as described below; and
 - b) seek approval of this Honourable Court for a sale of the Terrace House project at the conclusion of the SSISP Period.

Prior Reports and Purpose

48. The Monitor has previously filed thirteen (13) reports in these CCAA Proceedings: the “**Proposed Monitor’s Report**”, the “**First Report**”, the “**Second Report**”, the “**Third Report**”, the “**Fourth Report**”, the “**Fifth Report**”, the “**Sixth Report**”, the “**Seventh Confidential Report**”, the “**Eighth Report**”, the “**Ninth Report**”, the “**Tenth Report**”, the “**Eleventh**

Report", the "**Twelfth Report**". These reports, with the exception of the Seventh Confidential Report, are posted on the Monitor's website at www.ey.com/ca/terracehouse.

49. The purpose of this "**Thirteenth Report**" is to provide information to this Honourable Court with respect to the following:

- a) the Receivership Motion filed by Domain;
- b) the SSISP Motion filed by Aviva;
- c) the Monitor's commentary and observations; and
- d) the professional fees and disbursements for the Monitor and its legal counsel to date.

50. This Thirteenth Report should be read in conjunction with the Petitioners' Notice of Application filed June 15, 2022, Domain's Notice of Application filed July 5, 2022, and Aviva's Notice of Application filed July 7, 2022.

TERMS OF REFERENCE

51. In preparing this Thirteenth Report and making the comments herein, the Monitor has been provided with and has herein relied upon, unaudited financial information, books, records and financial information prepared by the Petitioners, discussions with management of the Petitioners ("**Management**"), and information from other third party sources (collectively, the "**Information**").

- a) the Monitor has reviewed the Information for reasonableness, internal consistency and use in the context in which it was provided. However, the Monitor has not audited or otherwise attempted to verify the accuracy or completeness of such information in a manner that would wholly or partially comply with Generally

Accepted Assurance Standards (“GAAS”) pursuant to the *Chartered Professional Accountants Canada Handbook* and, accordingly, the Monitor expresses no opinion or other form of assurance contemplated under GAAS in respect of the Information; and

- b) some of the information referred to in this Thirteenth Report consists of forecasts and projections. An examination or review of the financial forecast and projections, as outlined in the *Chartered Professional Accountants Canada Handbook*, has not been performed.

- 52. Future oriented financial information referred to in this Thirteenth Report was prepared based on Management’s and the Monitor’s estimates and assumptions. Readers are cautioned that since projections are based upon assumptions about future events and conditions that are not readily and currently ascertainable, the actual results will vary from the projections, even if the assumptions materialize, and the variations could be material.
- 53. Unless otherwise indicated, the Monitor’s understanding of factual matters expressed in this Thirteenth Report concerning the Petitioners and their business is based on the Information, and not independent factual determinations made by the Monitor.
- 54. All capitalized terms used herein that are undefined have the meanings ascribed thereto in the Proposed Monitor’s Report, the First Report, the Second Report, the Third Report, the Fourth Report, the Fifth Report, the Sixth Report, the Seventh Confidential Report, the Eighth Report, the Ninth Report, the Tenth Report, the Eleventh Report, the Twelfth Report and the Further Amended and Restated Initial Order.
- 55. Unless otherwise stated all monetary amounts contained herein are expressed in Canadian Dollars.

THE RECEIVERSHIP MOTION

56. As is described above, Domain filed the Receivership Motion on June 5, 2022 to terminate the CCAA Proceedings and appoint the Bowra Group as receiver and manager to take possession and run a process to sell the Terrace House Project to repay Domain and the Petitioners' other Secured Creditors (to the extent that proceeds allow).
57. The Receivership Motion notes that the Petitioners have an immediate need for financing. Post-filing creditors are not being paid. The Terrace House Project is subject to waste and in need of preservation and protection. The Petitioners appear to have no prospect of implementing a plan for the reorganization of the Terrace House Project.
58. Domain also submits that a receivership is the appropriate forum for selling the Terrace House Project. Domain notes in particular that the fundamental objectives of the CCAA are no longer capable of being met, the CCAA also involves additional layers of unnecessary costs as well as several other reasons including the observation that the Petitioners can continue to pursue their refinancing efforts while the Terrace House Project is in receivership.
59. In the event this Honourable Court approves the Receivership Motion, the Monitor will provide the Proposed Receiver such assistance as is necessary to support its mandate. The Monitor does not currently possess any enhanced powers and is not in possession of any of the Petitioners' property. The Monitor does however possess a large volume of information and knowledge pertaining to the Terrace House Project including information that is critical to administering a further sales process for the Terrace House Property. The Monitor will make that information available to the Proposed Receiver to the extent it is readily available.
60. The Proposed Receivership Order contemplates the granting of a receiver's charge (the **"Proposed Receiver's Charge"**) over the property of the Petitioners ranking behind only the Administrative Charge and claims contemplated by s. 14.06(7), 81.4(4), and 81.6(2) of the *Bankruptcy and Insolvency Act* (Canada) (the **"BIA"**).

THE SSISP MOTION

61. As is noted above, Aviva filed the SSISP Motion to enhance the powers of the Monitor to direct and commence and administer a SSISP for a period of three (3) weeks in the within CCAA Proceedings.
62. The SSISP contemplates that the Monitor will for a period of three (3) weeks, invite offers from the six qualified bidders under the Original SISP, identified in the Fifth Report as the “**Qualified Offerors**”, or such other parties as the Monitor may determine.
63. The SSISP contemplates a truncated process with the following target dates:

Bid Deadline	August 3, 2022
Court Approval Date (subject to Court availability)	August 10, 2022
Outside Closing Date	August 29, 2022

64. Should this Honourable Court approve the SSISP, the Monitor would:
 - a) re-open the data room used in the Original SISP which includes key financial, corporate, operational and other information including construction drawings, consultant reports and other business documents relevant to the Terrace House Project for the interested parties to review;
 - b) invite all forty-two (42) parties that signed NDAs in the Original SISP (in addition to the six qualified bidders under the Original SISP) to submit offers to acquire the Terrace House Project in accordance with the target dates above; and
 - c) provide those parties with a form asset purchase agreement and draft form of investment agreement (the “**Purchase Agreement From**”) (a copy of which is attached hereto as **Appendix “D”**) to assist those parties in submitting binding bids.

65. Aviva is of the view that the SSISP will provide greater benefit the stakeholders of these CCAA Proceedings than a receivership proceeding due to, *inter alia*:
- a) the Monitor has previously exposed the Terrace House Project to the market through the Original SISP and has identified the parties most likely to acquire the Terrace House Project;
 - b) that a further SISP or marketing process administered by a receiver will not likely identify any interested parties not already known to the Monitor and will not generate a significantly higher sale price; and
 - c) a further SISP or marketing process administered by a receiver will incur significant professional and interest costs.
66. The Monitor is of the view that undertaking the SSISP is not overly onerous or complex and the Monitor estimates the cost of soliciting and coordinating the receipt of offers to be \$25,000 and the cost of filing a Motion to approve the sale of the best offer received to be another \$25,000, assuming that the SSISP can be completed on a three (3) week timeline in accordance with its terms and no unanticipated complexities or contentious issues arise. The Monitor and its counsel would agree to undertake the SSISP with an increased Administration Charge to cover the fees and disbursements of the Monitor and its counsel should this Honourable Court approve the SSISP Order.
67. Based on non-binding discussions with certain participants in the Original SISP, the Monitor is reasonably confident (although it can make no assurances) that the proposed SSISP will result in an offer that may be capable of repaying Domain and making some recovery available to the Junior Lenders (being Aviva and the Deposit Holders).

MONITOR'S COMMENTARY AND OBSERVATIONS

68. The introductory section of this report describes these long, windy and difficult CCAA proceedings. The Petitioners have had over two (2) years to formulate and implement a plan to exit CCAA. The Petitioners can not meet their post-filing obligations in the short term; and in the longer term, they do not have construction financing to resume construction of the Terrace House Project; and while they have made good faith and diligent efforts, they do not appear to have any equity so they need to rely on support from others.
69. The Monitor is of the view that the Petitioners have had more than enough time finance a plan; and unless the Petitioners produce an unconditional financing proposal to repay Domain at the hearing scheduled for July 13, 2022, the Monitor is of the view this Honourable Court should approve either the Receivership Motion or the SSISP Motion.
70. Conducting a new SISP, either in Receivership or within these proceedings, will result in increased costs that will erode recoveries to stakeholders.
71. The Ward Affidavit describes that the Domain Facility accrues interest of \$15,808.32 before compounding. This equates to approximately \$500,000 per month. Additionally, the Monitor estimates that site preservation costs of \$45,000, insurance costs of \$31,500, and property tax accrual of \$5,000 are being incurred monthly. If Domain's receivership application is granted, the Petitioners' estate will also be required to fund the costs of the receiver and its legal counsel over the duration of the receivership, receivership borrowing costs, and potentially brokerage fees over the course of the receivership proceedings.
72. Accordingly, the Monitor is of the view that seems prudent, whether by receivership or within these proceedings, to approach parties that previously expressed interest in the Terrace House Project to see if a sale can be achieved on the timeline proposed in Aviva's SSISP that will result in a full payout of Domain and some recovery to the Junior Lenders. If an expedited approach does not achieve the desired result, then a full re-start and new SISP that offers interested parties more time in improved market conditions will be required.

PROFESSIONAL FEES AND DISBURSEMENTS

73. On July 11, 2022 the Monitor filed a motion (the “**Fee Approval Motion**”) with this Honourable Court seeking the approval the fees and disbursements of the Monitor and its counsel, Blakes, Cassels & Graydon LLP (the “**Monitor’s Counsel**”).
74. The Fee Approval Motion is supported by affidavits of Mr. Bell of the Monitor and Mr. Rubin of the Monitor’s Counsel. The affidavits include detailed summaries with respect to hours spent by each employee and are attached to the Fee Approval Motion.
75. The table below provides a summary of the Monitor’s fees for this period:

Ernst & Young Inc.								
Invoice No.	Date	Period Covered	Fees	Expenses	Subtotal	Taxes	Total	Hours
C500005324	Jun 26 '20	Apr 27 – May 28	54,595	-	54,595	2,730	57,325	115
C500005738	Sep 30 '20	May 29 – Jun 30	85,553	118	85,671	4,284	89,954	173
C500005741	Sep 30 '20	May 29 – Jun 30	48,076	-	48,076	2,403	50,479	113
C500005836	Oct 15 '20	Jul 1 – Jul 31	59,548	6,485	66,033	3,302	69,335	121
C500005837	Oct 15 '20	Jul 1 – Jul 31	43,041	-	43,041	2,152	45,193	95
C500005843	Oct 16 '20	Aug 1 – Aug 31	32,700	757	33,456	1,673	35,129	70
C500005844	Oct 15 '20	Aug 1 – Aug 31	6,897	-	6,897	345	7,241	14
C500005845	Oct 16 '20	Sep 1 – Sep 30	24,536	-	24,536	1,227	25,763	44
C500005846	Oct 16 '20	Sep 1 – Sep 30	4,768	-	4,768	238	5,006	10
C500006709	May 25 '21	Oct 1 – Oct 31	37,340	-	37,340	1,867	39,207	77
C500006710	May 25 '21	Nov 1 – Nov 30	31,961	-	31,961	1,598	33,559	65
C500006711	May 25 '21	Dec 1 – Dec 31	26,308	-	26,308	1,315	27,623	60
C500006712	May 25 '21	Jan 1 – Jan 31	31,808	-	31,808	1,590	33,398	67
C500006713	May 25 '21	Feb 1 – Feb 28	36,130	559	36,689	1,834	38,524	72
C500006714	May 25 '21	Mar 1 – Mar 31	49,437	-	49,437	2,472	51,909	103
C500006715	May 24 '21	Apr 1 – Apr 30	40,014	-	40,014	2,001	42,015	81
C500007212	Sep 29 '21	May 1 – May 31	62,775	-	62,775	3,139	65,914	132
C500007213	Sep 29 '21	Jun 1 – Jun 30	56,630	-	56,630	2,831	59,461	105
C500007214	Sep 29 '21	Jul 1 – Jul 31	22,223	-	22,223	1,111	23,334	43
C500007527	Dec 15 '21	Aug 1 – Aug 31	23,810	-	23,810	1,190	25,000	67
C500007528	Dec 15 '21	Sep 1 – Sep 30	23,810	-	23,810	1,190	25,000	72
C500007605	Jan 12 '22	Oct 1 – Oct 31	23,810	-	23,810	1,190	25,000	68
C500007606	Jan 12 '22	Nov 1 – Nov 30	20,000	-	20,000	1,000	21,000	56
C500007836	Mar 11 '22	Dec 1 – Dec 31	25,000	-	25,000	1,250	26,250	64
C500007837	Mar 11 '22	Jan 1 – Jan 31	17,000	-	17,000	850	17,850	44
C5xx (Draft)	Jul 6 '22	Feb 1 – Jun 30	74,653	-	74,653	3,733	78,385	152
			\$962,423	\$7,919	\$970,341	\$48,517	\$1,018,859	2,083

76. From May 29, 2020 to July 1, 2022, the Monitor incurred approximately 2,083 hours and billed fees and disbursements of \$962,423 (exclusive of GST). The activities of the Monitor are documents in the Reports filed throughout these CCAA Proceedings and in Mr. Bell's affidavit included within the Fee Approval Motion.

77. The work completed by the Monitor was delegated to the appropriate professionals in the Monitor's organization based on seniority and hourly rates. The Monitor's fees are consistent with the fees charged by similar firms in British Columbia with the capacity to handle a file of comparable size and complexity.
78. The table below provides a summary of the Monitor's Counsel's fees for this period:

Blakes, Cassels & Graydon LLP							
Invoice No.	Date	Period Covered	Fees	Expenses	Subtotal	Taxes	Total
2191959	Jul 9 '20	May 14 – Jun 30	10,898	7	10,905	1,308	12,212
2196743	Aug 8 '20	Jun 30 – Jul 31	19,694	21	19,715	2,364	22,079
2202371	Sep 14 '20	Aug 1 – Aug 31	5,681	-	5,681	682	6,362
2213718	Nov 17 '20	Sep 1 – Oct 31	600	-	600	72	672
2217462	Dec 8 '20	Nov 1 – Nov 30	2,475	7	2,482	297	2,779
2226493	Dec 31 '20	Dec 1 – Dec 31	900	99	999	113	1,112
2235756	Mar 12 '21	Feb 1 – Feb 28	7,050	-	7,050	846	7,896
2241747	Apr 19 '21	Mar 1 – Mar 31	50,102	97	50,199	6,016	56,215
2245693	May 7 '21	Apr 1 – Apr 30	22,423	89	22,511	2,695	25,206
2252400	Jun 16 '21	May 1 – May 30	21,400	-	21,400	2,568	23,968
2257328	Jul 16 '21	Jun 1 – Jun 30	42,013	9	42,022	5,042	47,063
2262736	Aug 16 '21	Jul 1 – Jul 31	12,998	7	13,005	1,560	14,565
2267709	Sep 16 '21	Aug 1 – Aug 31	35,399	6	35,405	4,248	39,653
2271873	Oct 12 '21	Sep 1 – Sep 30	69,450	7	69,457	8,334	77,791
2278007	Nov 15 '21	Oct 1 – Oct 31	18,200	-	18,200	2,184	20,384
2282676	Dec 9 '21	Nov 1 – Nov 30	5,279	-	5,279	633	5,912
2289376	Dec 31 '21	Dec 1 – Dec 31	11,755	50	11,805	1,413	13,218
2295394	Feb 16 '22	Jan 1 – Jan 31	3,300	-	3,300	396	3,696
2299859	Mar 10 '22	Feb 1 – Feb 28	5,400	-	5,400	648	6,048
2305756	Apr 12 '22	Mar 1 – Mar 31	3,975	-	3,975	477	4,452
2311815	May 13 '22	Apr 1 – Apr 30	4,950	-	4,950	594	5,544
2317283	Jun 15 '22	May 1 – May 30	6,975	-	6,975	837	7,812
			\$360,917	\$399	\$361,315	\$43,327	\$404,639

79. During this period, the Monitor's Counsel billed approximately 550 hours, representing fees and disbursements of approximately \$360,917 (exclusive of GST and PST). The Monitor has reviewed all accounts rendered by the Monitor's Counsel in this period and confirms that all services described in the accounts of the Monitor's Counsel were rendered to the Monitor by the Monitor's Counsel, and that the Monitor believes that all charges in the accounts are fair, reasonable and consistent with the market for such legal services in British Columbia.
80. Contemplated within the Fee Approval Motion are a combined approximate \$100,000 in professional fees that remain unpaid by the Petitioners to the Monitor and the Monitor's Counsel. This amount does not include approximately \$80,000 (after use of retainer held) that remains unpaid by the Petitioners to the Petitioners' Counsel, which when combined with the

professional fees that remain unpaid to the Monitor and the Monitor's Counsel, is in excess of the Administrative Charge of \$100,000.

81. The Monitor requests this Honourable Court's approval of the fees and disbursements of the Monitor and the Monitor's Counsel, as described in the Fee Approval Motion and its supporting affidavits.

All of which is respectfully submitted this 11th day of July, 2022.

ERNST & YOUNG INC.

in its capacity as Monitor
of Port Capital Development (EV) Inc. and
Evergreen House Development Limited Partnership
and not in its personal or corporate capacity

Per:

A handwritten signature in black ink, appearing to be 'Michael Bell', written over a light blue horizontal line.

Michael Bell, CPA, CA, CIRP LIT
Senior Vice President

Appendix A

Signed Irrevocable Direction for Deposits Held at Denton's

	<u>Unit #</u>		<u>\$'s</u>
1	801	Luz Consuelo Reyes	\$ 2,800,000
2	1001	1192706 B.C. Ltd.	\$ 1,155,000
3	CRU	1208596 B.C. Ltd.	\$ 975,201
4	901	1301981 B.C. Ltd.	\$ 1,162,500
5	403	1207867 B.C. Ltd.	\$ 645,000
6	503	Robert Davis	\$ 592,500
7	401	Simon Wong	\$ 675,000
TOTAL:			\$ 8,005,201

IRREVOCABLE DIRECTION TO PAY

TO: Dentons Canada LLP
 20th Floor, 250 Howe Street
 Vancouver, British Columbia
 V6C 3R8

Re: Funds held in trust for Deposits for Terrace House Units

Evergreen House Development Limited Partnership (the "Old LP") by its general partner, Port Capital Development (EV) Inc. (the "Old GP") pursued the development of a project located at 1250 West Pender Street, Vancouver, BC (the "Terrace House Project"). The undersigned has provided a deposit (the "Deposit") that is currently held in trust with Dentons Canada LLP ("Dentons") to acquire a unit in the Terrace House Project, the details of which are set out below.

CMLS Financial Ltd ("CMLS") was the Terrace House Project's construction lender pursuant to a commitment letter dated July 4, 2019 (the "CMLS Loan") as amended. The CMLS Loan is secured by, among other things, a first ranking mortgage against the Terrace House Project. The indebtedness on the CMLS Loan was approximately \$20.1 million at the commencement of the CCAA Proceedings in 2020.

On May 29, 2020, Ernst & Young Inc. ("EY") was appointed as the monitor of the Terrace House Project pursuant to a court order of the BC Supreme Court (the "CCAA Proceedings"). The court also approved a debtor in possession loan (the "DIP Loan") in favour of Desjardins Financial Security Life Assurance Company ("Desjardins" or the "DIP Lender"). The indebtedness on the DIP Loan is projected to be \$1.5 million as at April 30, 2021.

1296371 B.C. Ltd. (the "Junior Lender") has been created to participate in the acquisition of the CMLS Loan and the DIP Loan. Domain Mortgage Corp. and/or Bankers Mortgage Corp. doing business as Domain Funding (Domain Mortgage Corp. and Bankers Mortgage Corp., individually or collectively are "Domain Funding") as the new funder (the "Senior Lender") has agreed to provide the sum of \$16M and Domain Funding has or will establish a new entity ("Newco") controlled by Domain Funding to acquire the CMLS Mortgage and the DIP Loan. The Senior Lender will have the first position of repayment under the acquired CMLS Mortgage and DIP Loan and the Junior Lender will have second position of repayment under the CMLS Mortgage pursuant to an interlender or co-lender agreement as between the Senior Lender and the Junior Lender. The CMLS Loan and DIP Loan will remain as charges on the real estate related to the Terrace House Project with the expectation that the Senior Lender would be repaid once new construction financing (the "Construction Financing") is obtained. The Construction Financing will be used to repay the Senior Lender and may be used as part of a plan to exit CCAA on terms to be determined. On the registration of the Construction Financing on the Terrace House Project, the Junior Lender would release the funds back into the Terrace House Project to be used as equity with each of the lenders to the Junior Lender being credited with a deposit against a unit in the Terrace House Project.

This Direction is intended to reflect the general agreement of the undersigned to the use of the Deposit on the terms herein, subject only to the consents (the "Consents") required to obtain the release of the Deposit from the trust account of Dentons being (1) the consent of the Monitor (on behalf of the developer), (2) the consent of CMLS and agreement to sell and assign the CMLS Loan, and (3) the consent of the DIP Lender and agreement to sell and assign the DIP Loan. The additional conditions (the "Conditions") to the release of the Deposit are that CMLS, the DIP Lender and Newco finalize and sign a purchase agreement to allow Newco to acquire the CMLS Loan and the DIP Loan as well as the necessary Court approvals in the CCAA Proceedings.

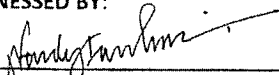
Please accept this as your irrevocable authority and direction to, once you have obtained the Consents and the Conditions have been satisfied, to transfer the Deposit to 1296371 B.C. Ltd. in order to facilitate the loan by the Junior Lender to Newco so that Newco can acquire the CMLS Loan and the DIP Loan. This irrevocable authority and direction will terminate on August 31, 2021, unless extended by the undersigned in writing.

Name of Deposit Holder: Luz Consuelo Reyes
 Deposit Amount Held in Trust at Dentons: \$2,800,000.00
 Unit: 801

Dated this 13th day of April, 2021.

THE UNDERSIGNED HAS HAD THIS IRREVOCABLE DIRECTION TO PAY WITNESSED AND COMPLETED BY A LAWYER WHO HAS PROVIDED INDEPENDENT LEGAL ADVICE TO THE UNDERSIGNED.

WITNESSED BY:


 Witness Signature

WENDY TAN LIM
 Printed Name of Witness

#702-6240 MCKAY AVE, BURNABY, BC V5H4L8
 Witness Address

LAWYER
 Witness Occupation


 LUZ CONSUELO REYES



IRREVOCABLE DIRECTION TO PAY

TO: Dentons Canada LLP
 20th Floor, 250 Howe Street
 Vancouver, British Columbia
 V6C 3R8

Re: Funds held in trust for Deposits for Terrace House Units

Evergreen House Development Limited Partnership (the "**Old LP**") by its general partner, Port Capital Development (EV) Inc. (the "**Old GP**") pursued the development of a project located at 1250 West Pender Street, Vancouver, BC (the "**Terrace House Project**"). The undersigned has provided a deposit (the "**Deposit**") that is currently held in trust with Dentons Canada LLP ("**Dentons**") to acquire a unit in the Terrace House Project, the details of which are set out below.

CMLS Financial Ltd ("**CMLS**") was the Terrace House Project's construction lender pursuant to a commitment letter dated July 4, 2019 (the "**CMLS Loan**") as amended. The CMLS Loan is secured by, among other things, a first ranking mortgage against the Terrace House Project. The indebtedness on the CMLS Loan was approximately \$20.1 million at the commencement of the CCAA Proceedings in 2020.

On May 29, 2020, Ernst & Young Inc. ("**EY**") was appointed as the monitor of the Terrace House Project pursuant to a court order of the BC Supreme Court (the "**CCAA Proceedings**"). The court also approved a debtor in possession loan (the "**DIP Loan**") in favour of Desjardins Financial Security Life Assurance Company ("**Desjardins**" or the "**DIP Lender**"). The indebtedness on the DIP Loan is projected to be \$1.5 million as at April 30, 2021.

1296371 B.C. Ltd. (the "**Junior Lender**") has been created to participate in the acquisition of the CMLS Loan and the DIP Loan. Domain Mortgage Corp. and/or Bankers Mortgage Corp. doing business as Domain Funding (Domain Mortgage Corp. and Bankers Mortgage Corp., individually or collectively are "**Domain Funding**") as the new funder (the "**Senior Lender**") has agreed to provide the sum of \$16M and Domain Funding has or will establish a new entity ("**Newco**") controlled by Domain Funding to acquire the CMLS Mortgage and the DIP Loan. The Senior Lender will have the first position of repayment under the acquired CMLS Mortgage and DIP Loan and the Junior Lender will have second position of repayment under the CMLS Mortgage pursuant to an interlender or co-lender agreement as between the Senior Lender and the Junior Lender. The CMLS Loan and DIP Loan will remain as charges on the real estate related to the Terrace House Project with the expectation that the Senior Lender would be repaid once new construction financing (the "**Construction Financing**") is obtained. The Construction Financing will be used to repay the Senior Lender and may be used as part of a plan to exit CCAA on terms to be determined. On the registration of the Construction Financing on the Terrace House Project, the Junior Lender would release the funds, including the Deposit, back into the Terrace House Project to be used as equity with each of the lenders to the Junior Lender, including the undersigned, being credited with a deposit against a unit in the Terrace House Project (the "**Transaction**").

This Direction is intended to reflect the general agreement of the undersigned to the use of the Deposit on the terms herein, subject to the consents (the "**Consents**") required to obtain the release of the Deposit from the trust account of Dentons being (1) the consent of the Monitor (on behalf of the developer), (2) the consent of CMLS and agreement to sell and assign the CMLS Loan, (3) the consent of the DIP Lender and agreement to sell and assign the DIP Loan, and (4) the consent of the undersigned to release the Deposit after undersigned's counsel has reviewed the definitive documents required to effect the Transaction. The additional conditions (the "**Conditions**") to the release of the Deposit are that CMLS, the DIP Lender and Newco finalize and sign a purchase agreement to allow Newco to acquire the CMLS Loan and the DIP Loan as well as the necessary Court approvals in the CCAA Proceedings.

Please accept this as your irrevocable authority and direction to, once you have obtained the Consents and the Conditions have been satisfied, to transfer the Deposit to 1296371 B.C. Ltd. in order to facilitate the loan by the Junior Lender to Newco so that Newco can acquire the CMLS Loan and the DIP Loan. This irrevocable authority and direction will terminate on August 31, 2021, unless extended by the undersigned in writing.

Name of Deposit Holder: 1192706 B.C. Ltd.

Deposit Amount Held in Trust at Dentons: \$1,155,000.00

Unit: 1001

Dated this 18th day of April, 2021.

THE UNDERSIGNED HAS HAD THIS IRREVOCABLE DIRECTION TO PAY WITNESSED REMOTELY BY VIDEO CONFERENCE AND COMPLETED BY A LAWYER WHO HAS PROVIDED INDEPENDENT LEGAL ADVICE TO THE UNDERSIGNED.

WITNESSED BY:



Witness Signature

Nicholas J. Carlson

Printed Name of Witness

900 - 885 West Georgia St., Vancouver, BC

Witness Address

Lawyer

Witness Occupation

1192706 B.C. LTD.



Authorized Signatory

Seal

IRREVOCABLE DIRECTION TO PAY

TO: Dentons Canada LLP
 20th Floor, 250 Howe Street
 Vancouver, British Columbia
 V6C 3R8

Re: Funds held in trust for Deposits for Terrace House Units

Evergreen House Development Limited Partnership (the "**Old LP**") by its general partner, Port Capital Development (EV) Inc. (the "**Old GP**") pursued the development of a project located at 1250 West Pender Street, Vancouver, BC (the "**Terrace House Project**"). The undersigned has provided a deposit (the "**Deposit**") that is currently held in trust with Dentons Canada LLP ("**Dentons**") to acquire a unit in the Terrace House Project, the details of which are set out below.

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On May 29, 2020, Ernst & Young Inc. ("**EY**") was appointed as the monitor of the Terrace House Project pursuant to a court order of the BC Supreme Court (the "**CCAA Proceedings**"). The court also approved a debtor in possession loan (the "**DIP Loan**") in favour of Desjardins Financial Security Life Assurance Company ("**Desjardins**" or the "**DIP Lender**"). The indebtedness on the DIP Loan is projected to be \$1.5 million as at April 30, 2021.

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S.A.

Please accept this as your irrevocable authority and direction to, once you have obtained the Consents and the Conditions have been satisfied, to transfer the Deposit to 1296371 B.C. Ltd. in order to facilitate the loan by the Junior Lender to Newco so that Newco can acquire the CMLS Loan and the DIP Loan. This irrevocable authority and direction will terminate on August 31, 2021, unless extended by the undersigned in writing.

Name of Deposit Holder: 1208596 B.C. Ltd.

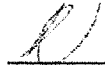
Deposit Amount Held in Trust at Dentons: \$417,057.00 and \$558,144.00

Unit: CRU#1 and CRU#2

Dated this 18th day of April, 2021.

THE UNDERSIGNED HAS HAD THIS IRREVOCABLE DIRECTION TO PAY WITNESSED REMOTELY BY VIDEO CONFERENCE AND COMPLETED BY A LAWYER WHO HAS PROVIDED INDEPENDENT LEGAL ADVICE TO THE UNDERSIGNED.

WITNESSED BY:



Witness Signature

Nicholas J. Carlson

Printed Name of Witness

900 - 885 West Georgia St., Vancouver, BC

Witness Address

Lawyer

Witness Occupation

1208596 B.C. LTD.



Authorized Signatory



IRREVOCABLE DIRECTION TO PAY

TO: Dentons Canada LLP
 20th Floor, 250 Howe Street
 Vancouver, British Columbia
 V6C 3R8

Re: Funds held in trust for Deposits for Terrace House Units

Evergreen House Development Limited Partnership (the "**Old LP**") by its general partner, Port Capital Development (EV) Inc. (the "**Old GP**") pursued the development of a project located at 1250 West Pender Street, Vancouver, BC (the "**Terrace House Project**"). The undersigned has provided a deposit (the "**Deposit**") that is currently held in trust with Dentons Canada LLP ("**Dentons**") to acquire a unit in the Terrace House Project, the details of which are set out below.

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Please accept this as your irrevocable authority and direction to, once you have obtained the Consents and the Conditions have been satisfied, to transfer the Deposit to 1296371 B.C. Ltd. in order to facilitate the loan by the Junior Lender to Newco so that Newco can acquire the CMLS Loan and the DIP Loan. This irrevocable authority and direction will terminate on August 31, 2021, unless extended by the undersigned in writing.

Name of Deposit Holder: 1301981 B.C. Ltd.
Deposit Amount Held in Trust at Dentons: \$1,162,500.00
Unit: 901

Dated this 6 day of May, 2021.

THE UNDERSIGNED HAS HAD THIS IRREVOCABLE DIRECTION TO PAY WITNESSED.

WITNESSED BY:

Witness Signature

Printed Name of Witness

Witness Address

Witness Occupation

1301981 B.C. LTD.

Authorized Signatory

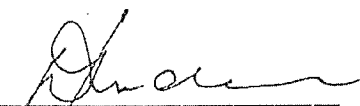


CONFIRMATION and AUTHORIZATION

Hudani Investment Corp. ("Hudani") confirms that the deposit in the amount of \$1,162,500.00 and held by Dentons Canada LLP in trust for the purchase of Unit 901 of the Terrace House Project is hereby irrevocably assigned by it to 1301981 B.C. Ltd. ("981 Ltd.") in consideration for 981 Ltd. agreeing to fulfill the terms and conditions of the purchase contract for the Unit 901, as amended, and arranging for or causing the release of Hudani from such purchase.

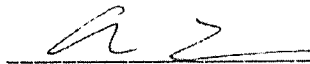
Hudani irrevocably authorizes Dentons Canada LLP to accept instructions from 981 Ltd. regarding the deposit and its use for 981 Ltd.

HUDANI INVESTMENT CORP.

Per: 

Print Name: Imtiyaz Hudani (CEO)

Date: May 6, 2021, 2021


Signature of Witness

A. Phaver
Print Name of Witness

Acknowledged by:

1301981 B.C. LTD.

Per: 

Print Name: AUTHORIZED SIGNATORY

Date: May 6, 2021

IRREVOCABLE DIRECTION TO PAY

TO: Dentons Canada LLP
 20th Floor, 250 Howe Street
 Vancouver, British Columbia
 V6C 3R8

Re: Funds held in trust for Deposits for Terrace House Units

Evergreen House Development Limited Partnership (the "**Old LP**") by its general partner, Port Capital Development (EV) Inc. (the "**Old GP**") pursued the development of a project located at 1250 West Pender Street, Vancouver, BC (the "**Terrace House Project**"). The undersigned has provided a deposit (the "**Deposit**") that is currently held in trust with Dentons Canada LLP ("**Dentons**") to acquire a unit in the Terrace House Project, the details of which are set out below.

CMLS Financial Ltd ("**CMLS**") was the Terrace House Project's construction lender pursuant to a commitment letter dated July 4, 2019 (the "**CMLS Loan**") as amended. The CMLS Loan is secured by, among other things, a first ranking mortgage against the Terrace House Project. The indebtedness on the CMLS Loan was approximately \$20.1 million at the commencement of the CCAA Proceedings in 2020.

On May 29, 2020, Ernst & Young Inc. ("**EY**") was appointed as the monitor of the Terrace House Project pursuant to a court order of the BC Supreme Court (the "**CCAA Proceedings**"). The court also approved a debtor in possession loan (the "**DIP Loan**") in favour of Desjardins Financial Security Life Assurance Company ("**Desjardins**" or the "**DIP Lender**"). The indebtedness on the DIP Loan is projected to be \$1.5 million as at April 30, 2021.

1296371 B.C. Ltd. (the "**Junior Lender**") has been created to participate in the acquisition of the CMLS Loan and the DIP Loan. Domain Mortgage Corp. and/or Bankers Mortgage Corp. doing business as Domain Funding (Domain Mortgage Corp. and Bankers Mortgage Corp., individually or collectively are "**Domain Funding**") as the new funder (the "**Senior Lender**") has agreed to provide the sum of \$16M and Domain Funding has or will establish a new entity ("**Newco**") controlled by Domain Funding to acquire the CMLS Mortgage and the DIP Loan. The Senior Lender will have the first position of repayment under the acquired CMLS Mortgage and DIP Loan and the Junior Lender will have second position of repayment under the CMLS Mortgage pursuant to an interlender or co-lender agreement as between the Senior Lender and the Junior Lender. The CMLS Loan and DIP Loan will remain as charges on the real estate related to the Terrace House Project with the expectation that the Senior Lender would be repaid once new construction financing (the "**Construction Financing**") is obtained. The Construction Financing will be used to repay the Senior Lender and may be used as part of a plan to exit CCAA on terms to be determined. On the registration of the Construction Financing on the Terrace House Project, the Junior Lender would release the funds back into the Terrace House Project to be used as equity with each of the lenders to the Junior Lender being credited with a deposit against a unit in the Terrace House Project.

This Direction is intended to reflect the general agreement of the undersigned to the use of the Deposit on the terms herein, subject only to the consents (the "**Consents**") required to obtain the release of the Deposit from the trust account of Dentons being (1) the consent of the Monitor (on behalf of the developer), (2) the consent of CMLS and agreement to sell and assign the CMLS Loan, and (3) the consent of the DIP Lender and agreement to sell and assign the DIP Loan. The additional conditions (the "**Conditions**") to the release of the Deposit are that CMLS, the DIP Lender and Newco finalize and sign a purchase agreement to allow Newco to acquire the CMLS Loan and the DIP Loan as well as the necessary Court approvals in the CCAA Proceedings.

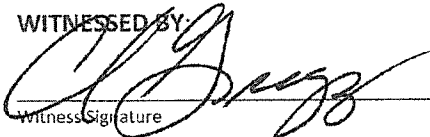
Please accept this as your irrevocable authority and direction to, once you have obtained the Consents and the Conditions have been satisfied, to transfer the Deposit to 1296371 B.C. Ltd. in order to facilitate the loan by the Junior Lender to Newco so that Newco can acquire the CMLS Loan and the DIP Loan. This irrevocable authority and direction will terminate on August 31, 2021, unless extended by the undersigned in writing.

Name of Deposit Holder: 1207867 B.C. Ltd.
 Deposit Amount Held in Trust at Dentons: \$645,000.00
 Unit: 403

Dated this 30th day of April, 2021.

THE UNDERSIGNED HAS HAD THIS IRREVOCABLE DIRECTION TO PAY WITNESSED AND COMPLETED BY A LAWYER WHO HAS PROVIDED INDEPENDENT LEGAL ADVICE TO THE UNDERSIGNED.

WITNESSED BY:

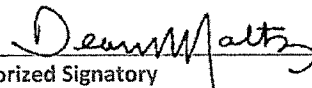

 Witness Signature

Carol Gregg
 Printed Name of Witness

415 W High Ave, High Point NC
 Witness Address

Furniture Designer
 Witness Occupation

1207867 B.C. LTD.


 Authorized Signatory



IRREVOCABLE DIRECTION TO PAY

TO: Dentons Canada LLP
 20th Floor, 250 Howe Street
 Vancouver, British Columbia
 V6C 3R8

Re: Funds held in trust for Deposits for Terrace House Units

Evergreen House Development Limited Partnership (the "Old LP") by its general partner, Port Capital Development (EV) Inc. (the "Old GP") pursued the development of a project located at 1250 West 4th Avenue, Vancouver, BC (the "Terrace House Project"). The undersigned has provided a deposit (the "Deposit") that is currently held in trust with Dentons Canada LLP ("Dentons") to acquire a unit in the Terrace House Project, the details of which are set out below.

CMLS Financial Ltd ("CMLS") was the Terrace House Project's construction lender pursuant to a commitment letter dated July 4, 2019 (the "CMLS Loan") as amended. The CMLS Loan is secured by, among other things, a first ranking mortgage against the Terrace House Project. The indebtedness on the CMLS Loan was approximately \$20.1 million at the commencement of the CCAA Proceedings in 2020.

On May 29, 2020, Ernst & Young Inc. ("EY") was appointed as the monitor of the Terrace House Project pursuant to a court order of the BC Supreme Court (the "CCAA Proceedings"). The court also approved a debtor in possession loan (the "DIP Loan") in favour of Desjardins Financial Security Life Assurance Company ("Desjardins" or the "DIP Lender"). The indebtedness on the DIP Loan is projected to be \$1.5 million as at April 30, 2021.

1296371 B.C. Ltd. (the "Junior Lender") has been created to participate in the acquisition of the CMLS Loan and the DIP Loan. Domain Mortgage Corp. and/or Bankers Mortgage Corp. doing business as Domain Funding (Domain Mortgage Corp. and Bankers Mortgage Corp., individually or collectively are "Domain Funding") as the new funder (the "Senior Lender") has agreed to provide the sum of \$16M and Domain Funding has or will establish a new entity ("Newco") controlled by Domain Funding to acquire the CMLS Mortgage and the DIP Loan. The Senior Lender will have the first position of repayment under the acquired CMLS Mortgage and DIP Loan and the Junior Lender will have second position of repayment under the CMLS Mortgage pursuant to an interlender or co-lender agreement between the Senior Lender and the Junior Lender. The CMLS Loan and DIP Loan will remain as charges on the real estate related to the Terrace House Project with the expectation that the Senior Lender would be repaid once new construction financing (the "Construction Financing") is obtained. The Construction Financing will be used to repay the Senior Lender and may be used as part of a plan to exit CCAA on terms to be determined. On the registration of the Construction Financing on the Terrace House Project, the Junior Lender would release the funds back into the Terrace House Project to be used as equity with each of the lenders to the Junior Lender being credited with a deposit against a unit in the Terrace House Project.

This Direction is intended to reflect the general agreement of the undersigned to the use of the Deposit on the terms herein, subject only to the consents (the "Consents") required to obtain the release of the Deposit from the trust account of Dentons being (1) the consent of the Monitor (on behalf of the developer), (2) the consent of CMLS and agreement to sell and assign the CMLS Loan, and (3) the consent of the DIP Lender and agreement to sell and assign the DIP Loan. The additional conditions (the "Conditions") to the release of the Deposit are that CMLS, the DIP Lender and Newco finalize and sign a purchase agreement to allow Newco to acquire the CMLS Loan and the DIP Loan as well as the necessary Court approvals in the CCAA Proceedings.

Please accept this as your irrevocable authority and direction to, once you have obtained the Consents and the Conditions have been satisfied, to transfer the Deposit to 1296371 B.C. Ltd. in order to facilitate the loan by the Junior Lender to Newco so that Newco can acquire the CMLS Loan and the DIP Loan. This irrevocable authority and direction will terminate on August 31, 2021, unless extended by the undersigned in writing.

Name of Deposit Holder: Robert Davis

Deposit Amount Held in Trust at Dentons: \$592,500.00

Unit: 503

Dated this ____ day of April, 2021.

THE UNDERSIGNED HAS HAD THIS IRREVOCABLE DIRECTION TO PAY WITNESSED AND COMPLETED BY A LAWYER WHO HAS PROVIDED INDEPENDENT LEGAL ADVICE TO THE UNDERSIGNED.

WITNESSED BY:

7/1/21
Witness Signature

Jeffrey Welsh
Printed Name of Witness

9643 Annelay Ave., Northridge CA 91325
Witness Address

Attorney
Witness Occupation

Robert Davis
ROBERT DAVIS



IRREVOCABLE DIRECTION TO PAY

TO: Dentons Canada LLP
 20th Floor, 250 Howe Street
 Vancouver, British Columbia
 V6C 3R8

Re: Funds held in trust for Deposits for Terrace House Units

Evergreen House Development Limited Partnership (the "Old LP") by its general partner, Port Capital Development (EV) Inc. (the "Old GP") pursued the development of a project located at 1250 West Pender Street, Vancouver, BC (the "Terrace House Project"). The undersigned has provided a deposit (the "Deposit") that is currently held in trust with Dentons Canada LLP ("Dentons") to acquire a unit in the Terrace House Project, the details of which are set out below.

CMLS Financial Ltd ("CMLS") was the Terrace House Project's construction lender pursuant to a commitment letter dated July 4, 2019 (the "CMLS Loan") as amended. The CMLS Loan is secured by, among other things, a first ranking mortgage against the Terrace House Project. The indebtedness on the CMLS Loan was approximately \$20.1 million at the commencement of the CCAA Proceedings in 2020.

On May 29, 2020, Ernst & Young Inc. ("EY") was appointed as the monitor of the Terrace House Project pursuant to a court order of the BC Supreme Court (the "CCAA Proceedings"). The court also approved a debtor in possession loan (the "DIP Loan") in favour of Desjardins Financial Security Life Assurance Company ("Desjardins" or the "DIP Lender"). The indebtedness on the DIP Loan is projected to be \$1.5 million as at April 30, 2021.

1296371 B.C. Ltd. (the "Junior Lender") has been created to participate in the acquisition of the CMLS Loan and the DIP Loan. Domain Mortgage Corp. and/or Bankers Mortgage Corp. doing business as Domain Funding (Domain Mortgage Corp. and Bankers Mortgage Corp., individually or collectively are "Domain Funding") as the new funder (the "Senior Lender") has agreed to provide the sum of \$16M and Domain Funding has or will establish a new entity ("Newco") controlled by Domain Funding to acquire the CMLS Mortgage and the DIP Loan. The Senior Lender will have the first position of repayment under the acquired CMLS Mortgage and DIP Loan and the Junior Lender will have second position of repayment under the CMLS Mortgage pursuant to an interlender or co-lender agreement as between the Senior Lender and the Junior Lender. The CMLS Loan and DIP Loan will remain as charges on the real estate related to the Terrace House Project with the expectation that the Senior Lender would be repaid once new construction financing (the "Construction Financing") is obtained. The Construction Financing will be used to repay the Senior Lender and may be used as part of a plan to exit CCAA on terms to be determined. On the registration of the Construction Financing on the Terrace House Project, the Junior Lender would release the funds back into the Terrace House Project to be used as equity with each of the lenders to the Junior Lender being credited with a deposit against a unit in the Terrace House Project.

This Direction is intended to reflect the general agreement of the undersigned to the use of the Deposit on the terms herein, subject only to the consents (the "Consents") required to obtain the release of the Deposit from the trust account of Dentons being (1) the consent of the Monitor (on behalf of the developer), (2) the consent of CMLS and agreement to sell and assign the CMLS Loan, and (3) the consent of the DIP Lender and agreement to sell and assign the DIP Loan. The additional conditions (the "Conditions") to the release of the Deposit are that CMLS, the DIP Lender and Newco finalize and sign a purchase agreement to allow Newco to acquire the CMLS Loan and the DIP Loan as well as the necessary Court approvals in the CCAA Proceedings.

Please accept this as your irrevocable authority and direction to, once you have obtained the Consents and the Conditions have been satisfied, to transfer the Deposit to 1296371 B.C. Ltd. in order to facilitate the loan by the Junior Lender to Newco so that Newco can acquire the CMLS Loan and the DIP Loan. This irrevocable authority and direction will terminate on August 31, 2021, unless extended by the undersigned in writing.

This irrevocable direction allows the use of the Deposit for participation into a loan to the Junior Lender secured against the purchased CMLS Loan mortgage. This direction does not convert this loan into equity. That would require a follow up equity conversion agreement. If no follow up agreement to convert into equity is accepted and signed by you, the Deposit would be repaid when the loan gets refinanced through the Construction Financing. If the Conditions are not met, then the Deposit will remain in trust at Dentons LLP.

Name of Deposit Holder: Simon Wong

Deposit Amount Held in Trust at Dentons: \$675,000.00

Unit: 401

Dated this 7 day of May, 2021.

THE UNDERSIGNED HAS HAD THIS IRREVOCABLE DIRECTION TO PAY WITNESSED.

WITNESSED BY:

Mary Wong
Witness Signature

Mary Wong
Printed Name of Witness

987 Crystal Court Coq
Witness Address

housewife
Witness Occupation

Simon Wong
SIMON WONG



Appendix B

From: Mike Bell (mike.bell@parthenon.ey.com)
Sent: July 4, 2022 1:19 PM
To: Dani Hendry; peter.rubin@blakes.com; Claire.hildebrand@blakes.com; Jason Eckford; colin.brousson@dlapiper.com; wroberts; jason.levine@justice.gc.ca; Vicki.Tickle@mcmillan.ca; phil@mckechnie.bc.ca; saepi@franclarchitecture.com; schua@workshopgroup.ca; ghods@pivoticproperties.com; ailin@linhaw.com; dorif.kh@gmail.com; athaver@banucapital.com; john.sandrelli@dentons.com; jordan.schultz@dentons.com; eamonn.watson@dentons.com; lee.ngo@dentons.com; avic.arenas@dentons.com; preardon@nst.ca; kjackson@fasken.com; gnesbitt@fasken.com; michael.williams@clydeco.ca; sstephens@owenbird.com; Philippe Mendelson; ateadale@lawsonlundell.com; apienaar@mcewanpartners.com; kmcewan@mcewanpartners.com
Cc: David Gruber; Keely Cameron
Subject: In the Matter of the Companies Creditors Arrangement Act and In the Matter of a Plan of Compromise and Arrangement of Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership [BJ-WSLegal.FID5537572]

Dear Service List,

On May 12, 2022, the Court granted an order in the above matter which approved a \$20 million refinancing (the "Proposed Mandate Loan") to, a) repay the Domain Facility, and b) provide the Petitioners with working capital to fund the ongoing CCAA Proceedings. The maturity date of the Domain Facility was July 1, 2022.

The Twelfth Report of the Monitor filed June 16, 2022 described that the Proposed Mandate Loan (which was expected to close the week ended May 20, 2022) had not yet closed and no funds had been advanced thereunder.

At a hearing on June 24, 2022, the Court directed the Monitor to report to stakeholders by July 4, 2022 on whether the Proposed Mandate Loan had closed prior to the maturity date of the Domain Facility. We write this email to confirm that the Proposed Mandate Loan has not closed and is not expected to close and the Petitioners are now in default on the Domain Facility.

The Petitioners advise the Monitor that they are in discussions with two parties with respect to a financing that will repay the Domain Facility. A hearing has been scheduled for July 13, 2022 to consider next steps. We anticipate that one or more of the Petitioners' Secured Creditors may seek relief at this hearing.



Mike Bell, CPA, CA, CIRP, LIT
Turnaround and Restructuring Strategy

Senior Vice President | Ernst & Young Inc.
Managing Director | EY-Parthenon
Direct: +1 604 899 3566 | Mobile: +1 604 786 8832 |
Email: mike.bell@parthenon.ey.com
Website: <http://www.ey.com>

Assistant: Katie Robertson | Ph: +1 604 891 8296 | Katie.J.Robertson@ca.ey.com

Appendix C

Open Invoice Register by Property

Port Capital Group of Companies

07/06/2022

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Property: 2020-00 Evergreen House Development LP

<u>Invoice</u>	<u>Invoice Date</u>	<u>Payment Date</u>	<u>Description</u>	<u>Property Expense Acct</u>	<u>Original Amount</u>	<u>Discount Offered</u>	<u>Payments To Date</u>	<u>Balance</u>
AKER01	Bryan Akeroyd							
2020-20220623	06/23/2022		2020-JUN23 INV TH	2020-00-0-1701	80.00	.00	.00	80.00
ALLI02	Allied Crane Ltd							
4933	04/01/2022		2020-CRANE RENTAL APR'22	2020-00-0-1701	8,085.00	.00	.00	8,085.00
4964	05/01/2022		2022-CRANE RENTAL MAY'22	2020-00-0-1701	8,085.00	.00	.00	8,085.00
5010	06/01/2022		2022-CRANE RENTAL JUN'22	2020-00-0-1701	8,085.00	.00	.00	8,085.00
5046	07/01/2022		2020-CRANE RENTAL JUL'22	2020-00-0-1701	8,085.00	.00	.00	8,085.00
			Vendor Totals		32,340.00	.00	.00	32,340.00
ALPIN01	Alpine West Systems Electrical							
F2381-029	06/25/2022		2020-RENTAL FEB-JUN'22	2020-00-0-1701	7,875.00	.00	.00	7,875.00
ARJI01	Arjian Investments Corp							
1270-22-04	04/01/2022		2020-MGMT APR'22	2020-00-0-1701	7,132.53	.00	.00	7,132.53
1270-22-05	05/01/2022		2020-MGMT MAY'22	2020-00-0-1701	7,132.53	.00	.00	7,132.53
1270-22-06	06/01/2022		2020-MGMT JUN'22	2020-00-0-1701	7,132.53	.00	.00	7,132.53
			Vendor Totals		21,397.59	.00	.00	21,397.59
BCHYDRO	BC Hydro							
2020-20220427	04/24/2022		2020-12002204 CONSTRUCTION	2020-00-0-1701	4,143.30	.00	.00	4,143.30
2020-20220531	05/31/2022		2020-11367304 MAY31	2020-00-0-1701	540.83	.00	.00	540.83
2020-20220602	06/02/2022		2020-11234075 JUN02	2020-00-0-1701	33.79	.00	.00	33.79
			Vendor Totals		4,717.92	.00	.00	4,717.92
BENN01	BENNETT JONES LLP							
1456057	06/08/2022		2020-090034.00003 JUN08	2020-00-0-1701	26,061.93	.00	.00	26,061.93
CITYVANCO	City of Vancouver							
2020-20220512	05/12/2022		2020-592117410000 2022	2020-00-0-1701	61,423.80	.00	.00	61,423.80
COAS01	Coastlines Creative Group Inc.							
8379	03/29/2022		2020-MAR INV	2020-00-0-1010	1,575.00	.00	.00	1,575.00

Open Invoice Register by Property

Port Capital Group of Companies

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Property: 2020-00 Evergreen House Development LP

<u>Invoice</u>	<u>Invoice Date</u>	<u>Payment Date</u>	<u>Description</u>	<u>Property Expense Acct</u>	<u>Original Amount</u>	<u>Discount Offered</u>	<u>Payments To Date</u>	<u>Balance</u>
DOKA01	Doka Canada Ltd.							
441012439	09/30/2021		2020-RENTAL SEP 2021	2020-00-0-1701	7,309.27	.00	.00	7,309.27
441012508	09/30/2021		2020-RENTAL SEP 2021	2020-00-0-1701	7,309.27	.00	.00	7,309.27
441012734	10/31/2021		2020-RENTA: OCT 2021	2020-00-0-1701	15,105.87	.00	.00	15,105.87
441012895	11/30/2021		2020-RENTAL NOV 2021	2020-00-0-1701	14,618.64	.00	.00	14,618.64
441013036	12/31/2021		2020-RENTAL DEC 2021	2020-00-0-1701	15,105.87	.00	.00	15,105.87
441013233	01/31/2022		2020-RENTAL JAN 2022	2020-00-0-1701	15,105.87	.00	.00	15,105.87
441013351	02/28/2022		2020-RENTAL FEB 2022	2020-00-0-1701	13,644.01	.00	.00	13,644.01
441013585	03/31/2022		2020-RENTAL MAR 2022	2020-00-0-1701	15,105.87	.00	.00	15,105.87
441013878	04/30/2022		2020-RENTAL APR 2022	2020-00-0-1701	14,618.64	.00	.00	14,618.64
441014097	05/31/2022		2020-RENTAL MAY 2022	2020-00-0-1701	15,105.87	.00	.00	15,105.87
2020-20220531	05/31/2022		2020-DISPUTE SETTLE 80%	2020-00-0-1701	26,605.84	.00	.00	26,605.84
			Vendor Totals		106,423.34	.00	.00	106,423.34
FIRSTINS	First Insurance							
5303649-1	04/30/2022		2020-5303649 INSTALLMENT AP	2020-00-0-1701	31,457.00	.00	.00	31,457.00
5303649-2	05/30/2022		2020-5303649 INSTALLMENT MA	2020-00-0-1701	31,457.00	.00	.00	31,457.00
5303649-3	06/30/2022		2020-5303649 INSTALLMENT JU	2020-00-0-1701	31,457.00	.00	.00	31,457.00
			Vendor Totals		94,371.00	.00	.00	94,371.00
GEOPACONS	GeoPacific Consultants							
187227	02/28/2022		2020-SEDIMENT CONTROLS FEB	2020-00-0-1701	420.00	.00	.00	420.00
188682	03/31/2022		2020-SEDIMENT CONTROL MAR	2020-00-0-1701	210.00	.00	.00	210.00
191305	04/30/2022		2020-MONTHLY MONITOR APR IN	2020-00-0-1701	1,050.00	.00	.00	1,050.00
191750	04/30/2022		2020-SEDIMENT CONTROL APR	2020-00-0-1701	210.00	.00	.00	210.00

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Property: 2020-00 Evergreen House Development LP

<u>Invoice</u>	<u>Invoice Date</u>	<u>Payment Date</u>	<u>Description</u>	<u>Property Expense Acct</u>	<u>Original Amount</u>	<u>Discount Offered</u>	<u>Payments To Date</u>	<u>Balance</u>
GEOPACONS GeoPacific Consultants								
194863	05/31/2022		2020-MONTHLY MONITOR MAY IN	2020-00-0-1701	210.00	.00	.00	210.00
			Vendor Totals		2,100.00	.00	.00	2,100.00
GHLCONS GHL Consultants Ltd								
63976	04/30/2022		2020-SERVICES APR'22	2020-00-0-1701	459.97	.00	.00	459.97
64323	05/30/2022		2020-SERVICES MAY'22	2020-00-0-1701	544.26	.00	.00	544.26
			Vendor Totals		1,004.23	.00	.00	1,004.23
GLAGLAZ Glastech Glazing Contractors								
515229	04/25/2022		2020-APR'22 STORAGE	2020-00-0-1701	6,548.85	.00	.00	6,548.85
515265	05/24/2022		2020-MAY'22 STORAGE	2020-00-0-1701	6,548.85	.00	.00	6,548.85
515305	06/22/2022		2020-JUN'22 STORAGE	2020-00-0-1701	6,548.85	.00	.00	6,548.85
			Vendor Totals		19,646.55	.00	.00	19,646.55
JOESCOT Joel Scott								
2020-20220318	03/18/2022		2020-EXPENSES MAR18 TH	2020-00-0-1701	1,944.75	.00	.00	1,944.75
2020-20220406	04/06/2022		2020-EXPENSES APR06 TH	2020-00-0-1701	66.91	.00	.00	66.91
2020-20220406	04/06/2022		2020-EXPENSES APR06 TH	2020-00-0-1701	100.00	.00	.00	100.00
2020-20220504	05/04/2022		2020-EXPENSE MAY04 TH	2020-00-0-1701	192.46	.00	.00	192.46
2020-20220504	05/04/2022		2020-EXPENSE MAY04 TH	2020-00-0-1701	85.93	.00	.00	85.93
			Vendor Totals		2,390.05	.00	.00	2,390.05
LION01 Lionsgate Water Treatment Ltd.								
18-3004.29	04/13/2022		2020-APR SEDIMENT CONTROL	2020-00-0-1701	1,792.00	.00	.00	1,792.00
18-3004.30	05/11/2022		2020-MAY SEDIMENT CONTROL	2020-00-0-1701	1,792.00	.00	.00	1,792.00
			Vendor Totals		3,584.00	.00	.00	3,584.00
LIVI05 Living Beachside Development								
1111-20220606	06/06/2022		2020-REIMBURSED BRYAN	2020-00-0-1010	1,531.05	.00	.00	1,531.05
MATA01 Matakana Scaffolding B.C Inc.								
39291	11/23/2021		2020-NOV23-DEC20 EQPMNT	2020-00-0-1010	1,461.60	.00	.00	1,461.60
40257	04/12/2022		2020-APR12-MAY09 EQPMNT	2020-00-0-1010	1,461.60	.00	.00	1,461.60

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Property: 2020-00 Evergreen House Development LP

<u>Invoice</u>	<u>Invoice Date</u>	<u>Payment Date</u>	<u>Description</u>	<u>Property Expense Acct</u>	<u>Original Amount</u>	<u>Discount Offered</u>	<u>Payments To Date</u>	<u>Balance</u>
MATA01	Matakana Scaffolding B.C Inc.							
40325	04/22/2022		2020-APR22-MAY19 EQPMNT	2020-00-0-1010	459.20	.00	.00	459.20
40326	04/22/2022		2020-APR22-MAY19 EQPMNT	2020-00-0-1010	772.80	.00	.00	772.80
40474	05/10/2022		2020-MAY10-JUN06 EQPMNT	2020-00-0-1010	1,461.60	.00	.00	1,461.60
40549	05/20/2022		2020-MAY20-JUN16 EQPMNT	2020-00-0-1010	459.20	.00	.00	459.20
40550	05/20/2022		2020-MAY20-JUN16 EQPMNT	2020-00-0-1010	772.80	.00	.00	772.80
40700	06/07/2022		2020-JUN07-JUL04 EQPMNT	2020-00-0-1701	1,461.60	.00	.00	1,461.60
40764	06/17/2022		2020-JUN17-JUL14 EQPMNT	2020-00-0-1010	459.20	.00	.00	459.20
40765	06/17/2022		2020-JUN17-JUL14 EQPMNT	2020-00-0-1010	772.80	.00	.00	772.80
			Vendor Totals		9,542.40	.00	.00	9,542.40
PORT03	PortLiving Development Corp.							
2020-20220228	02/28/2022		2020-INTERCO	2020-00-0-1010	1,135.60	.00	.00	1,135.60
STUHOWA	Stuart Howard Architects Inc							
2022-099	04/30/2022		1800-APR INV	2020-00-0-1701	2,291.63	.00	.00	2,291.63
VANFIRE	Vancouver Fire & Radius							
450294	04/01/2022		2020-APR'22	2020-00-0-1701	3,056.55	.00	.00	3,056.55
453568	05/01/2022		2020-MAY'22	2020-00-0-1701	3,056.55	.00	.00	3,056.55
456909	06/01/2022		2020-JUN'22	2020-00-0-1701	3,056.55	.00	.00	3,056.55
461446	07/01/2022		2020-JUL'22	2020-00-0-1701	3,056.55	.00	.00	3,056.55
			Vendor Totals		12,226.20	.00	.00	12,226.20
YELL02	Yellow Fence Rentals Inc							
0000115108	03/31/2022		2020-MAR31'22 FENCE RENTAL	2020-00-0-1701	369.60	.00	.00	369.60
0000115832	04/30/2022		2020-APR28'22 FENCE RENTAL	2020-00-0-1701	369.60	.00	.00	369.60
0000116592	05/29/2022		2020-MAY26'22 FENCE RENTAL	2020-00-0-1701	369.60	.00	.00	369.60

Open Invoice Register by Property

Port Capital Group of Companies

07/06/2022

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Property: 2020-00 Evergreen House Development LP

<u>Invoice</u>	<u>Invoice Date</u>	<u>Payment Date</u>	<u>Description</u>	<u>Property Expense Acct</u>	<u>Original Amount</u>	<u>Discount Offered</u>	<u>Payments To Date</u>	<u>Balance</u>
YELL02								
0000117376	06/26/2022		2020-JUN26'22 FENCE RENTAL	2020-00-0-1701	369.60	.00	.00	369.60
				Vendor Totals	1,478.40	.00	.00	1,478.40
				Property Totals	413,195.69	.00	.00	413,195.69
				Report Totals	413,195.69	.00	.00	413,195.69

Appendix D

**PURCHASE AND SALE AGREEMENT
(TERRACE HOUSE, VANCOUVER, BC)**

THIS AGREEMENT is dated for reference ●, 2022 and is made

AMONG:

PORT CAPITAL DEVELOPMENT (EV) INC., a British Columbia corporation formed under the *Business Corporations Act* (British Columbia)

(the “**GP**”)

AND:

EVERGREEN HOUSE DEVELOPMENT LIMITED PARTNERSHIP, a British Columbia limited partnership formed under the *Partnership Act* (British Columbia)

(the “**Limited Partnership**” and, together with the GP, the “**Vendor**”)

AND:

●

(the “**Purchaser**”)

BACKGROUND:

- A. The Vendor is the legal and beneficial owner of the lands and premises legally described in Part 1 of Schedule A (the “**Lands**”).
- B. The Vendor obtained an initial order of the Supreme Court of British Columbia dated May 29, 2020 under the *Companies’ Creditors Arrangement Act*, which among other things, commenced the CCAA Proceedings and granted an initial stay of proceedings in respect of the Vendor.
- C. The Vendor agrees to sell and the Purchaser has agrees to purchase all of the Vendor’s right, title, and interest in and to the Purchased Assets (as defined in this Agreement) on the terms and conditions set out in this Agreement.

FOR CONSIDERATION, the receipt and sufficiency of which is acknowledged by each of the parties, the parties agree as follows:

ARTICLE 1 - INTERPRETATION

1.1 Definitions. In this Agreement:

- (a) “**Approved Contracts**” means those Contracts entered into by the Vendor and any third party consultants in connection with the Project along with any other material Contracts which the Purchaser has approved by way of notice in writing to the Vendor on or before the Condition Date.

- (b) **“Approval and Vesting Order”** has the meaning given to it in Section 8.4(b)(ii).
- (c) **“Authorized Parties”** has the meaning given to it in Section 11.17.
- (d) **“Balance”** has the meaning given to it in Section 2.2(c).
- (e) **“Buildings”** means all buildings and improvements located on the Lands.
- (f) **“Business Day”** means any day that is not a Saturday, Sunday, Boxing Day, Easter Monday or statutory holiday in British Columbia.
- (g) **“Buyer”** means a purchaser of one or more condominium units at the Property pursuant to Pre-Sale Contracts.
- (h) **“Buyer List”** means a list of all Buyers specifying the name of each Buyer (or if applicable any assignee or sublessee) as stated in the applicable Pre-Sale Contract, such Buyer’s address and the amount of any deposits held by or on behalf of the Vendor in accordance such Pre-Sale Contract.
- (i) **“CCAA Proceedings”** means the legal proceedings in the Court under the *Companies’ Creditors Arrangement Act*, Vancouver Registry No. S-205095.
- (j) **“Chattels”** means all of the personal property owned by the Vendor and used in connection with Project including without limitation, all fixtures, leasehold improvements, glass, personal property, plant, and equipment, inventory including spare parts, furniture whether moveable or built-in, computer hardware, kitchen equipment, tools and supplies, whether the same is located on the Lands or otherwise.
- (k) **“Closing Date”** means the date that is 15 days after the granting of the Final Order.
- (l) **“Closing Documents”** has the meaning given to it in Section 9.4.
- (m) **“Condition Date”** means the date on which the conditions precedent set out in Section 8.1(a) are satisfied or waived.
- (n) **“Consultant Reports”** means all consultant reports and studies that were commissioned by the Vendor in connection with the Project.
- (o) **“Contracts”** means all contracts or agreements, other than Title Contracts and Pre-Sale Contracts, relating to the use or operation of the Property or any part thereof or the design, development and construction of the Project, including, without limitation, the consulting agreements in connection with the Property or any part thereof made by or on behalf of the Vendor relating to the Property.
- (p) **“Court”** means the Supreme Court of British Columbia.
- (q) **“Creditors”** means creditors of the Vendor.
- (r) **“Delay Notice”** has the meaning given to it in Section 11.13.
- (s) **“Deposit”** means the deposits referred to in Sections 2.2(a) and 2.2(b).

- (t) **"Encumbrance"** means any legal notation, charge, lien, interest or other encumbrance or title defect of whatever kind or nature, regardless of form, whether or not registered or registrable and whether or not consensual or arising by law (statutory or otherwise), including any mortgage, lien, pledge, debenture, trust deed, assignment by way of security, security interest, conditional sales contract or similar interest or instrument charging, or creating a security interest in, the Purchased Assets or any part thereof or interest therein, and any agreement, lease, licence, option or claim, easement, right of way, restriction, execution or other encumbrance (including any notice or other registration in respect of any of the foregoing) affecting title to or the ownership of the Purchased Assets or any part thereof or interest therein.
- (u) **"ETA"** has the meaning given to it in Section 10.1.
- (v) **"Execution Date"** means the date this Agreement is fully executed by all parties to the Agreement.
- (w) **"Excluded Assets"** means: (i) all shares of capital stock or other equity interest in securities in any entity other than the Shares; (ii) any partnership interest in the Limited Partnership; (iii) Contracts which are not Approved Contracts; (iv) all Liability of the Vendor arising prior to the Closing Date including, but not limited to, Liability owed to lenders, service contractors or third parties of any kind including all Liability under the Approved Contracts or Plans, Permits and Approvals; (v) any Liability relating to or arising out of the Excluded Assets including, without limitation, Liability for terminating, not complying with or a defaulting under any Contract; (vi) any Liability of the Vendor for taxes resulting from the Vendor's sale of the Purchased Assets; (vii) all employees, employment agreements, executive personnel agreements, officer or director agreements, union contracts, collective agreements, employee wages, employee benefit plans or payments, pension obligations, employee tax withholding obligations, employee health or dental plan obligations, all grievances, arbitrations, employee complaints or claims, labour relations board actions or other employee proceedings and similar obligations of the Vendor; (viii) all Liability for payment of fees for operations of the Purchased Assets up to the Closing Date; (ix) any proceedings, claims or actions commenced in any court initiated against the Vendor or threatened against the Vendor; (x) the costs and expenses and Liability of the Vendor under the CCAA Proceedings; (xi) any Liability for a breach or non-compliance with any applicable law; (xii) the Liability of the Vendor under this Agreement and any other assets, property or obligations which pursuant to the terms and conditions of this Agreement, remain the property of the Vendor after the completion of the transactions contemplated herein including, without limitation, the rights of the Vendor under this Agreement; (xiii) any proceedings, claims or causes of action for the benefit of the Vendor; (xiv) all cash of the Vendor; (xv) Receivables; and (xvi) all Pre-Sale Contracts including, for greater certainty, all deposits provided pursuant to the Pre-Sale Contracts and all claims, causes of action or rights in relation to such deposits.
- (x) **"Excusable Delay"** means any delay in the performance or observance by the Vendor or Purchaser of any obligation or act of the Vendor or Purchaser, as applicable, hereunder which occurs as a consequence of or is attributable to any circumstance which is not caused by any default or act of commission or omission of that party and which is beyond the reasonable control of that party, including

without limiting the generality of the foregoing, strikes or labour or industrial disturbances (including lock-outs), civil disturbances, acts, orders, legislation, regulations, good faith compliance with an order, directive, guideline or other recommendation of any governmental or other public authorities (including, without limitation, health authorities or occupational safety authorities), acts of public enemies, war, riots, sabotage, blockades, embargoes, shortages of materials and suppliers, shortages of labour, lightning, earthquakes, fire, storms, pandemics, epidemics, quarantines and health emergencies, hurricanes, floods, wash-outs, explosions and acts of God, but excluding, for clarity, the financial circumstances of the Purchaser.

- (y) **"Final Order"** has the meaning given to it in Section 8.4(b).
- (z) **"Governmental Authority"** means (i) any domestic or foreign government, whether national, federal, provincial, state, territorial, municipal or local (whether administrative, legislative, executive or otherwise), (ii) any agency, authority, ministry, department, regulatory body, court, central bank, bureau, board or other instrumentality having legislative, judicial, taxing, regulatory, prosecutorial or administrative powers or functions of, or pertaining to, government, (iii) any court, tribunal, commission, individual, arbitrator, arbitration panel or other body having adjudicative, regulatory, judicial, quasi-judicial, administrative or similar functions, and (iv) any other body or entity created under the authority of or otherwise subject to the jurisdiction of any of the foregoing, including any stock or other securities exchange or professional association.
- (aa) **"GST"** has the meaning given to it in Section 10.1.
- (bb) **"GST Certificate"** has the meaning given to it in Section 10.1.
- (cc) **"Intellectual Property"** means all intellectual property and proprietary rights of any kind in connection with the Project, including the "Terrace House" name, architectural design and instruments of service and all rights to the branding, logo and design in connection with the same.
- (dd) **"Interim Period"** means the period commencing on the Execution Date until and including the Closing Date.
- (ee) **"Land Title Office"** means the Land Title and Survey Authority of British Columbia, land title office applicable to the Lands.
- (ff) **"Lands"** has the meaning given to it in Recital A.
- (gg) **"Liability"** means any debts, claim, liability, duty, responsibility, obligations, commitment, assessment, cost, expense, loss, expenditure, charge, fee, penalty, fine, contribution or premium of any kind or nature whatsoever, whether known or unknown, asserted or unasserted, absolute or contingent, direct or indirect, or due or to become due and regardless of when sustained, incurred or asserted or when the relevant events occurred or circumstances existed.
- (hh) **"LP Agreement"** means the limited partnership agreement of Evergreen House Development Limited Partnership made as of June 30, 2014 and restated as of

March 13, 2015 between those persons who from time to time execute the agreement and become a limited partner, as limited partners, and the GP, as general partner, as further amended and restated, modified or supplemented from time to time.

- (ii) **"Material Loss"** means the loss or damage to or destruction of the Property or any part of it to such an extent that the replacement or repair of it cannot be substantially completed: (i) at a cost of less than \$500,000.00; or (ii) within six (6) months of the occurrence.
- (jj) **"Monitor"** means Ernst & Young Inc., in its capacity as monitor of the CCAA Proceedings or such other monitor or monitors as are appointed by the Court from time to time in connection with the CCAA Proceedings.
- (kk) **"Order"** means an order of the Court.
- (ll) **"Permitted Encumbrances"** means the Encumbrances set out in Part 2 of Schedule A.
- (mm) **"Plans, Permits and Approvals"** means: (i) all plans and specifications pertaining to the construction of the Project, including, without limitation, all structural, architectural, mechanical, electrical, landscape and interior design and specifications for the Project; and (ii) all planning approvals, permits, licences, development agreements, crane swing, underpinning and airspace agreements with respect to the Project.
- (nn) **"Pre-Sale Contracts"** means each of those agreements between the Vendor and a Buyer in respect of the purchase and sale of one or more condominium units at the Property. For greater certainty, a Pre-Sale Contract is not a Contract.
- (oo) **"Project"** means the construction and development of the Building on the Lands.
- (pp) **"Property"** means the Lands and the Buildings.
- (qq) **"Purchase Price"** means subject to Section 5.4, ●, exclusive of any applicable taxes.
- (rr) **"Purchased Assets"** means:
 - (i) in the event that a Reverse Vesting Order is granted by the Court:
 - (A) the Shares; and
 - (B) all of the Limited Partnership's right, title and interest, in and to the following assets and properties:
 - (I) the Property;
 - (II) the Chattels;
 - (III) the Approved Contracts;

- (IV) the Title Contracts;
- (V) the Plans, Permits and Approvals;
- (VI) the Warranties;
- (VII) subject to such transfer being approved by the necessary parties in accordance with Section 3.1(c)(i), the Intellectual Property;
- (VIII) all insurance and new home warranties obtained in connection with the Project; and
- (IX) all marketing materials prepared in connection with the Project,

excluding, for certainty, the Excluded Assets; or

(ii) in the event that an Approval and Vesting Order is granted by the Court:

- (A) all of the Vendor's right, title and interest, in and to the following assets and properties:
 - (I) the Property;
 - (II) the Chattels;
 - (III) the Approved Contracts;
 - (IV) the Title Contracts;
 - (V) the Plans, Permits and Approvals;
 - (VI) the Warranties;
 - (VII) subject to such transfer being approved by the necessary parties in accordance with Section 3.1(c)(i), the Intellectual Property;
 - (VIII) all insurance and new home warranties obtained in connection with the Project; and
 - (IX) all marketing materials prepared in connection with the Project,

excluding, for certainty, the Excluded Assets.

(ss) **"Purchaser's Solicitors"** means • or such other firm or firms of solicitors or agents as are retained by the Purchaser from time to time and written notice of which is provided to the Vendor.

- (tt) **"Receivables"** means the Vendor's interest in all receivables including, without limitation, receivables relating to amounts owed by a Buyer in connection with a Pre-Sale Contract, any grants, subsidies (including the Canada Emergency Wage Subsidy), tax relief or gifts or any other receivable.
- (uu) **"Reverse Vesting Order"** has the meaning given to it in Section 8.4(b)(i).
- (vv) **"Shares"** means all of the issued and outstanding shares in the capital of the GP.
- (ww) **"ShellCo"** means that entity, appointed by the Vendor in connection with a Reverse Vesting Order, to which all Excluded Assets will be transferred by the Vendor in connection with the closing of the transactions contemplated herein and that will replace the GP in its role as general partner of the Limited Partnership. ShellCo will be a subsidiary of GP, brought into the CCAA Proceedings and subsequently assigned into bankruptcy.
- (xx) **"Specified Date"** has the meaning given to it in Section 11.13.
- (yy) **"Title Contracts"** means, collectively, those agreements and instruments affecting the Property or any part thereof, including without limitation, the Permitted Encumbrances and any municipal site plan and development agreements, crane swing, underpinning and airspace agreements, common use agreements and easement agreements, concession or other agreements with any governmental authority or other public authorities having jurisdiction, and any new agreements of similar nature respecting the Property or any part thereof (other than the Contracts or Approved Contracts). For greater certainty, a Title Contract is not a Contract.
- (zz) **"Vendor's Solicitors"** means Bennett Jones LLP or such other firm or firms of solicitors or agents as are retained by the Vendor from time to time and written notice of which is provided to the Purchaser.
- (aaa) **"Warranties"** means all subsisting warranties and guarantees in connection with the Project or any part thereof that are assignable without consent and in effect on the Closing Date.

ARTICLE 2 – PURCHASE AND SALE

2.1 Agreement of Purchase and Sale. Subject to the terms and conditions of this Agreement, the Vendor agrees to sell and the Purchaser agrees to purchase the Purchased Assets for the Purchase Price on the Closing Date free and clear of all Encumbrances, except for the Permitted Encumbrances.

2.2 Payment of Purchase Price. The Purchase Price for the Purchased Assets will be paid by the Purchaser as follows:

- (a) by a first deposit of ●.
- (b) by payment of the balance (the "Balance") of the Purchase Price, as adjusted in accordance with Article 5, on the Closing Date as provided in Article 9.

2.3 Deposit. The Vendor shall cause the Vendor's Solicitors to: (i) deposit the Deposit in an interest bearing trust account promptly following receipt of the Deposit; and (ii) pay the Deposit and any interest that may accrue on it only as set out in this Agreement or as directed in writing by the Vendor and the Purchaser or as directed by a court of competent jurisdiction. The Vendor shall cause the Vendor's Solicitors to pay the Deposit to:

- (a) the Vendor without interest (less the \$10.00 paid by the Vendor to the Purchaser pursuant to Section 8.8):
 - (i) on account of the Purchase Price on the Closing Date as set out in Article 9; or
 - (ii) as liquidated damages upon the default of the Purchaser if the Purchaser is in default of its obligation to complete the transactions contemplated by this Agreement, unless such default is waived in writing by the Vendor and which payment shall be in full satisfaction of all claims the Vendor may have by reason of such default;
- (b) the Purchaser with interest (less the \$10.00 paid by the Purchaser to the Vendor pursuant to Section 8.3):
 - (i) if the Purchaser is not required to complete the transaction contemplated by this Agreement, promptly following the date on which the Purchaser becomes entitled not to complete the transactions contemplated by this Agreement;
 - (ii) upon the default of the Vendor without prejudice to any other right or remedy of the Purchaser, if the Vendor is in default of its obligation to complete the transactions contemplated by this Agreement, unless such default is waived in writing by the Purchaser and provided that the maximum aggregate liability of the Vendor in connection with such a default is limited and shall not exceed an amount equal to the Deposit; or
 - (iii) if any or all of the conditions set out in Sections 8.1 and 8.4 have not been satisfied or waived.

2.4 Allocation of Purchase Price. The parties agree that:

- (a) in the event that a Reverse Vesting Order is granted, the Purchase Price shall be allocated among the Purchased Assets as follows: (i) \$1.00 to the Shares; (ii) \$● to the Lands and Buildings; and (iii) \$1.00 to the remaining Purchased Assets; and
- (b) in the event that an Approval and Vesting Order is granted, the Purchase Price shall be allocated among the Purchased Assets as follows: (i)● to the Lands and Buildings; and (ii) \$1.00 to all other Purchased Assets.

ARTICLE 3 – GENERAL COVENANTS

3.1 Covenants of the Vendor. The Vendor:

- (a) throughout the Interim Period, will upkeep and maintain the Property in its present condition, reasonable wear and tear excepted, and will manage the Property in a professional and diligent manner and as a careful and prudent owner would do in accordance with current practices in the CCAA Proceedings and in compliance with all applicable laws, regulations and orders;
- (b) throughout the Interim Period, will maintain in full force and effect insurance coverage for fire, earthquake and all risks in respect of the Property as well as commercial liability coverage until closing on the Closing Date, in such amounts and on such terms as would a prudent owner;
- (c) throughout the Interim Period, will use commercially reasonable efforts to:
 - (i) obtain all consents, approvals and authorizations that may be required in order to provide the Purchaser with the right to use Intellectual Property for the purposes of the marketing, development and construction of the Project as of the Closing Date;
 - (ii) obtain an extension of at least six months from the City of Vancouver in connection with the building permit for the Project; and
 - (iii) obtain reliance letters in favour of the Purchaser in connection with those Consultant Reports that the Purchaser identifies to the Vendor, in writing, not less than fifteen (15) Business Days prior to the Closing Date;
- (d) will, as soon as reasonably possible following the Execution Date, deliver to the Purchaser a copy of the Buyer List;
- (e) from the Execution Date until the satisfaction or waiver of all of the conditions precedent set out in Section 8.1(a), will not enter into any commitment or agreement or contract, or modify any material terms or terminate any of the Approved Contracts, Permitted Encumbrances, Title Contracts, Plans, Permits and Approvals, or any mortgage or charge relating to the Purchased Assets or that would form an Encumbrance on the Purchased Assets without prior written notice to the Purchaser, and from the date of satisfaction or waiver by the Purchaser of all of the conditions precedent set out in Section 8.1(a) will not enter into any commitment or agreement or contract, or modify any material terms or terminate any of the Approved Contracts, Permitted Encumbrances, Title Contracts, Plans, Permits and Approvals, or any mortgage or charge relating to the Purchased Assets or that would form an Encumbrance on the Purchased Assets without the prior written consent of the Purchaser, which the Purchaser may withhold in its sole discretion;
- (f) will, on or prior to the Closing Date, cancel, disclaim or terminate at its expense all Contracts other than Approved Contracts;
- (g) will take or cause to be taken all proper steps and actions and corporate proceedings on its part to enable the Vendor to vest a good and marketable title to the Purchased Assets in the Purchaser free and clear of all Encumbrances except for Permitted Encumbrances and to enable the Vendor to carry out the sale of the

Purchased Assets and to execute and deliver this Agreement as valid and binding obligations of the Vendor;

- (h) will promptly notify the Purchaser if the Vendor becomes aware that, after the date of this Agreement, any of its representations or warranties in this Agreement become untrue or incorrect or if any covenants, terms or conditions in this Agreement are breached or cannot be performed; and
- (i) throughout the Interim Period, grant to the Purchaser and its authorized representatives the right to enter upon the Property during business hours upon reasonable notice for the purposes of carrying out such inspections, examinations, tests and surveys, including soil tests, as the Purchaser may deem necessary; provided that the Purchaser shall indemnify and save harmless the Vendor from any and all loss, cost or damage suffered as a direct result of the Purchaser exercising its rights pursuant to this clause.

ARTICLE 4 – RISK

4.1 Risk. The Purchased Assets will be at the risk of the Vendor until completion of closing on the Closing Date and thereafter at the risk of the Purchaser.

4.2 Material Loss Damage. If there is any Material Loss prior to the passing of risk as set out in Section 4.1, the Purchaser will, within fifteen (15) days following such Material Loss, by notice in writing at its option either:

- (a) terminate this Agreement, in which case the Deposit together with accrued interest will be paid to the Purchaser and neither party will be under any further obligation to the other; or
- (b) elect to complete the purchase of the Purchased Assets, in which case the insurance proceeds and the right to receive the proceeds of all insurance will be assigned by the Vendor to the Purchaser on the Closing Date and the Purchase Price shall be reduced by the amount of any insurance deductible that has not been paid by the Vendor.

Failure by the Purchaser to so elect within the period set out above will be deemed to be an election to complete the purchase of the Purchased Assets. The Vendor will promptly notify the Purchaser if it becomes aware of any Material Loss.

ARTICLE 5 – ADJUSTMENTS AND RELATED MATTERS

5.1 Adjustments. The Purchase Price payable by the Purchaser to the Vendor for the Purchased Assets will be subject to adjustment. All adjustments with respect to the Purchased Assets, including taxes, utilities, deposits and interest on deposits (if any), and other items normally adjusted between a vendor and purchaser in the sale of similar properties in British Columbia will be adjusted as of the Closing Date so that the Vendor will bear and pay all expenses and receive all income related to the Purchased Assets accruing prior to the Closing Date and the Purchaser will bear and pay all expenses and receive all income related to the Purchased Assets accruing on and after the Closing Date and the Purchase Price will be adjusted accordingly. The Vendor shall cause any water, gas, or electrical meter readings required to make the adjustments herein.

5.2 Statement of Adjustments. A statement of adjustments will be delivered to the Purchaser by the Vendor at least five (5) Business Days prior to the Closing Date and shall have annexed to it complete details of the calculations used by the Vendor to arrive at all debits and credits on the statement of adjustments. On request, the Vendor shall give the Purchaser access to the Vendor's working papers and backup materials in order to confirm the statement of adjustments.

5.3 Re-Adjustment Determination. The parties acknowledge and agree that there will be no re-adjustment after the Closing Date.

5.4 Purchase Price Reduction. In the event that an Approval and Vesting Order (rather than a Reverse Vesting Order) is granted by the Court, the parties agree that the Purchase Price shall be reduced by an amount equal to the amount of property transfer tax payable by the Purchaser in connection with the transfer of the Property to the Purchaser on the Closing Date.

ARTICLE 6 – POSSESSION

6.1 Possession Date. The Purchaser will, upon completion of the purchase and sale have possession of all Purchased Assets as of the Closing Date free and clear of all Encumbrances subject only to the Permitted Encumbrances.

6.2 Non-assignable Assets. If any of the Purchased Assets are not transferable without consent of a third party by the terms of the applicable instruments, the Vendor shall use commercially reasonable efforts to obtain such consent prior to the Closing Date and, if such consent is not obtained by the Closing Date, the Vendor shall use commercially reasonable efforts to obtain an Order in the CCAA Proceedings transferring or assigning, as applicable, such Purchased Assets to the Purchaser. For certainty, any failure to obtain the consent of any such third party will not constitute a default of the Vendor nor will it entitle the Purchaser to terminate this Agreement.

ARTICLE 7 – REPRESENTATIONS AND WARRANTIES

7.1 Vendor's Representations and Warranties. The Vendor represents and warrants to the Purchaser, regardless of any independent investigations that the Purchaser may cause to be made, that as at the date of this Agreement:

- (a) the Limited Partnership is a limited partnership formed under the *Partnership Act* (British Columbia) and has the power and authority to own the Purchased Assets, to enter into this Agreement, and to perform its obligations under this Agreement, all of which have been authorized by all necessary proceedings;
- (b) the GP is a corporation formed under the *Business Corporations Act* (British Columbia) and has the power and authority to own the Purchased Assets, in its capacity as general partner of the Limited Partnership or in its own capacity, as applicable, to enter into this Agreement, and to perform its obligations under this Agreement, all of which have been authorized by all necessary proceedings;
- (c) the Limited Partnership is a Canadian partnership within the meaning of the *Income Tax Act* (Canada); and
- (d) the GP is not a non-resident of Canada within the meaning of the *Income Tax Act* (Canada).

7.2 Survival of Vendor's Representations and Warranties. The representations and warranties contained in Section 7.1 will survive the Closing Date and will continue in full force and effect for the benefit of the Purchaser after the Closing Date for a period of 12 months, unless otherwise expressly indicated herein, notwithstanding any independent inquiry or investigation by the Purchaser or the satisfaction or waiver by the Purchaser of any condition set out in Section 8.1, the subject matter of which is contained in a representation or warranty in this Agreement.

7.3 Purchaser's Representations and Warranties. The Purchaser represents and warrants to the Vendor, regardless of any independent investigation that the Vendor may cause to be made that:

- (a) the Purchaser is a corporation incorporated and existing under the laws of British Columbia;
- (b) the Purchaser has the corporate power and authority to enter into this Agreement and to perform its obligations under this Agreement;
- (c) there is no action or proceeding pending or to the best of the Purchaser's knowledge, threatened against the Purchaser before any court, arbiter, arbitration panel, administrative tribunal or agency which, if decided adversely to the Purchaser, might materially affect the Purchaser's ability to perform the Purchaser's obligations hereunder;
- (d) neither the Purchaser's entering into this Agreement nor the performance of its terms will result in the breach of or constitute a default under any term or provision of any indenture, mortgage, deed of trust or other agreement to which the Purchaser is bound or subject;
- (e) the Purchaser is not a non-Canadian for the purposes of the *Investment Canada Act* (Canada); and
- (f) the Purchaser is not a foreign entity for the purposes of the *Property Transfer Tax Act* (British Columbia).

7.4 Survival of Purchaser's Representations and Warranties. The representations and warranties contained in Section 7.3 will survive the Closing Date and will continue in full force and effect for the benefit of the Vendor after the Closing Date for a period of 12 months, unless otherwise expressly indicated herein, notwithstanding any independent inquiry or investigation by the Vendor.

7.5 "As Is" Purchase. The Purchaser acknowledges and agrees that:

- (a) in entering into this Agreement and completing the transactions contemplated herein, except for the representations and warranties of the Vendor set out in Section 7.1, the Purchaser has relied and will continue to rely solely upon its own due diligence with respect to the Purchased Assets;
- (b) the Purchased Assets are being purchased by the Purchaser on an "as is, where is" basis as of the Closing Date and without any representation or warranty, whether expressed or implied by this Agreement or at law, by the Vendor of any nature or kind whatsoever respecting any of the Purchased Assets or any matter

relating thereto, except for the representations and warranties of the Vendor set out in Section 7.1 or in the Closing Documents;

- (c) except for the representations and warranties of the Vendor set out in Section 7.1 or in the Closing Documents, the Vendor makes no representations or warranties concerning any statements made or information delivered or made available to the Purchaser (whether by the Vendor, the Vendor's Solicitors or any other agents, representatives or advisors of the Vendor or any of their respective affiliates, or any other person) with respect to the Purchased Assets, whether included as part of any due diligence matters or any other information disclosed to the Purchaser or otherwise; and
- (d) except as otherwise expressly provided for in this Agreement or in the Closing Documents, the Vendor shall have no obligations or responsibility to the Purchaser after the Closing Date with respect to any matter relating to the Purchased Assets or the condition thereof.

The provisions of this Section shall survive closing or the termination of this Agreement.

ARTICLE 8 – CONDITIONS PRECEDENT

8.1 Purchaser's Conditions. The Purchaser's obligation to complete the transactions contemplated by this Agreement is subject to the following conditions, all of which are for the sole benefit of the Purchaser:

- (a) on or before 5:00 p.m. (Vancouver time) on the date that is fifteen (15) business days after the Execution Date, the Purchaser will have satisfied itself, in its sole discretion, of the site conditions of the Property;
- (b) on the Closing Date, the representations and warranties of the Vendor contained in Section 7.1 will be true and correct in all material respects with the same effect as though such representations and warranties had been made on and as of the Closing Date; and
- (c) on the Closing Date, all of the covenants and agreements of the Vendor to be performed on or before the Closing Date pursuant to this Agreement will have been duly performed in all material respects.

If the conditions set out in this Section have not been satisfied by notice in writing from the Purchaser to the Vendor, by the times specified in this Section, the Purchaser may by notice in writing to the Vendor waive satisfaction of such conditions, in whole or in part, without prejudice to any of its other rights under this Agreement and complete the purchase of the Purchased Assets or elect not to complete.

8.2 Satisfaction and Waiver of Purchaser's Conditions. The parties agree that if the Purchaser does not give notice to the Vendor by the Condition Date that the condition precedent set out in Section 8.1(a) is satisfied or waived, then this Agreement will automatically be null and void upon the expiry of such time and the Deposit shall be returned to the Purchaser with interest (if any).

8.3 Consideration for and Nature of Conditions. A portion of the Deposit in the amount of \$10.00 represents non-refundable consideration paid by the Purchaser for its right to satisfy or waive the conditions set out in Section 8.1 and Section 8.4 and the Vendor acknowledges the sufficiency in all respects of such consideration. Although the Purchaser's obligation to complete the transaction contemplated by this Agreement is subject to satisfaction or waiver of conditions, those conditions are not conditions to there being a binding agreement of purchase and sale between the parties respecting the Purchased Assets and until the time limited for the satisfaction or waiver of such conditions has expired, this Agreement is not void, voidable, revocable or, except for default, otherwise capable of being terminated by either of the parties.

8.4 Mutual Conditions. The obligation of each of the parties to complete the transactions contemplated by this Agreement is subject to the following mutual conditions, all of which are for the benefit of both the Vendor and the Purchaser:

- (a) [Intentionally Deleted];
- (b) on or before 5:00 p.m. (Vancouver time) on the date that is 15 Business Days after the date that the condition precedent set out in Section 8.1(a) has been satisfied or waived, the Vendor has obtained (at the sole cost of the Vendor) an Order or Orders (the "**Final Order**") either:
 - (i) (A) adding ShellCo as a debtor to the CCAA Proceedings; (B) replacing the GP as the general partner of the Limited Partnership with ShellCo; (C) transferring and assigning all of the Excluded Assets to ShellCo; (D) vesting title to the Purchased Assets (including, without limitation, the Shares) in and to the Purchaser, free and clear of all Encumbrances except the Permitted Encumbrances; and (E) approving this Agreement and implementing the transactions contemplated herein in accordance with its terms (the "**Reverse Vesting Order**"); or
 - (ii) (A) vesting title to the Purchased Assets (which, for certainty, do not include any shares of the GP) in and to the Purchaser, free and clear of all Encumbrances except the Permitted Encumbrances and in a form registrable in the Land Title Office; and (B) approving this Agreement and implementing the transactions contemplated herein in accordance with its terms (the "**Approval and Vesting Order**").

8.5 Satisfaction of Mutual Conditions. The parties agree that if each of the Purchaser and the Vendor do not give notice to the other party by the time limited in Section 8.4(b) that the conditions in those Sections are satisfied, then this Agreement will automatically be null and void upon the expiry of such time and the Deposit shall be returned to the Purchaser with interest (if any). For certainty, a failure to satisfy any of the conditions set out in Section 8.4 shall not constitute a default of either party.

8.6 Vendor's Conditions. The Vendor's obligation to complete the transactions contemplated by this Agreement is subject to the following conditions, all of which are for the sole benefit of the Vendor:

- (a) on the Closing Date, the representations and warranties of the Purchaser contained in Section 7.3 will be true and correct in all material respects with the

same effect as though such representations and warranties had been made on and as of the Closing Date; and

- (b) on the Closing Date, all of the covenants and agreements of the Purchaser to be performed on or before the Closing Date pursuant to this Agreement will have been duly performed in all material respects.

If the conditions set out in this Section have not been satisfied by notice in writing from the Vendor to the Purchaser, by the times specified in this Section, the Vendor may, with the written consent of the Monitor, by notice in writing to the Purchaser waive satisfaction of such conditions, in whole or in part, without prejudice to any of its other rights under this Agreement and complete the sale of the Purchased Assets or elect not to complete.

8.7 [Intentionally Deleted].

8.8 Consideration for and Nature of Conditions. The Vendor hereby pays to the Purchaser the amount of \$10.00 representing non-refundable consideration paid by the Vendor for its right to satisfy or waive the conditions set out in Sections 8.4 and 8.6 and the Purchaser acknowledges the sufficiency in all respects of such consideration. Although the Vendor's obligation to complete the transaction contemplated by this Agreement is subject to satisfaction or waiver of conditions, those conditions are not conditions to there being a binding agreement of purchase and sale between the parties respecting the Purchased Assets and until the time limited for the satisfaction or waiver of such conditions has expired, this Agreement is not void, voidable, revocable or, except for default, otherwise capable of being terminated by either of the parties.

8.9 CCAA Proceedings. The Purchaser shall support the application for the Final Order. Each of the parties agrees that the Vendor shall seek a Reverse Vesting Order from the Court as a first option and, failing that, the Vendor shall seek an Approval and Vesting Order from the Court. In the event any variation is sought or leave to appeal is sought, an appeal is taken or a stay pending appeal is requested with respect to the Final Order, the Vendor shall promptly notify the Purchaser of such application for leave to appeal, appeal or stay request and shall promptly provide to the Purchaser a copy of the related notice(s) or order(s).

8.10 Form of Order. The Vendor or its solicitors will provide the Purchaser and its solicitors with a draft copy of all Orders proposed to be obtained in connection with this Agreement for review and comment at least two (2) days prior to the date that the Vendor applies for such Order(s), and, provided that such amendments are consistent with the terms set out herein, the Vendor will incorporate any reasonable amendments requested by the Purchaser or its solicitors.

ARTICLE 9 – CLOSING

9.1 Closing. The closing of the purchase and sale of the Purchased Assets will commence at 10:00 a.m. (Vancouver time) on the Closing Date as a virtual closing with documents to be exchanged electronically, or at such other time on the Closing Date or in such other format as may be agreed in writing by the Vendor and the Purchaser.

9.2 Vendor's Closing Documents. On or before the Closing Date, the Vendor will deliver, or cause the Vendor's Solicitors to deliver, to the Purchaser's Solicitors in trust to be held in escrow as provided in this Agreement, the following duly executed as applicable and all in a form satisfactory to the Purchaser, acting reasonably:

- (a) Court certified copy of the Final Order and any other Orders as are necessary, all in a form registrable in all necessary offices required to effect the transfer of the Purchased Assets;
- (b) letters from legal counsel to the Vendor to the Land Title Survey Authority or other agency as may be required by the Final Order;
- (c) a beneficial transfer conveying the beneficial interest in the Property to the Purchaser;
- (d) an assignment and assumption of Approved Contracts, Plans, Permits and Approvals wherein the Purchaser assumes the rights and obligations under the Approved Contracts and Plans, Permits and Approvals as of the Closing Date and the Purchaser indemnifies the Vendor for all Liability under the Approved Contracts and Plans, Permits and Approvals arising after the completion of the transactions contemplated herein and the Vendor retains all Liability under the Approved Contracts and Plans, Permits and Approvals arising prior to the Closing Date and indemnifies the Purchaser for all Liability under the Approved Contracts and Plans, Permits and Approvals arising prior to the completion of the transactions contemplated herein;
- (e) an assignment and assumption of Permitted Encumbrances and Title Contracts;
- (f) an assignment and assumption of the Vendor's right, title and interest, in and to:
 - (i) subject to such transfer being approved by the necessary parties in accordance with Section 3.1(c)(i), the Intellectual Property; (ii) all insurance and new home warranties obtained in connection with the Project; and (iii) all marketing materials prepared in connection with the Project;
- (g) a bill of sale conveying the Chattels to the Purchaser;
- (h) a statement of adjustments pursuant to Article 5;
- (i) an assignment of all of the Vendor's rights under any and all Warranties wherein the Purchaser acquires all rights under the Warranties whether arising prior to or after the Closing Date;
- (j) in the event that a Reverse Vesting Order is granted: (i) a transfer of the Shares together with all resolutions, certificates and acknowledgements of the Limited Partnership and the GP as may be reasonably required by the Purchaser to effectively transfer the Shares; and (ii) an amendment to the LP Agreement effecting the change in the general partner from the GP to ShellCo, together with all supporting resolutions, certificates and acknowledgements of the Limited Partnership and the GP as may be reasonably required by the Purchaser;
- (k) a certificate dated as of the Closing Date of a senior officer of the GP, in its own capacity and as general partner of the Limited Partnership, having knowledge of the facts certifying, on behalf of the GP and the Limited Partnership and without personal liability, that the representations and warranties set out in Section 7.1 are true and correct in all material respects as at the Closing Date and that the Vendor's covenants and agreements to be observed or performed on or before the

Closing Date pursuant to the terms of this Agreement have been duly observed and performed in all material respects;

- (l) a notice from the Vendor to the other parties under the Approved Contracts giving notice of the sale of the Property;
- (m) keys to all units and facilities of the Property to the extent required by the Purchaser; and
- (n) such other documents and assurances as may be reasonably required by the Purchaser to give full effect to the intent and meaning of this Agreement.

9.3 Purchaser's Closing Documents. On or before the Closing Date, the Purchaser will deliver, or cause the Purchaser's Solicitors to deliver, to the Vendor's Solicitors in trust to be held in escrow as provided in this Agreement, the following duly executed as applicable:

- (a) an assignment and assumption of Approved Contracts, Plans, Permits and Approvals;
- (b) an assignment and assumption of Permitted Encumbrances and Title Contracts;
- (c) an assignment and assumption of the Vendor's right, title and interest, in and to:
 - (i) subject to such transfer being approved by the necessary parties in accordance with Section 3.1(c)(i), the Intellectual Property; (ii) all insurance and new home warranties obtained in connection with the Project; and (iii) all marketing materials prepared in connection with the Project;
- (d) the GST Certificate;
- (e) a certificate dated as of the Closing Date of a senior officer of the Purchaser having knowledge of the facts certifying, on behalf of the Purchaser and without personal liability, that the representations and warranties set out in Section 7.3 are true and correct in all material respects as at the Closing Date and that the Purchaser's covenants and agreements to be observed or performed on or before the Closing Date pursuant to the terms of this Agreement have been duly observed and performed in all material respects; and
- (f) such other documents and assurances as may be reasonably required by the Vendor to give full effect to the intent and meaning of this Agreement.

9.4 Preparation and Form of Documents. The closing documents contemplated in Sections 9.2 and 9.3 (collectively, the "**Closing Documents**"), other than the statement of adjustments in Article 5, the materials required in connection with a Reverse Vesting Order set out in Section 9.2(j), if applicable, and the Final Order, will be prepared by the Purchaser's Solicitors and delivered to the Vendor's Solicitors at least five (5) Business Days before the Closing Date. The Closing Documents (including the statement of adjustments in Article 5, the materials required in connection with a Reverse Vesting Order set out in Section 9.2(j), if applicable, and the Final Order) will be in a form and substance reasonably satisfactory to the parties. The Vendor shall provide the Purchaser with drafts of all materials to be filed with the Court no later than two (2) days prior to the date of any hearing of the Court regarding the Final Order.

9.5 Payment into Trust. On or before the Closing Date, the Purchaser will pay to the Purchaser's Solicitors in trust, by way of certified cheque, bank draft, or wire transfer, funds in an amount equal to the Balance, as adjusted, less any amount to be advanced to the Purchaser on the Closing Date under any mortgage financing arranged by the Purchaser, as further described in Section 9.9.

9.6 Registration. On the Closing Date, after receipt by the Purchaser's Solicitors of the Closing Documents set out in Section 9.2 and the funds as set out in Section 9.5, and after receipt by the Vendor's Solicitors of the Closing Documents set out in Section 9.3, the Purchaser will cause the Purchaser's Solicitors to file the Final Order in the Land Title Office and any security documents applicable to any mortgage financing arranged by the Purchaser, as further described in Section 9.9.

9.7 Closing Escrow. All Closing Documents, funds, and other items delivered by the parties, except the Final Order (which will be dealt with pursuant to Section 9.6), will be held in trust by the Vendor's Solicitors and the Purchaser's Solicitors until completion of closing on the Closing Date in accordance with this Agreement. Promptly after the filings set out in Section 9.6 and a satisfactory post filing for registration search has been received by the Purchaser's Solicitors showing that title to the Property will be registered in the name of the Purchaser free and clear of all Encumbrances except for the Permitted Encumbrances or any Encumbrances granted by or claimed through the Purchaser, the Closing Documents will be released to the appropriate parties and the Purchaser will cause the Purchaser's Solicitors to pay the Purchase Price, as adjusted, to the Vendor's Solicitors by way of wire transfer.

9.8 Concurrent Requirements. It is a condition of the closing that all matters of payment, execution and delivery of documents by each party to the other and the filing of documents in the Land Title Office as set out in Section 9.6, all pursuant to the terms of this Agreement, will be deemed to be concurrent requirements and it is specifically agreed that nothing will be complete at the closing until everything required as a condition precedent at the closing has been paid, executed and delivered and all filings set out in Section 9.6 have been completed.

9.9 Purchaser's Financing. If the Purchaser is relying upon a new mortgage to finance the purchase of the Purchased Assets, the Purchaser, while still required to pay the Purchase Price on the Closing Date, may wait to pay the Purchase Price until after the Final Order and new mortgage documents have been filed in the Land Title Office and after receipt of the proceeds of such mortgage financing, but only if, before such filing, the Purchaser has:

- (a) made available for tender to the Vendor that portion of the Purchase Price not secured by the new mortgage;
- (b) fulfilled all the new mortgagee's conditions for funding except filing the mortgage for registration; and
- (c) made available to the Vendor, a lawyer's undertaking to pay the Purchase Price upon the filing of the Final Order and new mortgage documents and the advance by the mortgagee of the mortgage proceeds.

9.10 Payment by Wire Transfer. Notwithstanding anything else contained herein, provided the Purchaser's Solicitors have initiated the wire transfer for the balance of the Purchase Price, as adjusted, to the Vendor's Solicitors on the Closing Date, and provided the Vendor's Solicitors with written confirmation thereof, the Purchaser will be deemed to have paid the balance of the

Purchase Price, as adjusted, due to the Vendor if such amount is credited to the Vendor's Solicitors account by 11:00 a.m. (Vancouver time) on the first Business Day following the Closing Date without interest or penalty. If such amount is not received by 11:00 a.m. (Vancouver time) on the first Business Day following the Closing Date, the Purchaser will pay to the Vendor interest at the rate of the prime rate of interest designated from time to time by Royal Bank of Canada plus 3% per annum on such amount until such time as it is received by the Vendor.

9.11 Termination.

- (a) Notwithstanding any other provision of this Agreement, if the transactions contemplated by this Agreement do not complete on or prior to November 30, 2021, other than as a result of the default of the Purchaser, then the Purchaser may terminate this Agreement with written notice delivered to the Vendor without any further liability and the Deposit and interest (if any) shall be returned to the Purchaser.
- (b) Notwithstanding any other provision of this Agreement, if the transactions contemplated by this Agreement do not complete on or prior to November 30, 2021, other than as a result of the default of the Vendor, then the Vendor may terminate this Agreement with written notice delivered to the Purchaser without any further liability and the Deposit and interest (if any) shall be returned to the Purchaser.

ARTICLE 10 – TAXES

10.1 GST. The Purchaser represents and warrants to Vendor that it is and will be, as of the closing on the Closing Date, registered for the purposes of Part IX of the *Excise Tax Act* (Canada) (the “**ETA**”) in accordance with the requirements of Subdivision D of Division V of the ETA and will assume responsibility to account for, report and remit any goods and services tax and harmonized sales tax (collectively, the “**GST**”) payable under the ETA in connection with the transaction contemplated in this Agreement. On the Closing Date, the Purchaser will deliver to the Vendor a certificate (the “**GST Certificate**”) of a senior officer of the Purchaser certifying, on behalf of the Purchaser and without personal liability (a) that the Purchaser is registered under Part IX of the ETA as of the Closing Date; (b) its registration number; and (c) that the Purchaser will account for, report and remit any GST payable in respect of the purchase of the Purchased Assets in accordance with the ETA. If the Purchaser delivers such GST Certificate, then the Purchaser will not be required to pay to the Vendor, and the Vendor will not be required to collect from the Purchaser nor report or remit, any GST in connection with the transaction contemplated in this Agreement. The Purchaser shall indemnify and hold the Vendor and its directors, officers, employees, advisors and agents harmless from any liability under the ETA arising as a result of any breach of this Section, the GST Certificate or any declaration made therein and such indemnity shall survive the completion of the transactions contemplated herein.

10.2 Provincial Sales Tax. The Purchaser acknowledges that it may be liable to pay provincial sales tax in respect of some or all of the Chattels and, if required, it will report and remit as required by applicable law any such sales tax that is due directly to the applicable taxing authority. The Purchaser shall indemnify and hold the Vendor and its directors, officers, employees, advisors and agents harmless from any liability related to the Vendor's failure to account for, report and remit such provincial sales tax and such indemnity shall survive the completion of the transactions contemplated herein.

10.3 Tax Elections. Notwithstanding the above, the Vendor will cooperate with the Purchaser to execute any election available under applicable law that may reduce or defer the amount or due date of any GST or other tax payable by the Purchaser provided such election will not result in any increased cost or tax liability for the Vendor.

10.4 Other Taxes. The Purchaser shall be responsible for all transfer taxes (subject to an adjustment to the Purchase Price in accordance with Section 5.4), fees and expenses in connection with the registration of the Final Order or transfer of the Purchased Assets.

10.5 Preparation of Tax Returns After Closing. In the event that a Reverse Vesting Order is granted by the Court and the Purchaser acquires the Shares (along with the balance of the Purchased Assets), the Vendor agrees that forthwith following closing on the Closing Date the Vendor will, in consultation with the Purchaser and the Purchaser's professional advisors and accountants, cause income tax and other tax returns consequent to the closing to be prepared for the GP. The Purchaser will be responsible for all reasonable costs related to the preparation and filing of these returns along with the costs of the Purchaser's own accountant and other consultants in reviewing the same. The Vendor will also provide reasonable assistance in preparing and filing all financial statements, tax returns and other documents required by law in respect of any government charges or in respect of any federal, provincial, municipal or other taxing statute for fiscal periods of the GP ending for tax purposes on or before the Closing Date.

ARTICLE 11 – GENERAL

11.1 Further Assurances. Each of the parties will execute and deliver all such further documents and do such further acts and things as may be reasonably required from time to time to give effect to this Agreement.

11.2 No Merger. The execution and delivery of the Closing Documents is not intended to and will not in any way merge or otherwise restrict the terms, covenants, conditions, representations, warranties or provisions made or to be performed or observed by the parties contained in this Agreement other than the obligation to deliver the Closing Documents.

11.3 Entire Agreement. This Agreement constitutes the entire agreement between the Vendor and the Purchaser pertaining to the purchase and sale of the Purchased Assets and supersedes all prior agreements and undertakings, negotiations and discussions, whether oral or written, of the Vendor and the Purchaser, including, for certainty, the LOI, and there are no representations, warranties, covenants or agreements between the Vendor and Purchaser except as set out in this Agreement.

11.4 Amendment. Subject to Section 11.5, this Agreement may only be altered or amended by an agreement in writing executed by all of the parties.

11.5 Solicitors as Agents. Any notice, approval, waiver, agreement, instrument, document or communication permitted, required or contemplated in this Agreement may be given or delivered and accepted or received by the Purchaser's Solicitors, on behalf of the Purchaser, and by the Vendor's Solicitors, on behalf of the Vendor, and any tender of Closing Documents and the Purchase Price may be made upon the Vendor's Solicitors and the Purchaser's Solicitors, as the case may be.

11.6 Notices. Any notice, document or communication required or permitted to be given under this Agreement will be in writing and delivered by hand or electronic transmission as follows:

(a) if to the Purchaser:

-

with a further copy to the Purchaser's Solicitors:

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(b) if to the Vendor:

Port Capital Development (EV) Inc. / Evergreen House Development Limited Partnership
c/o Ernst & Young Inc.
700 West Georgia Street
Vancouver, BC V7Y 1C7

Attention: Mike Bell
E-mail: mike.bell@parthenon.ey.com

with a further copy to the Monitor's Solicitors:

Blake, Cassels & Graydon LLP
595 Burrard Street, P.O. Box 49314,
Suite 2600, Three Bentall Centre
Vancouver, BC V7X 1L3

Attention: Peter Rubin and Greg Umbach
E-mail: peter.rubin@blakes.com; greg.umbach@blakes.com

or to such other address in Canada as either party may in writing advise. Any notice, document or communication will be deemed to have been given on the Business Day when delivered by hand if delivered prior to 5 p.m. (Vancouver time), otherwise will be deemed to be delivered and received on the next Business Day; or, if made by email, shall be deemed to have been given on the Business Day when transmitted if it is so transmitted prior to 5 p.m. (Vancouver time) on the day of transmittal, otherwise will be deemed to be given and received on the next Business Day.

11.7 Fees. Each of the parties will pay its own legal fees and fees of its consultants. The Purchaser will pay all registration costs and property transfer tax payable in connection with its purchase of the Purchased Assets, subject to an adjustment to the Purchase Price in accordance with Section 5.4.

11.8 Real Estate Commissions. Each of the Vendor and the Purchaser represents and warrants that it has not made any agreement with any real estate agent or broker regarding payment of any commission in respect of the purchase and sale of the Purchased Assets.

11.9 Waiver of Site Disclosure Statement. The Purchaser waives any right it may have to be provided with, and any requirement for the Vendor to provide, a site disclosure statement for the Property under the *Environmental Management Act* (British Columbia) and the regulations under that act.

11.10 Time. Time is of the essence of this Agreement. If anything is required to be done under this Agreement on a day which is not a Business Day, the same shall be done on the next following Business Day.

11.11 Tender. Unless otherwise set out herein, any tender of documents or money may be made upon the party being tendered or upon its solicitors and money will be tendered by certified cheque, bank draft, or wire transfer.

11.12 Enurement. This Agreement will enure to the benefit of and be binding upon the parties and their respective successors and permitted assigns.

11.13 Force Majeure. If by reason of Excusable Delay, the Vendor or Purchaser is delayed in performing or observing a covenant or obligation hereunder which is to be performed or observed (the "**Specified Date**"), or if either the Purchaser or the Vendor is delayed in satisfying or waiving any of the conditions precedent set out in Sections 8.1, 8.4 or 8.6, the applicable Specified Date will be extended by a period of time equal to the duration of the Excusable Delay, provided that the Vendor or Purchaser, as applicable, notifies the other party in writing prior to the applicable Specified Date, and such notice sets out in detail the date of the commencement and nature of such circumstances (the "**Delay Notice**"), and provided further that the party giving the Delay Notice uses its commercially reasonable efforts to render performance in a timely manner utilizing to such end commercially reasonable and available resources required in the circumstances. If the duration of the Excusable Delay exceeds 60 days from the date of giving a Delay Notice, the party receiving such Delay Notice may terminate this Agreement forthwith, notwithstanding any other provision of this Agreement, by giving written notice of termination to the other party, in which event the parties shall have no further obligations to one another. In determining whether delay is excusable, the party giving the Delay Notice shall be held to a commercially reasonable standard and not to a best efforts standard.

11.14 Assignment. The Purchaser will be entitled to assign its rights and obligations under this Agreement on prior written notice to, but without the consent of the Vendor to any one or more affiliates (within the meaning of the *Business Corporations Act* (British Columbia)) of the Purchaser or to one or more limited partnerships in which the general partners are affiliates (within the meaning of the *Business Corporations Act* (British Columbia)) of the Purchaser if: (i) the Purchaser delivers written notice of such assignment(s) to the Vendor; (ii) the assignee(s) enters into an agreement pursuant to which the assignee(s) agrees to be bound by all of the obligations and Liability of the Purchaser under this Agreement as if it was the original Purchaser; (iii) the Purchaser is not released from its obligations and Liability under this Agreement until the completion of the transactions contemplated in this Agreement, at which time the assignor will be automatically released from all of its obligations and Liability under this Agreement without the need for any further deliveries or instruments of release; and (iv) such assignment(s) is completed not less than ten (10) Business Days prior to the Closing Date. The Purchaser will not otherwise be entitled to assign its rights and obligations under this Agreement except with the prior written consent of the Vendor, such consent may be arbitrarily withheld or delayed by the Vendor.

11.15 Governing Law. This Agreement will be governed by and construed in accordance with the laws of the Province of British Columbia and the laws of Canada applicable in it.

11.16 Waiver. No waiver of any of the provisions of this Agreement will be deemed or will constitute a waiver of any other provision nor will any waiver constitute a continuing waiver unless otherwise expressed or provided.

11.17 Confidentiality. Except as may be required in the CCAA Proceedings, the parties will not disclose the existence of nor the contents of this Agreement to any third party, except their respective directors, officers, employees, agents or advisors, including lawyers, accountants, consultants, bankers and financial advisors (collectively, the “**Authorized Parties**”), without the prior written consent of the other party, not to be unreasonably withheld, provided that such consent is not required in the case of disclosure required by law or disclosure by either party to enforce any of its rights under this Agreement or to obtain necessary consents under this Agreement. The parties will instruct their respective Authorized Parties to comply with the provisions of this Section 11.17 and the parties will be responsible for any breach of the provisions of this Section 11.17 by their respective Authorized Parties. This Section 11.17 does not apply to public information or information in the public domain at the time that such information is obtained, information in the possession of a party not provided by the other party, or information received in good faith from a third party lawfully in possession of the information and not in breach of any confidentiality obligation. The obligations under this Section 11.17 shall terminate as of the second anniversary of the date of this Agreement. The provisions of this Section 11.17 shall supersede the confidentiality provisions of the LOI and any non-disclosure or confidentiality agreements entered into by the parties with respect to the Purchased Assets and the transactions contemplated in this Agreement.

11.18 Public Announcement. The parties agree that no disclosure or announcement, public or otherwise shall be made concerning this Agreement or the transactions contemplated hereunder without the prior consent of both parties, except as otherwise required by applicable law, regulation or regulatory authority or stock exchange rules or requirements. The parties shall consult and cooperate with each other with respect to any proposed announcement of the transactions contemplated hereunder.

11.19 No Registration. The Purchaser will not register this Agreement or notice of this Agreement against title to the Property.

11.20 Currency. All dollar amounts referred to are Canadian dollars.

11.21 Construction. The division and headings of this Agreement are for reference only and are not to affect construction or interpretation.

11.22 Counterparts and Execution. This Agreement may be executed in counterparts and delivered by electronic transmission including by PDF format, and each such counterpart will constitute an original and all such counterparts together will constitute one and the same agreement.

11.23 Schedules. The following schedules are attached to and form a part of this Agreement:

Schedule A – Legal Description and Permitted Encumbrances

[Signature pages follow]

The parties are signing this Agreement as of the date set out above.

**ERNST & YOUNG INC. in its capacity as the
Monitor of EVERGREEN HOUSE DEVELOPMENT
LIMITED PARTNERSHIP, by its general partner,
PORT CAPITAL DEVELOPMENT (EV) INC., and
not in its personal capacity**

By: _____
Name: Mike Bell
Title: Senior Vice President, Ernst & Young
Inc.

**ERNST & YOUNG INC. in its capacity as the
Monitor of PORT CAPITAL DEVELOPMENT (EV)
INC., and not in its personal capacity**

By: _____
Name: Mike Bell
Title: Senior Vice President, Ernst & Young
Inc.

•

By: _____
Name:
Title:

SCHEDULE A
LEGAL DESCRIPTION AND PERMITTED ENCUMBRANCES

Part 1 – Legal Description of Lands

PID: 006-721-397; LOT 18, EXCEPT THAT PART OF THE CANADIAN PACIFIC RAILWAY RIGHT-OF-WAY AS DESCRIBED IN ABSOLUTE FEE PARCELS BOOK, VOLUME 9, FOLIO 317, NO. 1154C, AND EXCEPT THE SOUTH 7 FEET NOW ROAD, BLOCK 29 DISTRICT LOT 185 PLAN 92

Part 2 – Permitted Encumbrances

- (a) the reservations, limitations, provisions or conditions expressed in the original grants from the Crown of any of the Lands and the statutory exceptions to title currently applicable to the Lands;
- (b) a claim of right, title or jurisdiction which may be made or established by any aboriginal peoples by virtue of their status as aboriginal peoples to or over any Lands;
- (c) liens for taxes, assessments, rates, duties, charges or levies not at the time due, which relate to obligations or Liability assumed by the Purchaser; and
- (d) the Encumbrances listed below in respect of the Lands.

Legal Notations

- 1. Easement No. BP238635

Charges, Liens and Interests

- 1. Restrictive Covenant No. R18424
- 2. Easement and Indemnity Agreement No. J7909
- 3. Easement No. BP238634



NO. S-205095
VANCOUVER REGISTRY

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

- AND -

IN THE MATTER OF THE BUSINESS CORPORATIONS ACT,
S.B.C. 2002, C. 57, AS AMENDED

- AND -

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF
PORT CAPITAL DEVELOPMENT (EV) INC. AND EVERGREEN HOUSE DEVELOPMENT
LIMITED PARTNERSHIP

NOTICE OF APPLICATION

Name of Applicant: Aviva Insurance Company of Canada

To: The Service List

TAKE NOTICE that an application will be made by the Applicant to the Honourable Madam Justice Fitzpatrick at the Courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia on **July 22, 2022, at 2:00 p.m.** for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An Order substantially in the form attached as Schedule "A" (the "Reverse Vesting Order") hereto, providing for the following relief:
 - a. Abridging the time for service of this notice of application to the extent necessary, and that service upon any interested party, other than those parties on the service list maintained by the Petitioners and Ernst & Young Inc., in its capacity as court-appointed Monitor of the Petitioners (the "Monitor") in these proceedings is hereby dispensed with;
 - b. Approving the Purchase and Sale Agreement entered into on July 22, 2022 (the "PSA") between Port Capital; Development (EV) Inc. and Evergreen House Development Limited Partnership as vendors (the "Vendor") and Solterra

Acquisition Corp. (the “Purchaser” or “Solterra”), attached as Exhibit A to the Affidavit of Rebecca Barclay Nguinambaye, articted student;

- c. Enhancing the Monitor’s powers to complete the sale transaction, including, among other things, to sell, and in each such case notice under Section 59(10) of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 shall not be required;
- d. Authorizing the Monitor to incorporate a new subsidiary of Port Capital Development (EV) Inc. (the “Residual Co”) who will be a party to which the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-356, as amended (“CCAA”) applies;
- e. Ordering and declaring that upon the filing of the Monitor’s Certificate attached to the proposed form of Reverse Vesting Order, that all of the Excluded Assets (as defined in the PSA) shall be transferred and vested absolutely in the name of Residual Co.

Part 2: FACTUAL BASIS

- 2. The Petitioners Port Capital Development (EV) Inc. (the “General Partner”) and Evergreen House Development Limited Partnership (“Evergreen LP”), own the “Terrace House Project”, which consists of an ongoing development of a high-rise luxury residential strata development in the Coal Harbour neighborhood, located as 1250 West Hastings Street, Vancouver.
- 3. The General Partner is the Bare Trustee that holds title to the real property owned by the Petitioner, legally described as:

PARCEL IDENTIFIER: 006-721-397
 LOT 18, EXCEPT THAT PART OF THE CANADIAN PACIFIC RAILWAY
 RIGHT-OF-WAY AS DESCRIBED IN ABSOLUTE FEE PARCELS BOOK,
 VOLUME 9, FOLIO 317, NO. 1154C, AND EXCEPT THE SOUTH 7 FEET
 NOW ROAD, BLOCK 29 DISTRICT LOT 185 PLAN 92

- 4. Aviva Insurance Company of Canada (“Aviva”) holds the second ranking secured claim against the assets that are the subject of these proceedings. The security secures contingent obligations of the debtors in excess of \$8 million.

Summary of Proceeding

- 5. On May 29, 2020, the Petitioners sought and obtained creditor protection under the *Companies’ Creditors Arrangement Act*, RSC 1985 c. C-36, as amended (the “CCAA Proceedings”) and the Honourable Madam Justice Fitzpatrick granted the Initial Order (the “Initial Order”), which established, among other things, a stay of proceedings (the “Stay

of Proceedings”) effective until June 8, 2020. Ernest & Young, Inc. (the “Monitor”) was appointed as Monitor of the Petitioners in these CCAA proceedings by the Initial Order.

6. Among other things, the Initial Order granted the Monitor enhanced powers, including the ability to execute control over the Petitioners, explore restructuring opportunities for the Terrace House Project and administer a “dual-track” sale and investment solicitation process (the “SISP”), to obtain an equity investment, a refinancing or alternatively a sale of the Terrace House.
7. The Stay of Proceedings has been extended to September 30, 2022, by various Orders of this Court dated June 8, 2022, February 24, 2021, April 16, 2021, June 11, 2021, and further extended by the Order of the Court of Appeal (Court of Appeal File No. CA-4585) pronounced as of September 22, 2021, and by further Orders of this Court pronounced April 29, 2022 and May 13, 2022.
8. On June 8, 2020, the Petitioners obtained an amended and restated initial order (the “ARIO”) in these proceedings. Pursuant to the terms of the ARIO, the Monitor ran an extensive SISP process, but that process did not result in a completed sale or investment transaction.
9. The Monitor’s original SISP process is summarized in the Monitor’s Fifth Report dated April 13, 2021. The report sets out that the Monitor:
 - a. “solicited the Terrace House Project to approximately 670 potential bidders, including local, national and international strategic and financial parties and real estate developers;
 - b. “retained CBRE Limited in a limited capacity to market the Terrace House Project to its investor network in Asia as well as a newspaper advertisement that was published in a Hong Kong newspaper, the South China Morning Post;
 - c. “populated an electronic data room (the “Data Room”) with key financial, corporate, operational and other information including construction drawings, consultant reports and other business documents relevant to the Terrace House Project for Prospective Parties to evaluate following the signing of a CA; and
 - d. “short-listed six (6) “Qualified Offerors” to participate in Phase II of the SISP and provided those parties a period of approximately six (6) weeks to acquire or refinance the Terrace House Project (those parties which submitted the offers, the “Qualified Offerors”).

- e. "The Monitor received six (6) Phase II Offers from the Qualified Offerors (the **"Phase II Bids"**) and filed copies of these offers under seal in a Confidential Supplement to the November 27, 2020 Third Report;
 - f. "Following consultation with the Secured Creditors, the Monitor executed a **"Bid Offer Agreement"** on behalf of the Petitioners with Bosa Properties (OC) Inc. (the **"Bid Offeror"**). The execution of the Bid Offer Agreement was approved by this Honourable Court on December 1, 2020.
 - g. "The Bid Offer Agreement provided the Bid Offeror to February 16, 2021 (the **"Due Diligence Period"**) to complete a satisfactory feasibility study and due diligence analysis (the **"Feasibility Study"**) relating to the economics of the Terrace House Project, and to obtain construction financing."
10. The Monitor's Fourth Report describes that on February 16, 2021, the Bid Offeror provided the Monitor with a feasibility study (the **"Confidential Feasibility Study"**) on the Terrace House Project, and put forward a proposal that varied from the Bid Offer that was not acceptable to CMLS. Accordingly, the Monitor in consultation with CMLS did not advance Bid Offer to a definitive agreement.
 11. After the Bid Offer had failed to materialize into a definitive agreement, on April 16, 2021, the Court approved the Monitor entering into a purchase and sale agreement (the **"Landa PSA"**) with Landa Global Acquisitions Ltd. (**"Landa"**) which provided for the opportunity for third parties to submit competing bids. If no competitive proposals were received that were deemed superior to the Landa PSA, the Court would then be asked to grant an approval and vesting order in favour of Landa.
 12. On June 15, 2021, the Petitioners sought and were granted an Order (the **"Order Approving Sale"**) approving the Purchase and Sale Agreement dated for reference June 4, 2021 (the **"Sale Agreement"**), made between the Petitioners and Solterra Acquisitions Corp (**"Solterra"**), for the purchase of the Terrace House Project.
 13. On September 22, 2021, 1296371 B.C. Ltd. (**"129"**) appealed the Order Approving Sale to the British Columbia Court of Appeal (the **"BCCA"**). By way of an Order dated September 22, 2022 (the **"BCCA Order"**), the BCCA set aside the Order Approving Sale and granted an Order approving an offer (the **"129 Offer"**) submitted by 1296371 B.C. Ltd. (**"129"**) to purchase and take assignment of the loan and security held by CMLS and to repay the Construction Loan and the Original DIP Lender.
 14. The BCCA Order further removed the Enhanced Powers granted to the Monitor and reverted operational control of the Terrace House Project back to the Petitioners.

The Mandate Loan

15. As set out in the Receiver's Twelfth Report to the Court:

- a. "The 129 Offer was completed in three tranches with \$14,700,000 provided by Domain Facility Corp. ("**Domain**") (the "**Initial Domain Loan**"), \$8,399,060 provided by 129 and \$2,150,000 provided by 1260780 B.C. Ltd. ("**126**" and together with 129, the "**Junior Lender**"). 126 and 129 are related to the Petitioners."
- b. "The Initial Domain loan matured on May 1, 2022, however the Petitioners obtained an extension of the maturity date to July 1, 2022 for an extension fee of \$98,000."
- c. "The Initial Domain Loan was almost entirely used to complete the 129 Offer and left very little cash available to the Petitioners to pay for working capital and site preservation expenses. To fund these costs through to the expiry of the current Stay Period, on February 15, 2022 this Honourable Court granted the Further Amended and Restated Initial Order ("**FARIO**") and approved an additional \$1,800,000 tranche to the Domain facility (the "**Second Domain Loan**" and collectively with the Initial Domain Loan, the "**Domain Facility**") to provide working capital to the Petitioners for this proceeding."

16. "... the Petitioners have identified a development partner, Enso Holdings Ltd. ("**Enso**") that has agreed with the Petitioners that it will co-develop the Terrace House Project, become the majority General Partner, and provide its covenant and an equity investment to support the necessary construction financing to exit these proceedings. The Petitioners together with Enso negotiated a commitment letter dated April 19, 2022 (the "**Initial Mandate Commitment Letter**") with Mandate Management Corporation ("**Mandate**") which was attached to the Monitor's Tenth Report, for a proposed \$20,000,000 mortgage financing (the "**Proposed Mandate Loan**") to repay the Domain Facility and provide working capital for these CCAA Proceedings."

17. On May 13, 2022, this Honourable Court granted an order approving the Proposed Mandate Loan and extending the Stay of Proceedings to September 30, 2022. The Proposed Mandate Loan has not yet completed and has not yet funded.

18. As the Proposed Mandate Loan has not yet funded, Aviva Insurance Company of Canada ("**Aviva**") is seeking an Order approving the PSA.

Proposed Transaction

19. As this court is aware, no successful transaction resulted from the SISP. As such, Aviva negotiated with various stakeholders and third parties in the hopes of reaching agreement

on a transaction. The most viable transaction, both in terms of consideration and closing certainty, appears to be from Solterra.

20. Proceeding by way of a Reverse Vesting Order is the preferred approach as it will result in the greatest recovery by the estate.

PART 3: LEGAL BASIS

21. The Petitioners have been unable to obtain financing to repay the Domain Facility, and the Domain Facility is in default. Domain is seeking to have a receiver appointed to, among other things, market and sell the Petitioner's assets and undertakings.
22. Pursuant to the Original SISP, the Monitor fully exposed these assets and undertakings to the market, and identified the parties most likely to acquire those asset and undertakings.
23. Aviva is of the view that a further SISP or marketing process administered by a receiver will not likely identify any interested parties not already known to the Monitor, and will not generate a significantly higher sale price. Conversely, a further SISP or marketing process administered by a receiver will incur significant professional and interest costs.
24. It is Aviva's position that the stakeholders will benefit most from a the proposed sale.

Approval of the Transaction Including Reverse Vesting Order

25. Section 36(1) of the CCAA provides jurisdiction to the Court to authorize the sale of a debtor company's assets out of the ordinary course of business. Section 36(3) sets out a non-exhaustive list of factors that courts are to consider in determining whether to approve a sale:
- a. whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - b. whether the monitor approved the process leading to the proposed sale or disposition;
 - c. whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition in bankruptcy;
 - d. the extent to which creditors were consulted;
 - e. the effects of the proposed sale or disposition on the creditors and other interested parties; and

- f. whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
26. Courts applying section 36 of the CCAA have cited a number of factors that may be considered, but the essential role of the Court is to "look at the transaction as a whole and essential decide whether or not the sale is appropriate, fair and reasonable."
27. The Court's decision in *Royal Bank v. Soundair Corp.*, 1991 CanLII 2727 ("Soundair") inform the Court's analysis under section 36 of the CCAA through the Soundair Factors which consider:
- a. whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently;
 - b. the interests of all parties;
 - c. the efficacy and integrity of the process by which offers were obtained; and
 - d. whether there has been unfairness in working out the process.
28. Both the section 36 and Soundair factors favour the granting of the vesting order being sought as:
- a. The process leading up to the proposed transaction has been the subject of approvals by the Court and overseen by the Monitor;
 - b. The Monitor is supportive of the proposed transaction;
 - c. The proposed transaction is supported by all fo the parties with a financial interest in the development;
 - d. This proposed transaction is in the best interest of the stakeholders as it represents the best option for fulfilling the goals of restructuring;
 - e. There has been no unfairness in the working out of the process;
 - f. The transaction results from extensive efforts to obtain the best price for the assets
29. This Court in *Quest University Canada (Re)*, 2020 BCSC 1883 ("Quest"),¹ has recognized that sections 11 and 36 of the CCAA provide for the jurisdiction to grant reverse vesting orders
30. In *Quest*, the Court noted that Courts have recognized reverse vesting orders as an innovative solution to challenges in a proceeding and that in exercising the Court's

discretion in this regard, the Court should consider (1) whether the order sought is appropriate in the circumstances, (2) whether the applicant has been acting in good faith; and (3) with due diligence.

31. A reverse vesting order is appropriate in this instance as it represents the best opportunity to realize value for the Petitioners' stakeholders and the alternative would be a greater shortfall for the secured creditors, to the prejudice of all stakeholders. Further, a reverse vesting order will enable the Purchaser to preserve a number of key agreements including a "Building Permit" issued by the City of Vancouver and other agreements in order to carry on and complete construction of the Terrace House Projects.

Adding Residual Co. As a Petitioner

32. The Monitor requires authorization to incorporate a subsidiary of Port Capital Development (EV) Inc. for the purpose of facilitating the reverse vesting order contemplated by the PSA.
33. Section 3 of the CCAA provides the Court with authority with respect to both debtor companies and their affiliates. Courts have in other matters have authorized the addition of an entity to the CCAA proceedings for enabling a transaction involving a reverse vesting order.

Part 4: MATERIAL TO BE RELIED ON

Previous Court Orders

34. Initial Order pronounced May 29, 2020;
35. Amended and Restated Initial Order pronounced June 8, 2020;
36. Further Amended and Restated Order pronounced February 14, 2022;
37. Order made After Application pronounced May 13, 2022

Monitor's Reports to the Court

38. Monitor's Third Report to the Court, dated November 27, 2020;
39. Monitor's Fourth Report to the Court, dated February 23, 2021;
40. Monitor's Fifth Report to the Court, dated April 13, 2021;
41. Monitor's Sixth Report to the Court, dated May 20, 2021

42. Monitor's Twelfth Report to the Court, dated June 16, 2022
43. Such further and other material as counsel may advise and this Honourable Court may permit.

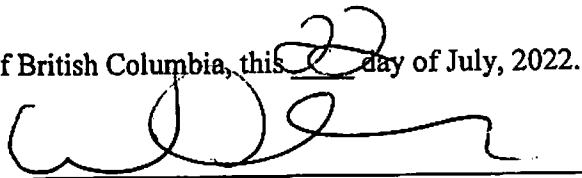
The Applicants estimate that the application will take 1 hour.

☒ This matter is not within the jurisdiction of a Master. **Madam Justice Fitzpatrick is seized of this proceeding.**

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this Notice of Application, you must, within 5 business days after service of this Notice of Application or, if this application is brought under Rule 9-7, within 8 business days after service of this Notice of Application.

1. file an Application Response in Form 33,
2. file the original of every affidavit, and every other document, that
 - a. you intend to refer to at the hearing of this application, and
 - b. has not already been filed in the proceeding, and
3. serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - a. a copy of the filed Application Response;
 - b. a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - c. if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated at the City of Vancouver, in the Province of British Columbia, this 22 day of July, 2022.


Lawson Lundell LLP
Solicitors for the Applicants

Filed by:

William L. Roberts
Lawson Lundell LLP
1600 – 925 West Georgia Street
Vancouver, British Columbia, V6C 3L2

Telephone: 604-685-3456

Email for Application: wroberts@lawsonlundell.com.

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs _____
of Part 1 of this Notice of Application

☐ with the following variations and additional terms:

Date:

Signature of ☐ Judge ☐ Master

APPENDIX

The following information is provided for data collection purposes only and is of no legal effect.

THIS APPLICATION INVOLVES THE FOLLOWING:

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ other matters concerning document discovery
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☐ amend pleadings
- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts

NO. S-205095
VANCOUVER REGISTRY

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

- AND -

IN THE MATTER OF THE *BUSINESS*
CORPORATIONS ACT,
S.B.C. 2002, C. 57, AS AMENDED

- AND -

IN THE MATTER OF A PLAN OF
COMPROMISE AND ARRANGEMENT OF
PORT CAPITAL DEVELOPMENT (EV) INC.
AND EVERGREEN HOUSE DEVELOPMENT
LIMITED PARTNERSHIP

NOTICE OF APPLICATION



Barristers & Solicitors
1600 Cathedral Place
925 West Georgia Street
Vancouver, BC V6C 3L2
Phone: (604) 685-3456
Attention: William L. Roberts
Email: wroberts@lawsonlundell.com

S-205095
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
(BEFORE THE HONOURABLE MADAM JUSTICE S. FITZPATRICK)

Vancouver, B.C.
July 22, 2022

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

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,
S.B.C. 2002, C. 57, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF
PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE
DEVELOPMENT LIMITED PARTNERSHIP

PROCEEDINGS IN CHAMBERS

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S-205095
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA
(BEFORE THE HONOURABLE MADAM JUSTICE S. FITZPATRICK)**

Vancouver, B.C.
July 22, 2022

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

AND

**IN THE MATTER OF THE BUSINESS CORPORATIONS ACT,
S.B.C. 2002, C. 57, AS AMENDED**

AND

**IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF
PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE
DEVELOPMENT LIMITED PARTNERSHIP**

PROCEEDINGS IN CHAMBERS

Counsel for Evergreen House and Port Capital
appearing by videoconference:

K. Cameron

Counsel for Domain Mortgage Corp.
appearing by videoconference:

S. Stephens

Counsel for Ernst & Young:

P. Bychawski

Counsel for Jing Chen:

M. Ferreira

Counsel for Aviva Insurance:

W. Roberts

Counsel for Solterra Acquisitions:

K. Jackson

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EXHIBITS

Nil

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1
Proceedings

Vancouver, B.C.
July 22, 2022

THE CLERK: Calling the matter of *Companies Creditors Arrangement Act* and Port Capital Development Inc. and others, Madam Justice.

THE COURT: Mr. Stephens?

CNSL S. STEPHENS: Madam Justice, Stephens, first initial S., counsel for Domain Mortgage Corp.

THE COURT: Mr. Bychawski?

CNSL P. BYCHAWSKI: Yes, Bychawski, B-y-c-h-a-w-s-k-i, first initial P., counsel for Ernst & Young.
Good morning.

THE COURT: Okay, thank you.

CNSL M. FERREIRA: Ferreira, F-e-r-r-e-i-r-a, first initial M., appearing for the pre-purchaser, Jing Chen.

THE COURT: Okay.

CNSL W. ROBERTS: Roberts, initial W., for Aviva Insurance Company Canada.

THE COURT: Okay. And Mr. Jackson --

CNSL K. JACKSON: Good afternoon.

THE COURT: -- you're back.

CNSL K. JACKSON: I'm back.

THE COURT: One year later.

CNSL K. JACKSON: Yes.

THE COURT: One year later.

CNSL K. JACKSON: Almost to the day.

THE COURT: Well, I know. You don't have -- you're not at all in white and you don't have big floppy ears but you might --

CNSL K. JACKSON: But -- but yet -- but yes.

THE COURT: -- if I'm reading the -- if I'm reading the tea leaves correctly, maybe --

CNSL K. JACKSON: My nose is twitching.

THE COURT: -- you're heading in that direction.

CNSL K. JACKSON: That's right. Jackson, initial K., Madam Justice, for Solterra Acquisitions Corp.

THE COURT: Yes, and Ms. Cameron, I see you on the video.

CNSL K. CAMERON: Good afternoon. Cameron, initial K., on for the petitioners.

THE COURT: All right. And I also have on this list William Jackson. Is there -- or was that -- was that just you, Mr. Jackson?

CNSL K. JACKSON: I mean I --

THE COURT: You're the only Jackson here?

2

Submissions by Cnsl W. Roberts

1 CNSL K. JACKSON: As far as I know.

2 THE COURT: Okay.

3 UNIDENTIFIED SPEAKER: Well, there was a guest on the
4 line but I don't know who it was.

5 THE COURT: Is there a W. Jackson, who's attending,
6 also? No, okay.

7 WILLIAM JACKSON: Yes, yes, I'm --

8 THE COURT: Oh.

9 WILLIAM JACKSON: Yes, I'm -- I'm with Port Capital.

10 THE COURT: Oh, are you?

11 WILLIAM JACKSON: I won't -- I won't be addressing --
12 I won't be addressing the court. I'm just here
13 to monitor.

14 THE COURT: Oh, I see. Are a lawyer, Mr. Jackson?

15 WILLIAM JACKSON: No, I'm not.

16 THE COURT: Oh, okay. All right. You're just an
17 observer then. Okay, well, that -- that's fine.

18 WILLIAM JACKSON: Yes, thank you.

19 THE COURT: Yeah. All right. I'm just going to
20 update this list, Madam Clerk, to show Mr.
21 Stephens. If you've already inputted the names,
22 I think otherwise it's correct.

23 All right. Well, I'm not sure who's going
24 to speak first because...

25 CNSL W. ROBERTS: My Lady, I think it's to me to
26 start.

27

28 **SUBMISSIONS BY CNSL W. ROBERTS:**

29

30 CNSL W. ROBERTS: You'll recall -- first of all,
31 welcome to almost your vacation. When we left
32 off a couple of days ago, Aviva was working hard
33 with two potential rabbit bids.

34 THE COURT: Well, that was the eight -- no, that was
35 the 18th was --

36 CNSL W. ROBERTS: Was it the 18th?

37 THE COURT: No, I think it was the --

38 CNSL W. ROBERTS: Was it last week?

39 THE COURT: It was -- well, actually, to be clearer,
40 it was the 13th where there were two rabbits --

41 CNSL W. ROBERTS: Okay.

42 THE COURT: -- one of which was in the --

43 CNSL W. ROBERTS: Since then --

44 THE COURT: -- in and -- then after that one rabbit
45 had gone away and another rabbit was in play on
46 the 18th, which was not one of the -- and the one
47 in play was not represented by Mr. Jackson.

3

Submissions by Cnsl W. Roberts

1 CNSL W. ROBERTS: So the one in -- the one in play
2 today --

3 THE COURT: Yeah.

4 CNSL W. ROBERTS: -- was not one of those rabbits.

5 THE COURT: Not one of the other two.

6 CNSL W. ROBERTS: No. So we -- we today have --

7 THE COURT: Oh, today.

8 CNSL W. ROBERTS: -- an offer that Aviva is supporting
9 from Solterra Acquisitions. So again --

10 THE COURT: Oh, well, they were one of the first --
11 the two original rabbits.

12 CNSL W. ROBERTS: They were, correct, correct.

13 THE COURT: Okay.

14 CNSL W. ROBERTS: So we've spent --

15 THE COURT: I thought you said Solterra said no.

16 CNSL W. ROBERTS: And they -- and then they've come
17 back and said yes again. We have an offer to put
18 before you today from Solterra. Aviva feels that
19 they have exhausted this marketplace in the sense
20 of the known bidders. We've worked very hard
21 over the last five days, seven days, 14 days, in
22 negotiations with the petitioners, with parties
23 working with the petitioners and we are at the
24 point where -- I'll go back -- the offers in
25 front of you are consistent with what you've seen
26 before and the one in front of you now is for
27 eighteen-point-five, lower than before, but that
28 is effectively --

29 THE COURT: Substantially lower than before.

30 CNSL W. ROBERTS: -- all into the Aviva portion of the
31 security stack.

32 THE COURT: Mm-hm.

33 CNSL W. ROBERTS: I'll go through the details of the
34 offer in a second but Aviva is at the point where
35 we're supporting that offer. We think it's the
36 best you're going to get -- we are going to get.

37 You're going to hear from Ms. Cameron where
38 the petitioners have, I'm going to refer to as, a
39 faint hope of a something. They have an unsigned
40 term sheet to give them some new money to do
41 something and I'll leave it to her to explain to
42 you. It is not something that Aviva supports.
43 It is not something that we think is viable.
44 It's not something that we think will come to
45 fruition in short order.

46 The offer from Solterra has been vetted in
47 principle, not line-by-line, by the monitor. The

4

Submissions by Cnsl W. Roberts

1 monitor supports it as well. And you'll hear
2 from Mr. Bychawski but he'll tell you he also
3 feels that it is the best we are going to do in
4 this marketplace and in this time.

5 What the problem we have is -- I'm going to
6 suggest the first problem is procedural. We
7 don't have a separate, stand-alone motion in
8 front of you to approve that sale. I think I can
9 shoehorn it into the motion I had in front of you
10 a week or two weeks ago for my simplified SISP,
11 if you recall, because part of that order sought
12 the approval of a sale. It sought the approval a
13 sale after a simplified SISP. I'm going to
14 suggest, and I think most of the people in this
15 room will agree with me, we've effectively done
16 what we were suggesting to have done, which is
17 gone back to all of the parties who have
18 expressed interest -- I shouldn't say we -- the
19 monitor did most of that work -- to go back to
20 the parties who expressed interest before to see
21 what their interest was today and what we have --

22 THE COURT: So that includes Landa and Bosa and --

23 CNSL W. ROBERTS: Correct. I'll let Mr. Bychawski
24 speak to that but yes. And we -- the two most
25 viable -- I'm going to say this and hope I'm not
26 wrong -- the two most viable were Solterra and
27 Landa and I believe Landa gave us just a straight
28 no, they'd move on to another project. I think
29 that's correct.

30 Assuming -- go back to the procedural point.
31 If you were sitting next week, I would have a
32 relatively easy procedural answer for you which
33 is we'll get a motion out today and we'll come
34 back on whatever date was convenient for you next
35 week. But I understand you're away for two
36 weeks. The reality is, is that -- our bidder,
37 Solterra, says they've been through this before
38 and they're not going to sit around and wait.

39 THE COURT: I know they've been through it before.

40 CNSL W. ROBERTS: And they have no interest in -- in
41 sitting around and waiting.

42 THE COURT: Do you have a signed APA?

43 CNSL W. ROBERTS: If you tell me that we are going to
44 substantively hear that application, I will have
45 it for you --

46 UNIDENTIFIED SPEAKER: Signed by -- yes, Madam
47 Justice, signed by my client. One of the

5
Submissions by Cnsl W. Roberts

1 questions is who will sign it for [indiscernible
2 - overlapping speakers].

3 CNSL W. ROBERTS: Who will sign it.

4 UNIDENTIFIED SPEAKER: But for my client, I can have
5 that in five minutes, just have it printed.

6 CNSL W. ROBERTS: Part of what we would seek is that
7 you enhance -- we had thought that you enhance
8 the monitor's powers to allow the monitor to
9 accept and complete that sale. Mr. Stephens may
10 have other thoughts on the receiver doing that
11 same task but effectively that you would enhance
12 somebody's powers to complete the sale 'cause one
13 of the issues with the Solterra bid is it has a
14 60-day close. It's a million-dollar deposit,
15 non-refundable, but a 60-day close. And so
16 somebody's going to have to deal with both the
17 property and the closing issues between now and
18 then. I would say this, we negotiated hard to
19 try and get that closing moved up. That's a long
20 time. But that's where we are, as I said, a 60-
21 day close.

22 And sorry, I want to go back to the
23 procedural issue 'cause I don't want to get too
24 far into the substantive.

25 THE COURT: Mm-hm.

26 CNSL W. ROBERTS: The -- the other piece you've heard
27 part of an application to deal with outstanding
28 professional fees, monitor's fees, et cetera.

29 THE COURT: Mm-hm.

30 CNSL W. ROBERTS: Obviously, with a 60-day close,
31 there's going to be more time spent and then with
32 the monitor closing it and our proposal to the
33 monitor, which I think is acceptable, is subject
34 to you, of course, granting the order is we would
35 support the admin charge being increased by one-
36 fifty behind Domain but in front of Aviva to deal
37 with the two things: one, the 60 days in closing
38 the same; and, two, it will partially compensate
39 the arrears. It won't compensate them in full
40 and the only term we put on that was we were
41 looking to have an agreement that they wouldn't
42 ask for more, that if -- if that's the order that
43 went, that that would be the charge and then one
44 of them wouldn't come back and say, oh, can we
45 have another 50 or so but I think we're there.

46 So what we've tried to do, other than the
47 procedure problem of when are you going to hear

6

Submissions by Cnsl W. Roberts

Submissions by Cnsl K. Jackson

1 this, wrap all of the issues up in a bow that
2 bring an ended to this proceeding. And maybe
3 I'll stop there and see if any of my friends want
4 to correct something I've said wrong or
5 misstated.

6 CNSL K. JACKSON: I could add just a bit more on the
7 offer, Madam Justice, which is --

8 THE COURT: Yes, could -- could you come forward, Mr.
9 Jackson --

10 CNSL K. JACKSON: Yes, of course.

11 THE COURT: -- to the microphone just so we can make
12 sure that we get -- and that would go for
13 everyone else that's speaking, please.

14 CNSL K. JACKSON: What I can do is I could hand up a
15 copy of the Offer perhaps. I have copies for my
16 friends, too. I should have handed them out
17 before, I'm sorry. But there -- maybe my friend,
18 Mr. Roberts, could hand them around. Just a
19 couple of details.

20

21 **SUBMISSIONS BY CNSL K. JACKSON:**

22

23 CNSL K. JACKSON: My friend didn't say anything
24 incorrect but he's -- there's a couple of other
25 tweaks to it that I just would point out to the
26 court.

27 THE COURT: Is this essentially the same document I
28 approved back in July --

29 CNSL K. JACKSON: Very much so.

30 THE COURT: -- or June of 2021?

31 CNSL K. JACKSON: Yeah, 98 percent of the document is
32 the same on exactly. It contemplates a reverse
33 vesting order as part of the transaction just
34 like in May of '21. Or June maybe.

35 The -- if we look at the definition on page
36 2 of closing date, it mentions the original
37 closing date or, if the second deposit is paid on
38 or before that, the extended closing date. And
39 so the concept is that it's 60 days but my client
40 can, within that 60 days, pay another -- add --
41 add 650,000 to the purchase price and -- and pay
42 that as another deposit at the same time and then
43 the closing date is extended by 30 more days.
44 And -- and the reason for the six-fifty is it's
45 -- you know, by my math, roughly it's the burn
46 rate and then some cushion for costs and such.
47 And so the purchase price would go up from

7
 Submissions by Cnsl K. Jackson

1 eighteen-and-a-half --
 2 THE COURT: I can write on this, can't I?
 3 CNSL K. JACKSON: Certainly, yes.
 4 THE COURT: Or is this -- this isn't -- I hope --
 5 CNSL K. JACKSON: No, that's a copy for -- for you.
 6 THE COURT: Yeah, okay.
 7 CNSL K. JACKSON: It would go up from eighteen-and-a-
 8 half to nineteen-point-one-five, if extended
 9 beyond 60 days.
 10 THE COURT: Sorry, sorry, sorry, give me those figures
 11 again.
 12 CNSL K. JACKSON: Right. So eighteen-and-a-half if it
 13 closes within 60 days and it goes to nineteen-
 14 point-one-five if it goes another 30 days beyond
 15 that, so 90 days all together.
 16 THE COURT: Oh, so it's the 650,000 plus the eighteen-
 17 and-a-half.
 18 CNSL K. JACKSON: Right, right. It just increases the
 19 purchase price by that amount to get an extra
 20 month which -- which is intended to ensure that
 21 Domain's covered in all the costs and that --
 22 that, by my math, is plenty of cushion.
 23 THE COURT: And what's the second deposit amount?
 24 CNSL K. JACKSON: That's the same amount. So they --
 25 they'd have to pay the six-fifty as an additional
 26 deposit --
 27 THE COURT: Oh, I see.
 28 CNSL K. JACKSON: -- and then it's -- but it's not
 29 just a deposit; it's also an increase in the
 30 purchase price.
 31 THE COURT: I see.
 32 CNSL K. JACKSON: I didn't want that to be lost.
 33 THE COURT: Yeah, I see. Okay.
 34 CNSL K. JACKSON: And the only other thing, and this
 35 is material as well, I think, is on page 5.
 36 THE COURT: Mm-hm. Hang on. Yeah.
 37 CNSL K. JACKSON: Right. And you'll see purchase
 38 price is at double M.
 39 THE COURT: Mm-hm.
 40 CNSL K. JACKSON: There's two options and, of course,
 41 one is the -- the second one is with the
 42 additional 650 you'll see. I haven't filled in
 43 the number before we will do that.
 44 THE COURT: Mm-hm.
 45 CNSL K. JACKSON: But there's also, you'll see, plus
 46 the revenue share portion.
 47 THE COURT: Mm-hm.

8

Submissions by Cnsl K. Jackson

Submissions by Cnsl S. Stephens

1 CNSL K. JACKSON: And so if you turn to that
2 definition over the next page, it's at double R.

3 THE COURT: Yeah.

4 CNSL K. JACKSON: Right, and so what happens if -- and
5 it's not based on profits because we all know how
6 that can be manipulated; it's revenue. So if the
7 revenue from the sales, gross sales, exceeds a
8 hundred and thirty-four million dollars,
9 everything over that is split such that 40
10 percent of that also goes to the -- to the
11 estate, effectively. So this thing gets built
12 out and who knows when it's done but whatever
13 that is, when all the units are sold, if the
14 revenues exceed a hundred and thirty-four million
15 dollars, anything over that 40 percent also goes
16 to the creditors.

17 But that won't be for some time and we'll
18 have to -- one of the things we'll have to work
19 out with the monitor is exactly how you create a
20 residual sort of trust, I suppose, in some sense
21 for that money to be paid eventually, if it gets
22 to that. So there is a potential for this to be
23 more than eighteen-and-a-half or more than
24 nineteen-point-one-five, it's just a question of
25 what those units sell for when they sell.

26 I just wanted to point that out. So there
27 is some potential significant upside. We just
28 don't know.

29 THE COURT: Mm-hm.

30 CNSL K. JACKSON: And I think -- I think really that's
31 the -- that's the guts of it. I wouldn't take
32 you through the details. It's otherwise very
33 much like the agreement that was approved a year
34 ago and it contemplates a reverse vesting order
35 as well. And I have a draft of the vesting order
36 which is being brought up now which I can
37 circulate it but I won't speak to that right now,
38 of course.

39 THE COURT: All right. Okay, thank you. All right.
40 Mr. Stephens, are you going to speak to the
41 procedural issue?

42 CNSL S. STEPHENS: Yes.

43 THE COURT: Okay.

44
45 **SUBMISSIONS BY CNSL S. STEPHENS:**

46
47 CNSL S. STEPHENS: Yes, that was -- it is my client's

9

Submissions by Cnsl S. Stephens

1 primary concern is there is no application before
2 you that would -- that we could fit this within,
3 in my submission, and there are interested
4 parties, there have been other appellate
5 proceedings. In my submission, the most
6 straightforward way to handle what is hopefully a
7 good offer and hopefully wouldn't fall apart is
8 to -- is to appoint Bowra as receiver, if
9 considered appropriate, direct Bowra to engage
10 with Solterra to sign and finalize that agreement
11 and bring it before the court for approval so we
12 can have specific language to address any concern
13 of Solterra and Aviva in terms of getting this
14 done as fast as possible but it is the -- it is
15 primarily the procedural issue that would be my
16 concern and the potential mischief that could
17 arise.

18 THE COURT: Well, why doesn't someone prepare a quick
19 Notice of Application? You can prepare a quick
20 -- I mean it just seems to me we've been -- this
21 -- this whole abbreviated process has been in
22 play now for some days now so there's no secret
23 that this was going on.

24 CNSL W. ROBERTS: Can I -- can I take you to --
25 somewhere you have my binder because you make --

26 THE COURT: I do not -- I do not, Mr. Roberts. I did
27 not get that at all.

28 CNSL W. ROBERTS: Okay. If I --

29 THE COURT: Well, I know you're in support. Let me
30 just hear from everybody.

31 CNSL W. ROBERTS: Sure. Can I give you one --

32 THE COURT: I know Mr. Stephens -- Mr. Stephens wants
33 his client to be paid.

34 CNSL W. ROBERTS: Yes.

35 THE COURT: ASAP.

36 CNSL S. STEPHENS: Yes.

37 THE COURT: I think that's your primary objective,
38 right, Mr. Stephens?

39 CNSL S. STEPHENS: That's absolutely correct, yes.

40 THE COURT: And frankly, it doesn't strike me as being
41 an entirely efficient way to appoint a receiver
42 and have a new party involved and all of that
43 rigmarole. That seems to be a lot and a lot of
44 expenses.

45 Mr. Bychawski, what do you have to say?

46 CNSL P. BYCHAWSKI: My Lady, a couple points just on
47 the 13th report of --

10

Submissions by Cnsl P. Bychawski

Submissions by Cnsl K. Cameron

1 THE COURT: Well, we're just dealing with the
2 procedural issue now, right?
3 CNSL P. BYCHAWSKI: Yeah, the procedural issue.
4 THE COURT: Yeah.
5

6 **SUBMISSIONS BY CNSL P. BYCHAWSKI:**
7

8 CNSL P. BYCHAWSKI: So in the monitor's report, the
9 monitor expressed that it would be prudent,
10 whether by receivership or within these
11 proceedings, to approach parties that previously
12 expressed interest in the Terrace House Project
13 to see if a sale can be achieved on an expedited
14 timeline. Now, that report was filed on July
15 12th. Since -- since that time, that sort of
16 process has, in fact, unfolded. The monitor has
17 been engaged with Mr. Jackson's client, with
18 Aviva, with the other rabbits and has worked to
19 try to facilitate an outcome within the context
20 of these CCAA proceedings.

21 And there also has been, of course,
22 discussions on the issue of the administration
23 charge and thus solving other issues to get to an
24 efficient outcome of the sale and the monitor is
25 supportive of this particular transaction. And
26 again, the options before the court are whether
27 it'd be more efficient in the CCAA or in
28 receivership. And frankly, the monitor's view is
29 -- is neutral in that respect but we have been
30 working towards this CCAA outcome for quite some
31 time now.

32 THE COURT: Yes, all right, thank you. Ms. Cameron,
33 what -- what say you on the procedural issue?
34

35 **SUBMISSIONS BY CNSL K. CAMERON:**
36

37 CNSL K. CAMERON: Justice Fitzpatrick, to start, you
38 were first advised that the Solterra offer may be
39 in play shortly before today's application and I
40 was first formally advised of it by Mr. Schultz,
41 counsel for 126 and 129 about 15 minutes before
42 this application. He was advised that he had
43 been -- heard a rumour that this might be
44 happening today. He's, unfortunately, unable to
45 attend but he asked that I instruct -- asked that
46 I advise the court that they would not support a
47 transaction if it wouldn't provide for their

11
 Submissions by Cnsl K. Cameron

1 repayment.

2 And specific to my clients, the petitioners
 3 have, throughout this last week, been in
 4 discussions with various parties to try to both
 5 look at other transactions where refining it
 6 saying to ensure the best outcome for their
 7 stakeholders.

8 Late yesterday, they did receive a Letter of
 9 Intent from Synvest Investment Management. I can
 10 advise -- it's not where it needs to be to be
 11 advanced but the parties believe they could get
 12 there in very short form.

13 So our main request or ask would be, yes,
 14 there's procedural issues with respect to
 15 advancing Solterra's application. We would be
 16 looking to see a procedure that provides a very
 17 short timeframe so that any other interested
 18 parties, specifically Synvest, could submit a bid
 19 as well so that we can try to maximize the
 20 purchase price without having further delays.

21 THE COURT: Sorry, who's this Synvest and how do you
 22 spell that?

23 CNSL K. CAMERON: S-y-n-v-e-s-t.

24 THE COURT: Oh, Synvest.

25 CNSL K. CAMERON: Investment Management.

26 THE COURT: Investment Management. And this LOI, is
 27 it for refinance or a sale or what is it?

28 CNSL K. CAMERON: It's for a sale, a reverse vesting
 29 order so a similar transaction. They were
 30 actually looking at the previous reverse vesting
 31 order that had been approved for Solterra as the
 32 format for their proposed bid.

33 THE COURT: And you got this LOI late yesterday, you
 34 say?

35 CNSL K. CAMERON: Yes.

36 THE COURT: Well, Mr. Gruber has known since the 13th
 37 that this return to the market was taking place
 38 on the 13th, is that -- is that the best that
 39 he's been able to do?

40 CNSL K. CAMERON: That's correct, Justice Fitzpatrick.
 41 There's been different avenues for
 42 [indiscernible] to pursue over this last week and
 43 this was the best that could come through once
 44 the [indiscernible] transaction fell apart
 45 earlier this week.

46 THE COURT: When did that fall apart?

47 CNSL K. CAMERON: I believe on Tuesday. Mr. Roberts

12

Submissions by Cnsl K. Cameron

Submissions by Cnsl W. Roberts

1 might be able to correct me if I'm wrong but I
2 believe that was Tuesday of this week.
3 THE COURT: Mm-hm. And how much time are the
4 petitioners looking for along with 129?
5 CNSL K. CAMERON: They believe they'd be in a position
6 to have a reverse vesting order application
7 before you within the next two weeks.
8 THE COURT: Okay. Anything further, Ms. Cameron?
9 CNSL K. CAMERON: No, that's it. Thank you, My Lady.
10 THE COURT: Okay, thank you. Mr. -- before Mr.
11 Roberts gets up again, Mr. Stephens, what's your
12 client's debt at now, leaving aside the 129
13 Domain level? I think you -- you told me about
14 those updated figures and I -- I think -- I
15 thought you had some updated evidence on that.
16 CNSL S. STEPHENS: I do. Affidavit -- Affidavit
17 number 2 of Ms. Dword (phonetic), if I can find
18 it, has a payout statement.
19 THE COURT: Yeah, did you -- did you give that to me?
20 CNSL S. STEPHENS: Yeah, you should have a copy. I do
21 have an additional one, if you --
22 THE COURT: Yes, no, I have that.
23 CNSL S. STEPHENS: -- would like me to hand that --
24 THE COURT: Thank you. I thought you'd handed that up
25 the last time.
26 CNSL S. STEPHENS: Exhibit page 4.
27 THE COURT: Page 4. So you're at 16.8?
28 CNSL S. STEPHENS: Yes, exclusive of legals.
29 THE COURT: Yes, that's right. And this offer's at
30 nineteen-and-a-half, right?
31 UNIDENTIFIED SPEAKER: Eighteen-and-a-half.
32 THE COURT: Or sorry, eighteen-and-a-half. Okay. Mr.
33 Roberts?
34 CNSL W. ROBERTS: Thank you.

SUBMISSIONS BY CNSL W. ROBERTS, continuing:

38 CNSL W. ROBERTS: First, one -- one more piece --
39 THE COURT: Yes, and sorry, you were -- you were going
40 to dig out your Application because I don't have
41 that.
42 CNSL W. ROBERTS: Correct, and I might just pass you
43 up my binder. And while I do that, I wanted to
44 disclose to the court, as you heard from Mr.
45 Jackson the terms of the Purchase and Sale
46 Agreement, including what I'll call the back-end
47 revenue sharing piece, the eight we get -- we'll

13

Submissions by Cnsl W. Roberts

1 get some piece of the eighteen-five, which will
2 be shared amongst the parties. There's maybe
3 some back-end revenue. But separately, Aviva and
4 Solterra have entered into a commercial agreement
5 dealing with the back-end. The monitor's been
6 advised of all the terms of that and the monitor
7 is content with it all.

8 We just wanted to pass that on that there's
9 another -- you're -- you're seeing us here
10 supporting Solterra and part of that support of
11 Solterra is another deal where Aviva has a claim
12 against petitioners and others to recover losses
13 and Solterra is participating in that.

14 THE COURT: Oh, so that's Solterra.

15 CNSL W. ROBERTS: Part of the commercial transaction
16 between them.

17 THE COURT: The claim against the --

18 CNSL W. ROBERTS: And just out of an abundance of
19 caution --

20 THE COURT: -- against the petitioners.

21 CNSL W. ROBERTS: Against the indemnitors under
22 Aviva's facility which effectively is the
23 petitioners.

24 THE COURT: I see, okay. And so I'm just trying to
25 figure out how this would flow then as if at
26 eighteen-and-a-half --

27 CNSL W. ROBERTS: I can do you a quick math, if you'd
28 like.

29 THE COURT: Yes, if you --

30 CNSL W. ROBERTS: So -- and again, this is rough,
31 rough math.

32 THE COURT: Yeah.

33 CNSL W. ROBERTS: You've got first admin charge of a
34 hundred.

35 THE COURT: So we've got eighteen-and-a-half at the
36 top on the revenue, right?

37 CNSL W. ROBERTS: On the revenue side, correct.

38 THE COURT: Yeah, hundred thousand?

39 CNSL W. ROBERTS: Hundred thousand. Then Domain for
40 17, let's say, keep it easy. Then our
41 proposed --

42 THE COURT: I thought it was 18.6 plus legal.

43 CNSL W. ROBERTS: I thought you said --

44 CNSL S. STEPHENS: 16.8 plus legals.

45 THE COURT: Sorry, 16.8, sorry.

46 CNSL W. ROBERTS: Yeah, so I'm rounding up to 17.

47 THE COURT: Plus legals so say 17, yeah.

14

Submissions by Cnsl W. Roberts

1 CNSL W. ROBERTS: Then you've got --

2 THE COURT: So that leaves --

3 CNSL W. ROBERTS: -- the proposed increase for admin
4 for another one-fifty. Then you've got a --
5 there's some super priority GST in there for
6 about 50. I think those are the only super
7 priority claims. And assuming there's a 60-day
8 close, we've probably got another six, 700
9 [indiscernible] between interest and -- interest
10 on the Domain facility.

11 THE COURT: Sorry, sorry, hang on, just -- I've got
12 eighteen-and-a-half less 100 for the admin,
13 that's 18.4, less 17 is -- so you're at net 1.4
14 after Domain less -- less a hundred and fifty for
15 the admin increase, 50 for the GST and we're down
16 to 1.2 million, right?

17 CNSL W. ROBERTS: And then I say six or 700 to
18 maintain the property over the next 60 days,
19 which is both Domain interest and will cut it
20 down to critical site maintenance.

21 THE COURT: Yeah.

22 CNSL W. ROBERTS: That's an estimate, obviously.

23 THE COURT: All right. So that's six -- that's five
24 to six million left -- or sorry, five to --

25 CNSL W. ROBERTS: Five to six hundred thousand, yes.

26 THE COURT: -- \$600,000 left.

27 CNSL W. ROBERTS: Correct. Meaning we don't have to
28 sway a lot on any of those numbers to get very
29 close to the bubble of zero. Aviva's looking at,
30 hopefully, back-end money on this deal, that
31 Solterra builds it out, sells it for enough to
32 hit the one thirty-four gross revenue number and
33 we can start sharing in some proceeds. If --
34 I'll say this bluntly. If we thought we could
35 sell it for more, we'd sell it for more.

36 THE COURT: Well, the second -- the second -- next
37 tranche after we've gone through all these
38 numbers is you at 35 percent of that --

39 CNSL W. ROBERTS: Correct.

40 THE COURT: -- tranche, right?

41 CNSL W. ROBERTS: That's right.

42 THE COURT: So one -- one two nine has got some skin
43 in the game here.

44 CNSL W. ROBERTS: Correct. At that -- correct.

45 THE COURT: At that -- at that level, right? So what
46 -- what do you say about Ms. Cameron's
47 communication of Mr. Schultz's communication on

15

Submissions by Cnsl W. Roberts

1 behalf of one two nine?

2 CNSL W. ROBERTS: Two things, I think. One is one two
3 nine is effectively headed by Tobi Reyes.

4 THE COURT: Mm-hm.

5 CNSL W. ROBERTS: He's the one giving instructions and
6 making decisions. He is well aware and one two
7 nine has been well aware of everything that's
8 happened in these proceedings and have made a
9 decision about when to participate and not
10 participate. And if one two nine thought it was
11 important to be here today, they would be here
12 today and they have chosen not to.

13 And asking one two nine, petitioners, are
14 asking for time again and what we feel is they're
15 gambling with our time. If we had confidence
16 that the petitioners' deal would come to fruition
17 and would get us more money, that is what we
18 support. There's no axe to grind, there's no --
19 Aviva's just -- this is business. We're -- we're
20 looking for the certainty of the Solterra bid
21 versus the uncertainty of a further delay.
22 Nothing we --

23 THE COURT: Are you aware of this Synvest deal?

24 CNSL W. ROBERTS: I'm -- I'm as aware as the monitor
25 is, which I've seen a -- I forget if it was
26 called a term sheet or whatever it was called, a
27 piece of paper -- Letter of Intent, I think it
28 was called -- but not signed by Synvest. The one
29 I saw had no Synvest signature on it. It had
30 Synvest letterhead and was signed by -- it
31 appeared to be Tony Reyes' signature. I can't
32 guarantee it was. It appeared to be his
33 signature. But no signature for Synvest.

34 THE COURT: On behalf of Synvest or on behalf of --

35 CNSL W. ROBERTS: No, on behalf of the petitioners --

36 THE COURT: Oh.

37 CNSL W. ROBERTS: -- purporting to accept the LOI,
38 though there's nothing to accept in an LOI, but
39 it wasn't signed by Synvest. But that's the last
40 -- that's -- that's all I've seen and I don't
41 purport to say that that is the end all and be
42 all. There's a -- this LOI from Synvest that I
43 couldn't make head nor tails of about what it is
44 or what it's for 'cause it seemed to be talking
45 about Synvest being a purchaser. There's a
46 second term sheet from a company called Rowanwood
47 for an additional four-point-something million.

16

Submissions by Cnsl W. Roberts

1 And I don't understand what it's for either. I
2 don't -- and if Ms. Cameron can't explain it to
3 the court and to everyone in the room, I -- I
4 don't purport to be able to.

5 THE COURT: Well, if it was of particular importance
6 in terms of what's happening today then I would
7 have thought that it would be here.

8 CNSL W. ROBERTS: Agreed. And so what we would say is
9 one of two things. I can have a motion done and
10 back to you in -- back here within 45 minutes but
11 if -- if you open to the first tab of the binder
12 I passed up and look at the motion that has been
13 filed that sought or simplified SISP, you'll see
14 at paragraph -- I think it's 1(c), part of that
15 motion seeks court approval of an offer.

16 THE COURT: 2(c) actually.

17 CNSL W. ROBERTS: 2(c), thank you. And so I suggest
18 that you have in front of you a motion that, in
19 part of it, seeks the monitor to effectively
20 bring before you an offer for approval at the end
21 of a process. Obviously, that process has not
22 been followed, as set out here, but I suggest to
23 you, in substance, it has effectively been
24 followed. We have put in a tremendous amount of
25 work trying to get to where we are today.

26 And I'll let the monitor speak to that but
27 that -- I say, in substance, we've done what this
28 application contemplated and we have brought
29 before you an offer supported by the majority --
30 everyone in this room with a financial interest,
31 but the majority of parties with a financial
32 interest.

33 The only one, if you remember -- if you do
34 the -- the stack, you've got to get over about
35 \$35 million to get past one two nine when you
36 stack them all up, meaning the only person not in
37 this room with a financial interest is one two
38 nine. And one two nine has chosen not to be
39 here. And all the parties in this room support
40 this offer, feel it can be closed, feel the terms
41 are reasonable and will get the best result out
42 of this difficult file.

43 THE COURT: Okay. Tell you what I'm going to do. I'm
44 going to hear your application. I want you to
45 come back in -- at 3:20 with an application,
46 affidavit, draft order. Ms. Cameron, if you have
47 anything you want to put before the court, I

17

Submissions by Cnsl W. Roberts

1 would suggest you do it immediately. All right?

2 CNSL W. ROBERTS: Good. Thank you, My Lady.

3 THE COURT: Come back at 3:20 then, okay? Thank you.

4
5 (PROCEEDINGS ADJOURNED)

6 (PROCEEDINGS RECONVENED)

7
8 CNSL W. ROBERTS: I guess I have to pass up to you a
9 filed motion with -- with a Schedule A, which I
10 will write on it, Schedule A, which is a draft
11 order. And an affidavit -- an unfiled affidavit,
12 but it's downstairs being filed now by an
13 articulated student who works with Mr. Jackson. And
14 attached to the affidavit is a copy of the Offer.
15 So you'll see in the motion, we are seeking a)
16 dealing with the very shortened service, which is
17 effectively just service on people in this
18 room --

19 THE COURT: Mm-hm.

20 CNSL W. ROBERTS: -- b) approving the purchase and
21 sale that's in front of you; c) enhancing the
22 monitor's powers to complete that sale; d)
23 authorizing the monitor to incorporate a new
24 subsidiary, which is part of the reverse vesting
25 order process; and, then e) dealing with process
26 at the end of the transaction, the monitor files
27 a certificate to confirm the transaction has
28 completed and along that happening, the unwanted
29 assets vest over to the garbage car.

30 There will be nothing surprising for you in
31 the factual basis; you know all of the things
32 that are in here. There should be nothing
33 surprising in the legal basis either which is
34 just the motherhood issues relating to this
35 court's jurisdiction to approve a sale in a CCAA
36 proceeding and the basis on which you should do
37 so.

38 This is an unusual situation in the sense
39 that you did not have a formal process in front
40 of you but I do suggest you had, in the monitor,
41 competent and diligent professionals doing
42 effectively what would have been done in that
43 process. You have in front of you an offer that
44 Aviva, as the second-ranking creditor, says is
45 the best offer we are going to see in these
46 circumstances that has any real certainty of
47 completing, that this offer is going to do the

18

Submissions by Cnsl W. Roberts

Submissions by Cnsl K. Jackson

best for stakeholders that we can expect, I would add especially given we're in a different world today than we were two months ago or six months ago.

This project is residential condos. The residential condo market is dramatically being affected by interest rates. The -- the -- I'm not going to say panic but the -- Aviva -- I'll only speak for Aviva, Aviva feels some urgency to this in the sense that the market isn't going to get better and may get drastically worse and we would -- we urge upon you to approve this sale and enhance the monitor's powers to allow a completion of that sale and to, as corollary, to increase the admin charge in the manner provided, and that's a bit complicated. I'll let Mr. Bychawski speak to that but to allow them the funding to do so.

THE COURT: And that's in the draft order, too, I assume?

CNSL W. ROBERTS: That's in the draft order as well. And I might let Mr. Jackson take us through this draft order because he's just run down to his office to fill in the blanks and so he could do that more efficiently than I.

THE COURT: Mm-hm. Okay, thank you. Mr. Jackson, it probably makes sense for you to start and then I'll hear from Mr. Stephens and -- and I'm sorry, Mr. Ferreira, I haven't -- I haven't called on you yet, Mr. Ferreira, but I'll ask you whether you have anything to say and then I'll deal with Ms. Cameron. Okay, thank you.

CNSL K. JACKSON: Thank you, Justice.

SUBMISSIONS BY CNSL K. JACKSON, continuing:

CNSL K. JACKSON: I -- I won't -- I don't think as the -- as the potential purchaser, I don't have a lot to say on the -- on the background or the facts and the legal basis. I can simply tell you that the offer is made. You've seen it's eight-and-a-half, it's now signed by Mr. McKelly (phonetic) on behalf of Solterra and, it's as I described earlier in terms of the purchase price and the timing for closing.

THE COURT: You've filled in those amounts then that --

19

Submissions by Cnsl K. Jackson

1 CNSL K. JACKSON: I did.
2 THE COURT: -- you had shown me before?
3 CNSL K. JACKSON: I did, yes, yes?
4 THE COURT: Yes?
5 CNSL K. JACKSON: So it's all as -- as advised this --
6 or earlier this afternoon.
7 THE COURT: Mm-hm. And then -- oh, and I see -- you
8 say it's been signed?
9 CNSL K. JACKSON: It has 'cause that -- I hope -- that
10 copy doesn't have a -- it would be the second-to-
11 last --
12 THE COURT: Oh, Solterra has signed, yes, yes.
13 CNSL K. JACKSON: Solterra has -- yes, so -- right.
14 And so the order would direct the monitor to sign
15 on behalf of the petitioners for this.
16 THE COURT: I see, okay, all right.
17 CNSL K. JACKSON: Yes.
18 THE COURT: No, it is signed, thank you.
19 CNSL K. JACKSON: Okay.
20 THE COURT: Mm-hm.
21 CNSL K. JACKSON: And I'm sorry, did my friend pass up
22 to you the form of order now then?
23 THE COURT: Yes, that's what I -- I actually was
24 thinking more --
25 CNSL K. JACKSON: Of looking at it --
26 THE COURT: -- so that you would take me --
27 CNSL K. JACKSON: Yes.
28 THE COURT: -- through. I do appreciate that it's
29 usually not a purchaser that's lobbying for its
30 own sale.
31 CNSL K. JACKSON: Right, right.
32 THE COURT: Yes.
33 CNSL K. JACKSON: Very good.
34 THE COURT: So is it -- is this essentially the same
35 form of order that I approved back in June of
36 2021?
37 CNSL K. JACKSON: Very much so with a couple of little
38 tweaks which I think reflect the fact that it's
39 the monitor now entering into it on behalf of the
40 petitioners. But I think otherwise this is
41 exactly current from the last order. When I
42 pulled up the Word version of it and basically
43 just updated it.
44 THE COURT: Mm-hm.
45 CNSL K. JACKSON: I'll tell you one thing I did change
46 in it but otherwise it's a pretty standard
47 reverse vesting order. I realize now when I was

20

Submissions by Cnsl K. Jackson

1 doing this, and of course haste is always a
2 concern, is that I've messed up the schedule and
3 so I'll have to probably handwrite something to
4 fix it up or to go back and fix it up because
5 what I did here is, in paragraph 1, I've inserted
6 a copy of the agreement as Schedule B.

7 There is no -- I mean otherwise it's just in
8 the affidavit, which is fine, but I think in some
9 cases, it's nice to have an easy reference to it
10 in an order and we do that in some cases. It was
11 also earlier going to be attached to a
12 supplemental report but that wasn't filed so that
13 was that change. And so the problem is, of
14 course, is it moves all of the other schedules up
15 and if you look at paragraph 2 and on, I haven't
16 done that. And so all those schedules just have
17 to be bumped out from B to C and so on.

18 THE COURT: Oh, I see.

19 CNSL K. JACKSON: And so if you look at paragraph 1 --

20 THE COURT: Sorry, and then --

21 CNSL K. JACKSON: Yes, sorry.

22 THE COURT: Yeah, okay, go ahead. Yeah, I just --
23 mm-hm.

24 CNSL K. JACKSON: And sorry, if we look at the very
25 last line on the first page:

26
27 The execution of this Sale Agreement by
28 Ernst & Young, the monitor on behalf of the
29 petitioners, is hereby authorized and
30 approved and the monitor and the petitioners
31 are authorized and directed to take
32 additional steps, execute documents...

33
34 The usual language. It does have the monitor and
35 the petitioners and Mr. Bychawski did raise to me
36 whether it's necessary to have the petitioners in
37 here given that the monitor is going to be the
38 one completing it but from my perspective, I
39 don't see any harm in directing the petitioners
40 to do this. If there's something we need done
41 that the monitor is having difficulty with, we'll
42 be able to say there's an order compelling your
43 cooperation here.

44 THE COURT: Mm-hm.

45 CNSL K. JACKSON: Standard language on the
46 [indiscernible - rapid speech] of the
47 certificate, which is when the assets vest. And

21

Submissions by Cnsl K. Jackson

1 so the order of things -- this is -- again, I
2 should mention also cribbed from -- from Quest,
3 too. We have a reverse vesting order in that so
4 there is -- this is becoming the model -- model
5 of reverse vesting orders for our province, I
6 guess. So incorporating a new sub, Residual Co.,
7 vesting the excluding assets and liabilities in
8 it, issuing one new share from the GP to the
9 purchaser.

10 THE COURT: Is GP defined in the order?

11 CNSL K. JACKSON: GP is defined -- I thought so.

12 Where is that now? Well, there's another thing.

13 Did I do that? We'll have to define that.

14 THE COURT: That's --

15 CNSL K. JACKSON: It's Port Capital Development (EV)

16 Inc. is the GP.

17 THE COURT: Oh, which you -- you've --

18 CNSL K. JACKSON: No, that's -- sorry.

19 THE COURT: You called it Residual Co.

20 CNSL K. JACKSON: Oh, the new subsidiary of Port
21 Capital Development (EV) Inc. is called Residual
22 Co. But what I could do is move that definition
23 up to new subsidiary and then put GP after that,
24 if that makes sense.

25 THE COURT: Yeah, just so the definitions work.

26 CNSL K. JACKSON: Yes, right.

27 THE COURT: Yeah, mm-hm.

28 CNSL K. JACKSON: Thank you. Good catch. And so the
29 GP issue is one, voting share to the purchaser or
30 to whoever it directs, and then all the other
31 shares are cancelled, et cetera, that is, of the
32 GP.

33 Fourth, all the petitioners' right, title
34 and interest to the purchased assets, which is
35 the share and the lands and anything chattels and
36 other things that the LP has an interest in they
37 vest in the purchaser absolutely, free and clear
38 of all claims. There is a schedule -- it says C
39 right now but that will be D. And just one point
40 here, if you turn to Schedule C right now, it's
41 actually blank because I realize we have to
42 update it given recent fans, including Domain and
43 others, and so -- no, not yet. Ms. Gillenby
44 (phonetic) is -- is diligently doing that. We'll
45 be asking her to slip sheet a Schedule C with all
46 the claims --

47 THE COURT: Mm-hm.

22

Submissions by Cnsl K. Jackson

1 CNSL K. JACKSON: -- to be taken off. And there's a
2 lot of builder's lien claims which will all have
3 to come off --

4 THE COURT: Mm-hm.

5 CNSL K. JACKSON: -- among other things.

6 THE COURT: Mm-hm.

7 CNSL K. JACKSON: And then Schedule D are the -- the
8 encumbrances that will remain, the permitted
9 encumbrances, the usual reservations and
10 limitations and easements and such.

11 And then fifthly, Port Capital Development
12 (EV), which we'll now define it as the GP, will
13 seek to be a petitioner and so it's out because
14 that's, of course, the -- the entity that's now
15 owned by the purchaser. So that would be changed
16 to GP.

17 THE COURT: Mm-hm. Can I write on this copy then
18 'cause this is going to be changed? Are you
19 going to -- is this the order you've got?

20 CNSL K. JACKSON: I don't have anything vetted so
21 you're welcome to write on that one and -- and
22 make it the order, if you like. I'm --

23 THE COURT: Well, I'll let you make these changes.

24 CNSL K. JACKSON: Sure, that makes more sense. Yeah,
25 I'm happy to do that while you're here in front
26 of us --

27 THE COURT: Because you've got it swirling --

28 CNSL K. JACKSON: Yeah.

29 THE COURT: -- in your brain more than I do. Okay.

30 CNSL K. JACKSON: That's a fact right now.

31 THE COURT: All right. Let's just go through it now
32 that you've sort of identified all these.

33 CNSL K. JACKSON: Right, right.

34 THE COURT: And -- all right. So this is just the
35 standard reverse RVO type of language, isn't it?

36 CNSL K. JACKSON: Right. And so the one -- the one
37 thing I'll come to that I've made a change is
38 paragraph 9. So at the closing date, Residual
39 Co. now gets added as a petitioner in here and
40 all the orders to apply to it *mutatis mutandis*.

41 THE COURT: Mm-hm.

42 CNSL K. JACKSON: And then at 10:

43
44 Immediately after the closing date, the
45 monitor is hereby authorized and directed to
46 bankrupt Residual Co. and neither GP nor the
47 purchaser will be liable for any obligations

23

Submissions by Cnsl K. Jackson

1 of Residual Co., whether in their capacities
2 as direct or indirect shareholders.

3
4 And so I do that because, in some cases, you can
5 find a leftover petitioner that you can
6 incorporate a sub for and put the assets in
7 there. In this case, there's no way to do that
8 and so we're going to -- just to be very careful,
9 we don't want anyone claiming that because our
10 client was a shareholder of Residual Co. through
11 the GP for some period of time before it was
12 bankrupt or there was some liability and so I
13 just want to make sure we don't have --

14 THE COURT: Mm-hm.

15 CNSL K. JACKSON: -- an oops on that one.

16 And so paragraph 11, it had occurred to me
17 the stay expires sometime in August, I'm told,
18 and so the idea is to extend it to September
19 30th, 2022, which presently is like the outside
20 date roughly for closing on this even if
21 extended. And then --

22 THE COURT: I think I've already extended it to
23 September, didn't I?

24 CNSL K. JACKSON: Oh, did you?

25 THE COURT: I think I did.

26 CNSL K. JACKSON: Oh, I getting a nod from the gallery
27 so you don't need that then.

28 THE COURT: Well, I thought it was -- this was in the
29 monitor's report.

30 CNSL K. JACKSON: Maybe we'll just double-check that
31 to make sure. If that's the case, then we can
32 take that paragraph out.

33 Excuse me, Madam Clerk, may I pass this up?
34 This is the Schedule C that would be substituted.

35 THE COURT: Thank you. I think that was done in
36 April.

37 CNSL K. JACKSON: Pardon me? It was?

38 THE COURT: I think that was done in -- no, that was
39 on May the 12th. I extended it to September the
40 30th.

41 CNSL K. JACKSON: That makes like easy. I can -- I
42 can cross that one out.

43 THE COURT: Mm-hm.

44 CNSL K. JACKSON: And paragraph 12, I was asked to
45 include this. It's the supplemental
46 administration charge and I --

47 THE COURT: Mm-hm.

24

Submissions by Cnsl K. Jackson

1 CNSL K. JACKSON: The language, I just took from my
2 friends, who had negotiated this but in effect
3 it's a supplemental admin charge of up to a
4 hundred and fifty thousand dollars for the fees
5 and disbursements, of course, of the monitor, its
6 counsel and petitioners' counsel. And it ranks
7 behind the existing admin charge and behind the
8 debt and security held by Domain.

9 And the claim's contemplated in 11.8(8) of
10 the CCAA and then there's a -- the second half of
11 that paragraph on page 6 is about how the
12 allocation of that supplemental admin charge has
13 been negotiated. And I gather it's first to the
14 monitor and the monitor's counsel and if there's
15 anything leftover I gather it's to the counsel
16 for the petitioner.

17 THE COURT: Mm-hm.

18 CNSL K. JACKSON: No, I'm sorry. Oh, sorry, right.
19 First, monitor and monitor's counsel and after
20 that, the petitioner shares in the -- in the
21 balance.

22 THE COURT: Mm-hm.

23 CNSL K. JACKSON: I think that really is the -- yeah,
24 that is the crux of it. And so what I would need
25 to do is clean it up a little bit with some of
26 those things we picked up on here. I have to
27 append the Agreement and I have to append the
28 Schedule C, which you now have as well.

29 THE COURT: Yeah, okay. Okay.

30 CNSL K. JACKSON: Thank you. I'm [indiscernible].

31 THE COURT: All right, thank you. Okay. Mr.

32 Stephens, anything to say about all that?

33 CNSL S. STEPHENS: Domain's supportive of -- of the
34 order. The only supplemental direction I might
35 ask for is for the -- the deposit be paid to the
36 monitor, the monitor have discretion to release
37 some or all of it to Domain for application to
38 the loan, which would be to the benefit of the
39 subordinate secured creditors.

40 THE COURT: Well, don't they have to maintain the
41 deposit until the matter closes?

42 CNSL S. STEPHENS: Not if it's unconditional.

43 THE COURT: I mean normally a deposit would be intact
44 until the closing, isn't it?

45 CNSL W. ROBERTS: That's my concern. I just haven't
46 heard this before so I hadn't even had a chance
47 to consider it and take instructions. The

25

Submissions by Cnsl K. Jackson

Submissions by Cnsl K. Cameron

1 concern is it is unconditional if we have court
2 approval, assuming there's no appeals or stays or
3 anything like that. And then, of course, there's
4 also the issue of, you know, something like a
5 force majeure. There's material loss provisions
6 in here which would -- you know, typical sort of
7 standard out clauses.

8 I understand my friend's point but -- but I
9 think my client would be a little concerned about
10 putting its deposit at risk under that proposal.
11 So I hadn't heard about that, sorry.

12 THE COURT: Yeah. Well, Mr. Stephens, I'm not
13 inclined to muddy the waters in that respect and,
14 frankly, given -- I suspect given I'm going to
15 suspect to hear Mr. Bychawski, I think the
16 monitor would be reluctant to exercise his
17 discretion to do that in any event in the
18 circumstances.

19 CNSL S. STEPHENS: I think Mr. Jackson made some
20 sense, thank you.

21 THE COURT: Yeah, okay. All right. I'm going to
22 delete all of that. Okay. Anything further
23 then, Mr. Stephens? Anything further?

24 CNSL S. STEPHENS: (No audible response).

25 THE COURT: No, okay. Okay. Mr. Ferreira?

26 CNSL M. FERREIRA: Yes, thank you, Justice. My client
27 takes no position.

28 THE COURT: Okay. That was for Mr. -- Ms. Chen, the
29 pre-sale purchaser, isn't that correct, Mr.
30 Ferreira?

31 CNSL M. FERREIRA: Yes.

32 THE COURT: Yes, okay. Sorry, my pen's just run out.
33 All right. Ms. Cameron, over to you.

34
35 **SUBMISSIONS BY CNSL K. CAMERON, continuing:**
36

37 CNSL K. CAMERON: Good afternoon, Justice Fitzpatrick.
38 My -- our office has prepared an affidavit and I
39 believe one of our assistants is just outside the
40 courtroom with a filed copy.

41 THE COURT: I don't see anyone. Oh, there she is.
42 Have the other counsel seen the affidavit, Ms.
43 Cameron?

44 CNSL K. CAMERON: It's a signed copy of the letter Mr.
45 Roberts had referenced.

46 THE COURT: Mm-hm.

47 CNSL K. CAMERON: So what I can advise is -- at this

26

Submissions by Cnsl K. Cameron

1 point, what the petitioners have been able to
2 arrange is they have an expression of intent,
3 Friends Investment Management Inc. (phonetic), to
4 purchase the property. Additionally, I
5 understand that Mr. Reyes was trying to get
6 personal counsel, Mr. Doug Hyndman, on the line.
7 Oh, and I see he's actually logged on. He might
8 have further submissions. So on behalf of the
9 petitioners, what we have is this Letter of
10 Intent and I appreciate it's less than what was
11 anticipated, less than what's been provided by
12 Solterra. But this is what they've been able to
13 organize at this time.
14 THE COURT: All right. Well, just let me read it,
15 please. If you could just give me a moment,
16 please, and then I'll hear you further on it.
17 Okay, I've read it now then, thank you, Ms.
18 Cameron. So the --
19 CNSL K. CAMERON: Thank you.
20 THE COURT: This is -- this is essentially talking
21 about a -- not an expression of intent but a
22 sincere expression of their intent for a deal of
23 \$18.75 million, is that right?
24 CNSL K. CAMERON: That's correct. Also, there have
25 been -- as Mr. Roberts had mentioned, there is
26 also another party prepared to provide \$4 million
27 that Port Capital has been trying to work out
28 further deals on how these two parties could work
29 together --
30 THE COURT: But sorry, sorry --
31 CNSL K. CAMERON: -- but in the amount of time --
32 THE COURT: -- another party for \$4 million, you said?
33 CNSL K. CAMERON: Correct.
34 THE COURT: For what? What would they be paying --
35 CNSL K. CAMERON: That would also be provided, too, as
36 part of this bid.
37 THE COURT: Oh, I see, as part of the 18.75?
38 CNSL K. CAMERON: Yes.
39 THE COURT: So this Synvest would come up with 14.75
40 and this other party --
41 CNSL K. CAMERON: No, the four million would be on top
42 of the eighteen --
43 THE COURT: Oh, I see.
44 CNSL K. CAMERON: -- point seven five.
45 THE COURT: And what's the name of this other party?
46 Are you prepared to share details?
47 CNSL K. CAMERON: Sorry, I believe it's Raven Woods.

27

Submissions by Cnsl K. Cameron

1 THE COURT: Braven, B-r-a-v --

2 CNSL K. CAMERON: Raven.

3 CNSL W. ROBERTS: It's Rowan, R-o-w-a-n-w-o-o-d.

4 Unlike -- unlike this sincere interest letter, I
5 haven't seen that one. I have seen the Rowanwood
6 commitment. It's a conditional commitment letter
7 that frankly doesn't make a lot of sense. But it
8 is conditional.

9 THE COURT: All right. Well, I can't really do
10 anything with it since there's nothing before me.
11 Okay. All right. So Ms. Cameron, what -- if you
12 want to continue with your comments, please?

13 CNSL K. CAMERON: Yes. Well, as previously mentioned,
14 the petitioners have been trying to work
15 diligently to try to find either a refinancing or
16 more recently they've been trying to focus their
17 efforts on finding other bidders. They do
18 believe that there are bidders out there who
19 would be willing to pay more than the Solterra
20 offer. And what they're looking for is the
21 ability to try to advance the discussions with
22 the parties they've currently been in discussions
23 with.

24 THE COURT: With the --

25 CNSL K. CAMERON: And as I mentioned, I believe
26 there's --

27 THE COURT: -- with the -- you mean -- do you mean --
28 sorry, sorry, do you mean Synvest and -- and
29 Rowanwood? Is that what you mean?

30 CNSL K. CAMERON: Yes, and I believe there's another
31 party which Mr. -- I think there's another
32 counsel who's just joined the call who might be
33 able to speak further to it, a Mr. Doug Hyndman.

34 THE COURT: Well, I certainly know Mr. Hyndman.

35 CNSL D. HYNDMAN: Yes, Justice -- yes.

36 THE COURT: Not on this matter, of course. All right.
37 Well, Mr. Hyndman, just hold your -- hold your --
38 keep your power drive. I'll hear from you in a
39 minute. I didn't actually register that that was
40 you. I can't read that writing at the bottom of
41 your screen. Okay. All right, thank you. Yes,
42 Ms. Cameron, anything further?

43 CNSL K. CAMERON: No, that's it, Justice Fitzpatrick.
44 Basically, what the petitioners are looking for
45 is, through the monitor, to have these other
46 opportunities explored further before a final
47 vesting order is granted, as the petitioners had

28

Submissions by Cnsl K. Cameron

Submissions by Cnsl D. Hyndman

1 known an offer was actually being advanced today,
2 unfortunately, they weren't better prepared in
3 terms of being able to push these financing -- or
4 purchaser agreements further.

5 THE COURT: All right. Okay, thank you. All right.
6 Now, I see two other people on the -- on the
7 video. I'm not sure who the other person was in
8 addition to Mr. Hyndman.

9 Oh, that's Mr. Reyes. Sorry, I don't know
10 if I've laid eyes on Mr. Reyes before, formally.

11 Okay. So it's just Mr. Hyndman that wishes
12 to speak next, is that correct?

13 CNSL D. HYNDMAN: Yes, I'm happy to speak next.

14

15 **SUBMISSIONS BY CNSL D. HYNDMAN:**

16

17 CNSL D. HYNDMAN: My client is, I guess, largely -- is
18 Hynes, H-y-n-e-s Group. And the principal of the
19 Hynes Group, Mr. Steven Hynes, has been in
20 discussions with Mr. Reyes. As recently as last
21 night, I was on a call with Mr. Hynes and we were
22 speaking of this project and we were aware that
23 there was an application to be heard today to
24 appoint a receiver but we were not aware that
25 there was any even hint at there being an offer
26 placed before the court today.

27 If we had received notice of that, we also
28 would have prepared an offer to put before the
29 court today. And from what I can glean, although
30 I haven't seen the Solterra Offer, that the price
31 that my client is looking at is in excess, I
32 believe, of what the offer is before the court
33 today. And so we're concerned that the process
34 is being, I guess, controlled by this artificial
35 attempt to have an offer approved when there
36 hasn't been notice given to the world at large
37 and not even to Mr. Reyes that there was such a
38 move afoot today.

39 THE COURT: Well, Mr. Hyndman, to be blunt --

40 CNSL D. HYNDMAN: And -- and --

41 THE COURT: -- to be blunt, that's because Mr. Reyes
42 did not appear on the earlier two applications
43 where this very matter was discussed as a
44 potential outcome.

45 CNSL D. HYNDMAN: Okay. I don't know -- I don't know
46 anything about any of that.

47 THE COURT: No, no,

29

Submissions by Cnsl D. Hyndman

1 CNSL D. HYNDMAN: And so I can't speak to whether he
2 was there or not. But I guess again, to be
3 blunt, I don't want to throw anyone under the bus
4 but my client and I had a conversation with Mr.
5 Stephens last night and no mention was made to us
6 about whether there would be an offer put before
7 the court today. Now, that's not to say that
8 that's the appropriate channel for that to happen
9 but certainly if we had been made aware somehow
10 that this was going on, we would have had a
11 written Offer before the court today and we
12 didn't and it just -- a little bit seems like the
13 process is being hijacked to have this occur. I
14 may be totally wrong. As I said, I haven't
15 appeared on anything on this matter up until now
16 but certainly, as far as I'm aware, Ms. Cameron
17 wasn't aware of anything happening either. And I
18 gather she has been acting for Mr. Reyes.

19 THE COURT: Well, I think Ms. Cameron has been
20 appearing on behalf of the petitioners actually,
21 to be clear, but -- and Ms. Cameron was obviously
22 at the -- I think the earlier -- well, Mr. Gruber
23 was there on the 13th and Ms. Cameron was there
24 on the 18th.

25 When did Mr. Reyes begin having discussions
26 with Mr. Hynes?

27 CNSL D. HYNDMAN: Well, there had been discussions on
28 a number of different levels that up until last
29 night had to do with the possibility of taking
30 out Domain and in the discussions we had last
31 night, we were talking about if that was too
32 complicated because of the structure that we
33 didn't really know any detail about but I gather
34 that mortgage is not as simple as if just a
35 mortgage to Domain.

36 We'd then been through a discussion of the
37 possibility of making an offer through the
38 receiver but believing at that time that there
39 was nothing that required the offer to be made by
40 two o'clock today because that was only -- today
41 was only the appointment of the receiver, not
42 having an offer to put before the court.

43 Now, as I say, I may be mistaken that Ms.
44 Keely (sic) was acting for Mr. Reyes but she's
45 acting for the entities, the petitioners, and as
46 far as I know, she wasn't aware this was
47 happening today either.

30

Submissions by Cnsl D. Hyndman
Submissions by Cnsl S. Stephens

1 THE COURT: Well, this very -- as I say, this very
2 outcome was discussed on the 18th when it was
3 made clear that all of the parties who are
4 present here were out beating the bushes,
5 including the monitor, to try to put together a
6 transaction.

7 Anyway, so I suppose the answer to my
8 question specifically the when is that -- and
9 because Mr. Gruber did mention that there was
10 unconditional financing that was being discussed,
11 but it was still conditional, that was during the
12 13th of July. I'm going to assume that that was
13 with your client and that it was only last night,
14 as you say, that that offer -- or discussion
15 segued into a discussion about an offer. Is that
16 right? Do I have that correct?

17 CNSL D. HYNDMAN: I can't speak to whether the 13th
18 was the beginning of discussions about taking out
19 the financing --

20 THE COURT: Mm-hm.

21 CNSL D. HYNDMAN: -- because discussions with me about
22 both of those issues happened for the first time
23 last evening.

24 THE COURT: Yes, okay. Well, I don't want you to go
25 beyond your personal knowledge, of course, Mr.
26 Hyndman. Yes. Okay, thank you.

27 All right. Mr. Stephens, you look like
28 you're about to leap out of your chair.
29

30 **SUBMISSIONS BY CNSL S. STEPHENS, continuing:**
31

32 CNSL S. STEPHENS: I was just going to address Mr.
33 Hyndman's point is true. When I spoke to him at
34 five o'clock yesterday, I had no knowledge of a
35 potential offer today. Last night, after I spoke
36 to Mr. Hyndman, I received an email from Mr.
37 Roberts indicating he hoped Solterra would be
38 here today and, frankly, I'd heard that a couple
39 of times from Mr. Roberts before and I have great
40 faith in him and I know he believed, but twice it
41 hadn't happened yet. So I was pretty agnostic as
42 to whether I would see anything and, frankly, the
43 first time I saw something was at one-fifty-
44 something today.

45 THE COURT: Okay.

46 CNSL S. STEPHENS: But you are quite correct that at
47 the last two hearings the hope was that exactly

31
 Submissions by Cnsl W. Roberts

1 this would occur.

2 THE COURT: Yes, all right. Before I hear from Mr.
 3 Bychawski on behalf of the monitor, Mr. Roberts,
 4 do you have any response to Ms. Cameron and Mr.
 5 Hyndman?

6

7 **SUBMISSIONS BY CNSL W. ROBERTS, continuing:**

8

9 CNSL W. ROBERTS: I think two things. First, that I
 10 love Mr. Hyndman. His interest -- his interest
 11 is irrelevant.

12 THE COURT: Well, I don't think we have to go that
 13 far.

14 CNSL W. ROBERTS: Yeah.

15 THE COURT: I mean unless there's something I don't
 16 know.

17 CNSL W. ROBERTS: His interests in this are
 18 irrelevant. The only question before you is, is
 19 this a provident sale, not whether his client was
 20 or was not denied the opportunity to -- to be
 21 involved. His client is, at best, a competing
 22 bidder. I would suggest more likely somebody
 23 coming very late to the table. I know because
 24 I've seen copies of emails that my client was
 25 actively engaged with Mr. Reyes directly up until
 26 -- I'm going to get the date wrong -- when the
 27 Enzo deal fell apart, which would have been -- I
 28 forget if it was last Thursday or --

29 THE COURT: Sorry, could you -- can you just slow down
 30 and give me that again?

31 CNSL W. ROBERTS: Sure.

32 THE COURT: Aviva was engaged with -- with Mr. --

33 CNSL W. ROBERTS: Was actively engaged directly with
 34 Mr. Reyes about a possible transaction involving
 35 the EnzoGroup. And you'll recall that the
 36 EnzoGroup was brought in as a development company
 37 to help through the CCAA process and we were
 38 actively involved with the EnzoGroup in a joint
 39 bid where Enzo -- the EnzoGroup and Mr. Reyes and
 40 the petitioners were going to acquire the
 41 property and move forward. And that got -- those
 42 negotiations were well advanced.

43 THE COURT: Is that the \$20 million deal that you had
 44 mentioned on the 18th?

45 CNSL W. ROBERTS: That was one of the -- one of the
 46 rabbits in the hat, correct. And it was well
 47 advanced. And then that did not come to fruition

32

Submissions by Cnsl W. Roberts

Submissions by Cnsl P. Bychawski

1 and, as you see here today, the EnzoGroup is not
2 participating in a bid. My greatest hope would
3 have been that the EnzoGroup and Solterra would
4 compete against each other and bring the price up
5 but they're not here and I won't go into the
6 reasons why but they're not here.

7 And so I suspect, though don't know, that
8 the Hynes Group are a late addition to that
9 party. I -- I don't know them so I have no
10 comment on them at all other than anybody who's
11 been in this room over the last few hearings
12 would have heard that this is coming to closure
13 very quickly and that we were actively, we,
14 everybody was actively looking for a bid, an
15 offer, a proposal, that would see this brought to
16 an end.

17 THE COURT: Okay, thank you. Mr. Bychawski?

18
19 **SUBMISSIONS BY CNSL P. BYCHAWSKI, continuing:**
20

21 CNSL P. BYCHAWSKI: A few comments. I don't have much
22 to say other than what I said earlier, which is
23 that the monitor's view, since July 12th, as
24 stated in this report, was that a prudent
25 approach for dealing with this situation would be
26 to approach the previously engaged parties in the
27 extensive sales process that was undertaken in
28 these proceedings before the Court of Appeal's
29 decision to see if one of those parties would
30 step forward with an offer that could be
31 implemented on an expedited timeline given the
32 state of the project and -- and the history of
33 this case.

34 And that strategy had been in a winding way
35 implemented over the past 10 days and the parties
36 that were involved did engage with the monitor
37 and with counsel and myself to explore the
38 various rabbits in the various hats to see what
39 sort of transaction would materialize. So the
40 monitor was fully engaged in discussions with
41 respect to iterations of the Solterra proposal.
42 It was also involved in discussions with respect
43 to the Enzo transaction and also did some of its
44 own due diligence in terms of dealing with prior
45 market participants such as Landa, as you noted.

46 And the -- based on that experience over the
47 past 14 days and over this file, the monitor's

33

Submissions by Cnsl P. Bychawski

1 view was that a transaction with one of the
2 previous six participants would likely deal with
3 result and scenario where an offer would be put
4 forward that would be capable of paying Domain
5 and taking some -- making some money available
6 for the junior lenders. And that's what has
7 materialized.

8 So the transaction before you is consistent
9 with the monitor's views, as stated in its
10 report, and it is the outcome of a process that
11 the monitor considered to be prudent even though
12 it was not undertaken in a strict SISP-type
13 manner that was suggested in Aviva's application.

14 With respect to Ms. Cameron's and Mr.
15 Hyndman's clients, I can say personally I have
16 not seen the document that was passed up in
17 affidavit form today. Other draft transaction
18 documents from other parties were provided to me
19 by counsel for -- for Solterra and -- and I've
20 seen other documents with respect to the Enzo
21 transaction but monitor's counsel, at least, was
22 not engaged by the petitioners with respect to
23 any of these efforts that were being undertaken
24 so the monitor had no opportunity to explore with
25 them what was being done. I will say that I
26 understand that --

27 THE COURT: Sorry, you saw the Enzo deal and then you
28 saw the Solterra --

29 CNSL P. BYCHAWSKI: The Solterra.

30 THE COURT: -- the Solterra deal.

31 CNSL P. BYCHAWSKI: Yeah, and -- and I'm speaking
32 personally. Things have been moving quickly. I
33 understand that a representative of the monitor
34 last night, I believe, was provided with a copy
35 of whatever document you may have. I can't
36 confirm if it's the same one but there was
37 certainly no engagement with -- with counsel on
38 what may be being put forward before the court as
39 an alternative to what had been explored to date.

40 THE COURT: So you were saying that the monitor was
41 just sort of kept in the loop in terms of the
42 discussions with Enzo and Solterra to the extent
43 that discussions were advanced or documents were
44 created.

45 CNSL P. BYCHAWSKI: Correct.

46 THE COURT: And what about the Synvest?

47 CNSL P. BYCHAWSKI: Again, I -- I personally had not

34

Submissions by Cnsl P. Bychawski

1 heard that name. I understand that last night, a
2 representative of the monitor other than myself
3 may have been provided with a copy of that
4 document but that's all I know of that.

5 THE COURT: Mm-hm.

6 CNSSL P. BYCHAWSKI: Subject to questions, I don't have
7 anything further to -- to say.

8 THE COURT: Okay, thank you. Mr. Roberts, is this my
9 -- or I see your -- your initials on it. This
10 material that is your application.

11 CNSSL W. ROBERTS: It's now yours.

12 THE COURT: Okay, good. Well, that's -- I wanted to
13 -- to ask you that before I made off with it, so
14 to speak.

15 All right. Well, I suppose this is an
16 example of the classic real-time litigation that
17 is characterized as these types of proceedings.
18 What I'm going to do is this.

19 I am going to approve the Solterra
20 transaction.

21 Mr. Stephens, I'm going to adjourn the
22 relief in your petition. I'm not going to dismiss
23 it for obvious reasons but if things come to pass
24 with Solterra then that will just die on the
25 vine, I expect.

26 And with written reasons to follow.

27 So is there an order, Mr. Jackson, that
28 you've been able to put together for me to sign?

29 CNSSL K. JACKSON: I gave it to my friend, Mr. Roberts.
30 It's been vetted it as well so...

31 THE COURT: Oh.

32 CNSSL W. ROBERTS: Vetted and -- and hand revisions
33 that you and Mr. Jackson discussed are
34 handwritten on it and we had it taken downstairs
35 and vetted.

36 THE COURT: All right. Okay. I've signed the -- the
37 order. When that is entered, Mr. Jackson, I'd
38 like you to upload that to the FTS, if you would,
39 please.

40 CNSSL K. JACKSON: Certainly, Madam Justice. And may I
41 just quickly run -- this has come together very
42 quickly, as you -- as you know, and I know that
43 you are away and hopefully able to stay out of
44 communication with everyone over the next while.
45 There is, as you're aware, often in these cases,
46 a nit or something that needs to be picked at by
47 way of the clean-up order and I just -- I think

35
Proceedings

1 it would be helpful if we had your consent to
2 have another justice hear something small like
3 that, if it wasn't substantive and it was mainly
4 a clean-up to address any issues that might arise
5 in relation to the -- the deal.

6 THE COURT: Yes, well, in fact, if -- if that happens,
7 hopefully you can do this by consent and you
8 could send it through the e-order process or
9 through Scheduling in some -- I mean I'm going to
10 be available by email.

11 CNSL K. JACKSON: Very good.

12 THE COURT: So one of those two things is fine. So
13 that's -- that's fine. I'll give that order back
14 to Madam Clerk to give back to you.

15 CNSL K. JACKSON: Thank you.

16 THE COURT: And -- and then, Mr. Bychawski, I have
17 your Application Record for the fee approval
18 application. I'm assuming that doesn't need to
19 proceed right now or does it in some fashion?

20 CNSL P. BYCHAWSKI: It does not and I anticipate that
21 when it does come before you again, it will be an
22 amended and updated application so...

23 THE COURT: Yes, all right. I'll give this binder
24 back then --

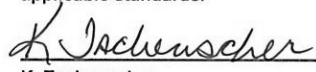
25 CNSL P. BYCHAWSKI: Thank you.

26 THE COURT: -- 'cause I don't need to carry that
27 around any further.

28 All right. Well, good luck to you all in
29 terms of hopefully closing this transaction and
30 I'll see you -- well, maybe at the tail-end of
31 it, maybe not. Okay.

32
33 (PROCEEDINGS CONCLUDED)
34
35

36 I certify that this is a true and accurate
37 transcript of these proceedings recorded on
38 sound recording apparatus, transcribed to the
39 best of my skill and ability in accordance with
40 applicable standards.

41 
42 K. Tschenscher
43 Court Transcriber
44
45
46
47

PART 4: ARGUMENT

Part 1: Facts

1. As are many in this era, this proceeding is a long running CCAA, in which the initial Order was made May 29, 2020. The amended and restated initial Order, made June 8, 2020, following the model Order, provided for service of materials as follows:

- (a) Anyone who wished to be served with applications, should notify the Monitor, who was charged with maintaining a service list on its website;
- (b) Anyone could serve material by serving with the use of that service list; and
- (c) Applications could be brought on two clear days notice, subject to the discretion of the Court. [Paras. 51, 52 and 60]

2. The facts leading up to the final steps complained of on this Appeal are summarized in the 13th Report of the Monitor, but, generally, the Monitor conducted what is known as a SISP process. It produced six offers, reduced ultimately to three. One was from Solterra Acquisitions Corp. ("Solterra") for \$23,666,666, one was from Landa Global Acquisition Inc. for \$22,000,000 and one was an "offer" from the Petitioners, for a refinancing.

3. Madam Justice Fitzpatrick approved the Solterra offer on January 15, 2021. This Appellant appealed, and ultimately, on September 22, 2021, this Honourable Court reversed the decision of Madam Justice Fitzpatrick and approved the refinancing. The Appellant completed that refinancing with a loan from Domain Mortgage Corp. ("Domain") in the amount of \$14,700,000. That loan was due and payable on July 1, 2022. The Petitioner arranged financing from Mandate Management Corporation ("Mandate"), in the amount of \$20,000,000 to repay Domain and provide working capital.

Exhibit K

4. On May 11, 2022, the Petitioner sought approval of the Mandate financing. In that Application, it was said to be also essential to the Petitioner's continuing in business and

to continue under the CCAA. It sought an Order abridging service to permit the Application to come on on May 13th, and to extend the stay of proceedings to September 20, 2022. The abridgement of service, approval of the financing, and the extension were all granted.

Exhibit B

5. On June 15th, the Petitioner's filed an application returnable June 17th, seeking abridgement of service, authorizing the filing of a plan and the summoning of a meeting to consider it. The Monitor in its 13th Report advised the Court that the Mandate financing had not closed, there was no evidence it was going to close, and the Petitioners may be incapable of completing the proposed plan. The Petitioners were not paying their post-filing debt, they had no working capital, and they were in default of the Domain security.

Exhibit D

6. The Petitioner's application was set for July 13, 2022.

7. On July 5, 2022, Domain:

- (a) Filed an Application to terminate the CCAA proceeding; and
- (b) Filed a Petition and a Notice of Application seeking the appointment of a Receiver with power of sale.

8. The filed material indicated the Receiver would conduct an expedited sales process.

Exhibits E to H

9. On July 7th, Aviva Insurance Company of Canada ("Aviva") filed an application, returnable July 13th, seeking expanded powers be given to the Monitor to conduct a simplified and shortened SISP process, to run for three weeks, limited to the original six offerors.

Exhibit I

10. On July 11th, the Monitor filed a Notice of Application returnable on the 13th of July, seeking to abridge service, and approving its activities and fees.

Exhibit J

11. On July 11th, the Monitor filed its 13th Report. The Monitor made it clear that the CCAA had spent its course, and that the property needed to be sold. It commented both on the receivership and the simplified SISP process.

Exhibit K, paras. 56 and 67

12. The Monitor's Report indicated that the original six offerors still seemed to be interested, based on discussions with them, that the SISP process would lead to repayment of the Domain facility, and might create some proceeds past that.

Exhibit K, para. 67

13. The Monitor concluded that it was prudent to approach the original six offerors, either in the receivership or pursuant to the truncated SISP process, in order to reduce ongoing costs.

Exhibit K, para. 72

14. As far as anyone, including the Appellant, was concerned, these were the applications being considered.

15. The hearing was ultimately continued, to July 22nd. During the course of the hearing on July 22nd, the Court moved in the direction of simply approving a new offer from Solterra. The court expressed that it wished to do so, but there was no application before the Court. The hearing was, therefore, adjourned, to permit an application to be filed and brought to the Courtroom.

16. After a short adjournment, such an application was brought by Aviva, placing before the Court an Agreement of Purchase and Sale with Solterra, dated July 22, 2022. The offer purported to be between the Petitioners and Solterra. It was executed only by

Solterra. The Solterra offer was now approximately \$5,000,000 less than its earlier offer and was in the amount of \$18,500,000.

17. The Notice of Application seeking approval of that Agreement of Purchase and Sale sought an abridgement of time to the same day and an Order dispensing with service on parties other than parties on the service list and sought an Order approving the new contract between the Petitioners and Solterra. Aviva now took a position diametrically opposed to its Notice of Application of July 7th.

Exhibit L, paras. 19 to 23; Exhibit I, paras. 21 to 22

18. The entered Order approves the sale transaction, but does not address service. The Notice of Application was not served on anyone, other than those in attendance.

19. The earlier applications of Domain and Aviva, as supported by the Monitor, all of which had been served, indicated that the applications to be considered on the 22nd were, essentially, whether the property would be sold by an expedited process undertaken by a Receiver or an expedited SISP process undertaken by the Monitor. There was no notice that any actual sale of the property might be approved.

20. A review of the transcript of the proceedings in chambers on July 22, 2022, reveals the following:

- (a) Counsel for Aviva advised the Court that it was intending to ask for approval of a specific sale, but that there was no motion before the Court to do so, a problem described as procedural; (Pg. 4, lines 5 to 9)
- (b) Counsel for Aviva advised that if the judge were sitting next week, the procedural problem could be solved by preparation of a motion returnable the next week, but that the judge would be on holidays; (Pg. 4, lines 30 to 36)
- (c) When the Chambers Judge asked if there was a signed agreement, he advised her that it would be signed if she indicated she would hear the application; (Pg. 4, lines 42 to 45)

- (d) Counsel for Domain highlighted for the Court that there was no application before it, that there were other interested parties, and that the best way to handle the matter would be to appoint a receiver as was applied for in the motion properly before her, who could bring an application to approve the order. He also referred to the problem as a procedural issue; (Pg. 8, line 47 to pg. 9, line 16)
- (e) The Court then suggested that someone prepare a quick application and indicated that, in her view, there was no secret that what was happening was in fact happening; (Pg. 9, lines 18 to 23)
- (f) Counsel for the Petitioner advised the Court that the first she had heard that an offer would be presented to the Court was 15 minutes before the application, that counsel for this Appellant had only heard of the application about 15 minutes before as well, that he was unable to attend, and had asked her to advise the Court that 129 did not support the transaction; (Pg. 10, lines 38 to 46)
- (g) Counsel for the Petitioner indicated that she had a letter of intent for a higher price, which was not sufficiently advanced to present, but requested there be a procedure that provided a very short time frame so that other interested parties could submit a bid to try and maximize the purchase price; (Pg. 11, lines 2 to 15)
- (h) Counsel for Aviva advised the Court that there was a private deal between Aviva and Solterra with which the Monitor was content. The details of that private deal were not disclosed to the Court; (Pg. 13, lines 1 to 13)
- (i) When asked about the communication from the Appellant's counsel, counsel for Aviva replied that if the Appellant thought it was important to be in Court, they would be there and they had chosen not to appear; (Pg. 15, lines 8 to 13)

- (j) Counsel for Aviva repeated that only the Appellant had any financial interest in the Application, and that they had chosen not to attend. (Perhaps that is not surprising given that counsel for this Appellant was not aware the offer would be placed before the Court until 15 minutes before the application commenced and was unavailable.) (Pg. 16, lines 35 to 41)
- (k) The court then ruled that it would hear the application, and directed counsel for Aviva to prepare and file an application, an affidavit and a draft order, bring it to Court at 3:20, and suggested to counsel for the Petitioner that if she had anything to put before the Court she should do so quickly; (Pg. 16, line 44 to pg. 17, line 1)
- (l) When Court resumed, counsel for Aviva passed up an Application Binder, and indicated that they were seeking very curtailed service, which was effectively limited to service on people actually in the Courtroom; (Pg. 17, lines 10 to 17)
- (m) The terms of the order sought were amended by the Court during discussions with counsel for Solterra; (Pgs. 21 to 23)
- (n) Counsel for the Petitioner provided a signed letter of intent, admittedly not binding, for a purchase in the amount of \$22,750,000; (Pg. 26, lines 1 to 13 and lines 38 to 43)
- (o) Counsel for the Petitioner advised the Court that it was seeking an opportunity to explore other opportunities identified before a final order was made, as she had not known an offer was actually being advanced in Court. (Pg. 27, line 43 to page 28, line 3)
- (p) Counsel for a party called the Hynes Group, who had not attended prior to the adjournment, indicated he had just learned of the application to approve the sale, that his client was interested in purchasing the property, and if they had received notice that approval of a sale was being sought, they would have prepared an offer to put before the Court, in excess of the Solterra

offer. He complained that an offer would be approved when no notice had been given to the world at large, including Mr. Tobi Reyes, principal of the Appellant and the Petitioners; (Pg. 28, lines 27 to 38 and Pg. 29, lines 1- 18)

- (q) The Court indicated that Mr. Reyes had chosen not to appear on the earlier applications where the matter was discussed as a potential outcome (of course, the earlier applications were for approval of a SISP process or appointment of a receiver to seek offers); (Pg. 28, lines 41 to 44)
- (r) Counsel for Domain, indicated that, indeed, he had not been aware of a potential offer being presented either, and had not seen it until 1:50 that day; and
- (s) Upon approval of the sale, the Court described the procedure of the day as classic real-time litigation. (Pg. 34, line 15 to pg. 35, line 1)

Part 2: Issues

21. The Learned Chambers Judge erred in law in granting an order in breach of the rules of natural justice.

22. The Learned chambers Judge erred in a principle in failing to consider potentially higher offers, failing to direct service on the Appellant who, along with Aviva had the only financial interest in a higher price and failing to require production of the agreement between Aviva and Solterra.

23. The Solterra proceeds were sufficient for Domain, including interest and professional fees and no more. The Appellant and Aviva shared the next level of security.

Part 3: Analysis: Leave and Stay of Execution

24. The test for granting leave to appeal is:

- (a) Is the point of significance to the profession?;
- (b) Is the point of significance to the action itself?;

- (c) Is the appeal *prima facie* meritorious or frivolous?; and
- (d) Will the appeal unduly hinder the progress of the action.

25. These four factors are all to be considered “under the rubric of the interests of justice”.

Port Development v. 1293671 B.C. Ltd., 2021 BCCA 319
paras. 45 and 46.

26. It is also true that leave is sparingly given in CCAA proceedings. As commented on by Mr. Justice Tysoe, in *Edgewater Casino Inc. (Re)*, 2009 BCCA 40, there are, generally speaking, two reasons for that. In the first place, CCAA decisions are frequently made by a judge with conduct of the proceedings, balancing the interests of the parties, during the reorganization process. The second is that such orders are usually discretionary in nature and are to be accorded deference.

27. The Order under appeal does not have the first of these attributes. This is the end of the CCAA proceedings. All that is left is to sell the assets at the highest price achievable with the proceeds to be distributed to the creditors. Indeed, the applications properly before the Learned Chambers Judge were simply asking for approval of two different ways to accomplish that end. There is no more balancing of interests to engage the Court’s ongoing supervisory function.

28. As for the second point, to the extent the decision is a discretionary one, the Appellant alleges the errors in principle set out in paragraph 22:

29. Our legal system does not operate on the principle that the end justifies the means. The Supreme Court Rules themselves outline and ensure that the process that is followed in achieving any particular result is consistent with the interests of justice.

30. In a more general and broad sense, the principles of natural justice are an overarching umbrella of safe guards to ensure fair, open and just decision making. Primary among those principles is the rule of *audi alteram partem*.

The *audi alteram partem* rule, which is a component of the principles of natural justice and of procedural fairness, requires that a person who is a party to proceedings before a tribunal be informed of the proceedings and provided with an opportunity to be heard by the tribunal.

Telecommunications Workers Union v. Canada (Radio-television and Telecommunications Commission), 1995 CanLII 102 (SCC), [1995] 2 SCR 781

31. Indeed, natural justice does not concern itself with the merits of any particular case or application. It is restricted to the form of the proceedings and to due process.

Beals v. Saldanha, 2003 SCC 72, para. 65

32. The notion that adequate notice is to be given to those parties affected by an order or an application, has been described as “a necessity”.

Beals v. Saldanha, supra, para. 65

33. Any fair hearing conducted in our Courts must comply with the rules of natural justice.

Malton v. Attia, 2016 ABCA 130, para. 35

See also *Waterman v. Waterman*, 2014 NSCA 110, paras. 71 to 72

See also *A.(L.L.) v. B.(A.)*, 1998 CanLII 57, para. 27

34. The principles of natural justice are twofold – an impartial tribunal and the right to be heard.

It has often been said that these rules can be separated in two categories, namely “that an adjudicator be disinterested and unbiased (*nemo iudex in causa sua*) and that the parties be given adequate notice and opportunity to be heard (*audi alteram partem*)”.

IWA v. Consolidated-Bathurst Packaging Ltd., 1990 CanLII 132 (SCC)

35. They are most often discussed in the context of administrative tribunals, but they apply with equal force to the Courts.

Malton, supra, para. 35

Waterman v. Waterman, supra, paras. 71 to 72

36. Indeed, *audi alteram partem* is one of the basic tenets of our legal system. It entitles a party to a proceeding whose interest may be affected, to notice of the hearing and an opportunity to be heard before any decision is made.

A.(L.L.) v. B.(A.), supra, para. 27

37. Neither the provisions of legislation nor implication from the circumstances can obviate that basic requirement.

Waterman v. Waterman, supra, paras. 90 to 91

38. However, like any principle, it is not to be applied blindly, without regard to the circumstances. In each case it must be determined whether the party alleging the right to be heard holds a sufficient interest to call for the application of the rule.

IWA v. Consolidated-Bathurst Packaging Ltd., 1990 CanLII 132 (SCC)
page 324(e)

Telecommunications Workers Union v. Canada (Radio-television and Telecommunications Commission), supra, paras. 529 and 531

39. A blending of the two elements of natural justice arises when the tribunal enters into the forum, even in a limited way. "A judge should not take jurisdiction to grant an order which has not been sought by either party with a properly filed application and supported by evidence ...".

Cold Lake First Nations v. Alberta (Tourism, Parks and Recreation), 2012 ABCA 36, para. 35

40. The fairness, which lies at the root of natural justice requires that a judge not bring issues into the litigation without giving the parties an opportunity to address them.

Canada Trustco Mortgage Co. v. Renard,
2008 BCCA 343 (CanLII), paras. 39 and 33

See also *Malton*, supra, para. 41

See also *Servus Credit Union Ltd. v. Crelogix Acceptance Corporation*, 2020 ABCA 220, para. 40

41. Civil litigation is an adversarial process. Even if acting with the best of intentions, a judge must leave it to the parties to determine the Court process that they wish to engage in to resolve the proceeding.

Jensen v. Ross, 2014 BCCA 173, paras. 23 and 24

42. At its heart, however, natural justice requires that an individual whose interest may be affected be given notice of the proceeding and to be afforded an opportunity to address the issue by argument or evidence before any decision is made. That principle is at the foundation of any fair just legal system and it must be obeyed.

Is the Point of Significance to the Profession?

43. If an order of this Court can be made in breach of the principles of natural justice that is significant to the profession. There has developed a notion that CCAA matters are “real time” litigation. Abridgements of service requirements are common, almost routine. But “real time” litigation does not, indeed cannot, mean that the Court is free to proceed in breach of the principles of natural justice. “Real time” litigation does not mean frontier justice. It does not mean that orders can be granted without notice, absent set aside provisions to protect those affected. The profession has an abiding interest in the rule of law, indeed is sworn to uphold it. An integral part of the rule of law are the principles of natural justice. It is of significance to the profession, if those principles do not apply to CCAA proceedings because they are “real time” litigation. If orders can be obtained without notice to those affected in CCAA proceedings, that is of enormous significance to the profession.

Is the Point of Significance to the Parties?

44. The point is, obviously, of significance to the Appellant, the only creditor adversely affected monetarily by the Order from which appeal is sought, although various others, for example, guarantors, may have an equally legitimate complaint. It is obviously of

significance to the parties present in Court on July 22, 2022, given the extraordinary steps they undertook to obtain the Order under appeal.

Is the Appeal Prima Facie Meritorious or Frivolous?

45. It is submitted that an appeal from an Order made in clear breach of the rules of natural justice cannot be said to be frivolous. The only argument that can be made to the contrary is the Appellant had chosen not to attend the proceedings. That argument was vigorously advanced by counsel for Aviva, and embraced by the Learned Chambers Judge. As a general proposition, if a party is served with an application, and chooses not to attend, its right to complain, if not non-existent, is almost so.

46. The Learned Chambers Judge commented twice that the Appellant had chosen not to attend, and also had chosen not to attend on July the 13th and subsequent dates when, she said, the very application she was considering had emerged as a possibility. The Appellant would have known the application might come on, had it earlier attended.

47. There are two answers to that. In the first place, the Appellant was served with one two applications. One was to order a simplified SISP, and one was to appoint a receiver to conduct a short sales process. One chooses to attend Court proceedings depending on whether one opposes the application of which notice has been given. The failure to attend most often indicates ambivalence.

48. In the second place, two of the counsel who had attended the entire sequence of hearings, advised the Court that they were unaware this application was going to be brought, essentially until it actually was. Whatever happened on those dates, therefore, it was not enough to provide those two experienced counsel with the knowledge the Learned Chambers Judge said the Appellant could have had had it attended. There is no obligation to attend a hearing just in case an application may be brought without any notice, entirely inconsistent with the applications of which notice has been given.

49. Further, it was an error in principle, when advised that there were two potential offers for a higher price, not to structure a process that could allow them to be advanced.

50. It was also an error in principle not to require Aviva and Solterra to disclose to the Court the particulars of the deal they had made which resulted in Aviva so significantly altering its position. If that deal affected Solterra's greatly reduced price, that alone may have redounded to the detriment of the Appellant. Although the Learned Chambers Judge was advised that the Monitor was aware of the details of that agreement, and was content with them, it was an error in principle to abrogate that responsibility, which belongs with the Court, to the Monitor.

Will the Appeal Unduly Hinder the Progress of the Action?

51. These proceedings are spent, and there is no more action to address. The only issue remaining is approval of a sale of the assets.

Stay of Execution

52. The test for a stay pending appeal is equally well known:

- (a) Is there some merit to the appeal in the sense that there is a serious question to be determined?
- (b) Would irreparable harm be occasioned to the Applicant if the stay was refused?
- (c) On balance, is the inconvenience to the Applicant, if the stay was refused, greater than the inconvenience to the Respondent, if the stay is granted?

British Columbia (Milk Marketing Board) v. Grisnich,
1996 CanLII 883 (BC CA), para. 7

53. The Appellant has nothing further to say as to the merits of the appeal, and says that the irreparable harm it will suffer if a stay is not granted is self-evident. The appeal will be moot. Any chance for a higher price will be lost.

54. The Appellant ranks behind Domain and Aviva in what is described as the creditor "stack" and an offer of \$22,500,000 provides (subject to various adjustments) \$4,000,000

more dollars to go into that “stack” to the Appellant and Aviva. The prejudice of a sale at \$18,500,000 sufficient only to pay Domain and the professionals is readily apparent.

55. The only issue about which there could be controversy is that of relative inconvenience or prejudice, if the stay is granted. It is possible that a stay, may, ultimately, permit Solterra to withdraw its offer.

56. The very fact that it has made two offers, a year and a half apart, should inform the Courts assessment of that risk. Moreover, both the Petitioners’ letter of intent and the potential Hynes’ offer ameliorate that risk.

57. Moreover, the risk can be addressed and minimized by directions. The outside date to close the Solterra transaction is October 20th. Directions for an expedited appeal, as to the content and filing of appeal books and factums, and shortening time periods in the *Act*, would make it possible to have the appeal heard prior to that date, leaving any further stay, if necessary, in the hands of the panel having heard the full appeal.

PART 4: ORDER SOUGHT

58. The Appellant seeks leave to appeal the Order of Madam Justice Fitzpatrick, made the 22nd day of July, 2022, in CCAA proceedings, approving an Agreement of Purchase and Sale in the basic amount of \$18,500,000 also dated the 22nd day of July, 2022, pursuant to a Notice of Application also dated July 22, 2022.

59. The Appellant seeks a stay of Madam Justice Fitzpatrick’s Order.

60. The Appellant seeks directions for an expedited appeal.

ALL OF WHICH IS RESPECTFULLY
SUBMITTED

Dated: August 12, 2022



H.C. Ritchie Clark, Q.C.
Counsel for the Appellant, 1296371 B.C. Ltd.

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L.L.A., The Sexual Assault Care Centre of the Plummer Memorial Public Hospital and Women in Crisis (Algoma) Inc. Appellants

v.

A.B. Respondent

and

Her Majesty The Queen, the Attorney General of Canada, the Attorney General of Manitoba, the Canadian Foundation for Children, Youth and the Law, the Aboriginal Women's Council, the Canadian Association of Sexual Assault Centres, DAWN Ontario: DisAbled Women's Network Ontario, the Women's Legal Education and Action Fund ("LEAF") and the Criminal Lawyers Association Intervenors

INDEXED AS: A. (LL) v. B. (A.)

File No.: 24568.

1995: June 16; 1995: December 14.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Major JJ.

ON APPEAL FROM THE ONTARIO COURT (GENERAL DIVISION)

Jurisdiction — Supreme Court of Canada — Interlocutory judgment at trial — Third party seeking to appeal that judgment — Whether or not Supreme Court of Canada had jurisdiction to hear appeal — Supreme Court Act, R.S.C., 1985, c. S-26, ss. 2(1), 40(1).

Criminal law — Evidence — Privilege — Medical files and records — Allegation of sexual assault — Complainant counselled by institutions with specialties in sexual assault — Accused demanding production of all records — Whether or not documents subject to class privilege or meeting requirements for ad hoc production — Whether or not production should be ordered, and if so ordered, its nature and extent — Whether or not production infringing Charter right to privacy — Whether or not production infringing Charter right to equality of the sexual assault complainant — Whether or not pro-

L.L.A., le Sexual Assault Care Centre du Plummer Memorial Public Hospital et Women in Crisis (Algoma) Inc. Appellants

c.

A.B. Intimé

et

Sa Majesté la Reine, le procureur général du Canada, le procureur général du Manitoba, la Canadian Foundation for Children, Youth and the Law, l'Aboriginal Women's Council, l'Association canadienne des centres contre le viol, DAWN Ontario: DisAbled Women's Network Ontario, le Fonds d'action et d'éducation juridiques pour les femmes («FAEJ») et la Criminal Lawyers Association Intervenants

RÉPERTORIÉ: A. (LL) c. B. (A.)

Nº du greffe: 24568.

1995: 16 juin; 1995: 14 décembre.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory et Major.

EN APPEL DE LA COUR DE L'ONTARIO (DIVISION GÉNÉRALE)

Compétence — Cour suprême du Canada — Jugement interlocutoire au procès — Tiers cherchant à faire appel du jugement — La Cour suprême du Canada a-t-elle compétence pour entendre l'appel? — Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 2(1), 40(1).

Droit criminel — Preuve — Privilège — Dossiers médicaux — Allégation d'agression sexuelle — Plaignante ayant consulté des établissements spécialisés dans les agressions sexuelles — Accusé demandant la production de tous les dossiers — Les documents font-ils l'objet d'un privilège générique ou satisfont-ils aux exigences d'une production ad hoc? — Y a-t-il lieu d'ordonner la production et, dans l'affirmative, quelles en sont la nature et l'étendue? — La production viole-t-elle le droit à la protection de la vie privée garanti par la Charte? — La production viole-t-elle le droit de la vic-

duction infringing accused's Charter rights to a fair trial and to full answer and defence — Proper balancing of Charter rights — Canadian Charter of Rights and Freedoms, ss. 7, 8, 15.

The respondent was charged with indecently assaulting L.L.A. who, at the time of the alleged incidents, was a child. Before the trial was scheduled to begin, the respondent served subpoenas *duces tecum* on the institutional appellants commanding them to bring to court all records relating to the proceedings and to the appellant L.L.A. At the same time, the respondent served the institutional appellants and the Crown with a notice of motion for an order that the institutional appellants produce to the defence, before the scheduled trial date, all records relating to L.L.A. The motion was adjourned to be dealt with by the trial judge on the scheduled date for the trial to begin. Before that date, the Crown served and filed a notice of application for an order quashing the subpoenas.

The trial judge dismissed the Crown's application to quash the subpoenas. He concluded, with respect to the application for production, that the records were not privileged and ordered that all records sought be produced to the respondent, with the condition that no copies be made. He then granted an adjournment to allow the parties to assess their respective positions. Given the appellants' intention to appeal the order for production, a stay of the order was granted until such time as the appeals were disposed of. The appellants filed notices of appeal and the respondent brought applications to quash them. The Court of Appeal quashed the appeal for want of jurisdiction in a unanimous decision. It held that the appellants had no right to appeal to the Court of Appeal until there had been a final verdict at trial. As a result, the Court of Appeal ordered the production of the documents and directed that the trial proceed. Pursuant to s. 40(1) of the *Supreme Court Act*, the appellants applied for leave to appeal to this Court from the trial judge's order for the production of the documents. They also applied for a stay of the trial pending this Court's decision on their appeal. This Court remitted the question of the stay to the trial judge and granted the application for leave to appeal.

This appeal raises two issues. The first issue is whether third parties, here the appellants, can appeal a trial judge's interlocutory ruling in a sexual assault criminal proceeding. As such, it is necessary to determine whether this Court has jurisdiction to entertain this

time d'agression sexuelle à l'égalité garantie par la Charte? — La production viole-t-elle les droits de l'accusé à un procès équitable et à une défense pleine et entière? — Pondération des droits garantis par la Charte — Charte canadienne des droits et libertés, art. 7, 8, 15.

L'intimé a été accusé d'attentat à la pudeur contre L.L.A., qui était une enfant à l'époque des faits allégués. Avant la date fixée pour le procès, l'intimé a assigné les établissements appelants par *subpoenae duces tecum* leur enjoignant de produire en cour tous les dossiers se rapportant à l'instance et à l'appellante L.L.A. En même temps, l'intimé a donné avis aux établissements appelants et au ministère public d'une requête en vue d'obtenir une ordonnance les obligeant à communiquer à la défense, avant la date fixée pour le procès, tous les dossiers relatifs à L.L.A. La requête a été ajournée pour être entendue par le juge du procès à la date fixée pour le début du procès. Avant cette date, le ministère public a signifié et déposé un avis de requête en cassation des *subpoenae*.

Le juge du procès a rejeté la requête du ministère public en cassation des *subpoenae*. Sur la requête en production des dossiers, il a conclu que les dossiers ne bénéficiaient d'aucun privilège et en a ordonné la communication à l'intimé, sous réserve qu'aucune copie n'en soit faite. Il a ensuite ajourné l'audience pour permettre aux parties d'évaluer leur position respective. Vu l'intention des appelants d'interjeter appel de l'ordonnance de production, il a été sursis à l'ordonnance jusqu'à ce qu'il soit statué sur les appels. Les appelants ont déposé des avis d'appel et l'intimé a présenté des requêtes en cassation des appels. La Cour d'appel a, dans une décision unanime, annulé l'appel pour absence de compétence, estimant que les appelants n'avaient pas de droit d'appel à la Cour d'appel avant que soit rendu le verdict définitif au procès. En conséquence, la Cour d'appel a ordonné la production des documents ainsi que la reprise du procès. En vertu du par. 40(1) de la *Loi sur la Cour suprême*, les appelants ont demandé l'autorisation de se pourvoir devant notre Cour contre la décision du juge du procès ordonnant la production des documents. Ils ont également demandé qu'il soit sursis au procès en attendant la décision de la Cour. Notre Cour a renvoyé la question du sursis au juge du procès et a accordé la demande d'autorisation d'appel.

Le pourvoi soulève deux questions. La première est de savoir si des tiers, les appelants en l'espèce, peuvent faire appel d'un jugement interlocutoire rendu par le juge du procès dans le cadre d'une poursuite criminelle pour agression sexuelle. Il faut déterminer si, dans un tel

appeal. The second issue deals with the nature and extent of production to the defence of medical and therapeutic records relating to complainants held by third parties in sexual assault trials.

Held: The appeal should be allowed.

Jurisdiction

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Major J.J.: Different procedural avenues exist for third parties seeking to appeal an interlocutory order depending on the level of court issuing the order. A provincial court order is to be challenged through an enlarged remedy of *certiorari* which falls within the ambit of superior courts. This decision can then be appealed through the regular channels of the judicial system. Where a court order is issued by a superior court judge, third parties can challenge it by seeking leave to appeal directly to this Court, pursuant to s. 40(1) of the *Supreme Court Act*.

The appellants, who are third parties in the criminal proceeding, have standing to appeal before this Court. The full scope of s. 40(1) of the *Supreme Court Act* provides for an appeal not only of a "final judgment" but also of "other judgment[s]" and therefore encompasses interlocutory appeals of court orders in criminal matters sought by third parties. Furthermore, an interlocutory order affecting third parties is a final order and, accordingly, s. 40(1) is available to appeal an order of a superior court judge. Finally, s. 2(1) of the *Supreme Court Act*, in its definition of "final judgment", uses the term "any of the parties in controversy" rather than any of the parties in the proceedings. Third parties' substantive rights might be affected by the outcome of the trial judge's order; they are "parties in controversy" before the Court.

While the dismissal by the trial judge of a motion to quash the subpoenas may not open the door to an interlocutory appeal of that order by parties to the proceedings during the trial, the records here subpoenaed were not in the possession of the Crown but in that of third parties. The parties who seek to appeal the order are third parties, not the Crown. No appeal lay to the Court of Appeal but an appeal by third parties did lie to this Court, with leave. Given that this procedure was followed, this Court had jurisdiction to hear the appeal. The complainant, a third party to the proceedings (whether or not an appellant), and the Crown, a party to the proceedings, both have standing in third party

cas, notre Cour a compétence pour entendre le pourvoi. La seconde question porte sur la nature et l'étendue de la communication à la défense, dans les procès pour agression sexuelle, de dossiers médicaux et thérapeutiques qui concernent des plaignants et qui sont en la possession de tiers.

Arrêt: Le pourvoi est accueilli.

Compétence

Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory et Major: Les tiers qui cherchent à appeler d'une ordonnance interlocutoire doivent suivre des procédures différentes selon le tribunal qui a rendu l'ordonnance. Pour contester une ordonnance d'une cour provinciale, il faut procéder par voie de *certiorari* élargi, lequel relève de la compétence des cours supérieures. Il y a appel de cette décision selon les règles ordinaires du système judiciaire. Si l'ordonnance est rendue par un juge d'une cour supérieure, les tiers peuvent la contester en demandant une autorisation de pourvoi directement à notre Cour, conformément au par. 40(1) de la *Loi sur la Cour suprême*.

Les appelants, qui sont des tiers à la procédure criminelle, ont qualité pour se pourvoir devant notre Cour. Dans son sens global, le par. 40(1) de la *Loi sur la Cour suprême* porte qu'il peut être interjeté appel de «tout jugement, définitif ou autre», et englobe donc les appels interlocutoires par des tiers contre des ordonnances judiciaires rendues en matière criminelle. De plus, une ordonnance interlocutoire touchant des tiers est une ordonnance définitive et, en conséquence, le par. 40(1) permet d'interjeter appel d'une ordonnance d'un juge d'une cour supérieure. Enfin, le texte anglais du par. 2(1) de la *Loi sur la Cour suprême* renvoie à «*any of the parties in controversy*», plutôt qu'à «*any of the parties in the proceedings*». L'ordonnance du juge du procès peut affecter les droits substantiels de tiers; ceux-ci sont donc des «*parties in controversy*» devant la Cour.

Alors que le rejet par le juge du procès d'une requête en cassation des subpoenas n'est pas susceptible de donner lieu à un appel interlocutoire par les parties à l'instance, les dossiers requis par subpoena en l'espèce n'étaient pas en la possession du ministère public mais en celle de tiers. Ce sont des tiers qui cherchent à faire appel de l'ordonnance, non le ministère public. Il ne pouvait y avoir appel devant la Cour d'appel mais les tiers pouvaient se pourvoir devant notre Cour, sur autorisation. Étant donné que cette procédure a été suivie, notre Cour avait compétence pour entendre le pourvoi. Le plaignant, tiers à l'instance (appelant ou non), et le ministère public, partie à l'instance, ont tous deux qua-

appeals. The *audi alteram partem* principle requires that courts provide an opportunity to be heard to those who will be affected by the decisions.

Production of Medical Records held by Third Parties

Per Lamer C.J. and Sopinka, Cory and Major JJ.: The procedure and substantive law to be followed where the accused seeks the production of therapeutic records in the hands of third parties is set out in *R. v. O'Connor*. The appeal must be allowed as respondent failed to follow the requisite procedure and substantive law but without prejudice to his right to renew his request for production via the procedures developed by this Court in *O'Connor*.

Per La Forest, L'Heureux-Dubé and Gonthier JJ.: Private records, or records in which a reasonable expectation of privacy lies, may include medical or therapeutic records, school records, private diaries, social worker activity logs, and so on.

A class privilege should not be recognized for private records. Privilege exempts, completely or partially, particular communications arising out of certain defined relationships from disclosure in judicial proceedings. Although the justification for privilege has traditionally been utilitarian, a view based on fundamental individual values, such as privacy, has recently begun to emerge. Nevertheless, privilege is a question of public policy, as it impedes the search for truth, a central objective of our legal system, in order to advance other goals. Notwithstanding several strong arguments of public policy militating in favour of protecting the confidentiality of counsellor-sexual assault complainant communications in criminal trials, a class privilege should not be recognized for private records. The following concerns weigh against the recognition of such a privilege: (1) the truth-finding process of our adversarial trial procedure; (2) the possible relevance of some private records; (3) the accused's right to make full answer and defence; (4) the categories of actors included in a class privilege; and (5) the experience of other countries.

The granting of a case-by-case privilege may be appropriate in some circumstances. Given the nature of the relationship between counsellors and sexual assault complainants, the first three Wigmore criteria will usually be easily met. These relationships are founded on

lité pour agir dans le cadre d'appels formés par des tiers. Le principe *audi alteram partem* exige que les tribunaux accordent aux personnes visées par leurs décisions l'occasion d'être entendues.

Production de dossiers médicaux détenus par des tiers

Le juge en chef Lamer et les juges Sopinka, Cory et Major: La procédure et le droit substantiel à suivre lorsque l'accusé cherche à obtenir la production de dossiers thérapeutiques en la possession de tiers sont exposés dans l'arrêt *O'Connor*. Le pourvoi doit être accueilli puisque l'intimé n'a pas suivi la procédure ni le droit substantiel applicables, mais sous réserve de son droit de présenter une nouvelle demande de production en suivant la procédure que notre Cour a élaborée dans l'arrêt *O'Connor*.

Les juges La Forest, L'Heureux-Dubé et Gonthier: Les dossiers privés, ou dossiers donnant ouverture à une attente raisonnable en matière de respect de leur caractère privé, peuvent comprendre des dossiers médicaux ou thérapeutiques, des dossiers scolaires, des journaux intimes, des notations de travailleurs sociaux, etc.

La reconnaissance d'un privilège générique pour les dossiers privés n'est pas justifiée. Un privilège empêche la divulgation, en tout ou en partie, de communications particulières découlant de certains rapports définis, lors de procédures judiciaires. Quoique la justification du privilège ait traditionnellement été d'ordre utilitaire, un point de vue fondé sur des valeurs individuelles fondamentales, telle la protection de la vie privée, est récemment apparu. Néanmoins, il s'agit d'une question de principe en ce que le privilège entrave la recherche de la vérité, un objectif central de notre système juridique, afin de promouvoir d'autres buts. Malgré les puissants arguments de principe qui militent en faveur de la protection, dans les procès criminels, du caractère confidentiel des communications entre conseillers et plaignants victimes d'agression sexuelle, il n'y a pas lieu de reconnaître un privilège générique pour les dossiers privés. La reconnaissance en droit criminel d'un tel privilège soulève les préoccupations suivantes: (1) le processus de recherche de la vérité de notre procédure judiciaire contradictoire; (2) la pertinence possible de certains dossiers privés; (3) le droit de l'accusé à une défense pleine et entière; (4) les catégories d'acteurs inclus dans un privilège générique; et (5) l'expérience d'autres pays.

L'octroi d'un privilège, au cas par cas, peut être indiqué dans certaines circonstances. Les trois premiers critères de Wigmore seront en général facilement satisfaits étant donné la nature de la relation entre conseillers et plaignants dans les affaires d'agression sexuelle.

trust and confidence, confidentiality is essential to their maintenance, and the public fosters and supports the relationships. The fourth criterion involves the balancing of the relative values favouring privilege with those favouring production of the records. The determination of whether privilege should be granted in a particular case is based on public policy considerations, as distinct from a balancing of *Charter* rights. While a case-by-case privilege for private records of sexual assault complainants may be recognized in some instances, exceptions to the general evidentiary rule of admissibility and disclosure should not be encouraged. Moreover, this *ad hoc* approach to privilege will not cure the most important ills associated with production of private records, notably the deterrent effect that such production has on reporting and counselling.

A better approach is that advocated in *R. v. O'Connor*, involving a balancing of the sexual assault complainant's *Charter* rights to privacy and equality with the accused's *Charter* rights to a fair trial and to full answer and defence.

When deciding whether to order production of private records held by third parties, the court must exercise its discretion in a manner that is respectful of *Charter* values. The constitutional values involved here are the right to full answer and defence, the right to privacy, and the right to equality without discrimination.

The use of state power to compel production of private records will be justified in a free and democratic society when the following criteria are met: (1) it is shown that the accused cannot obtain the information by any other reasonable means; (2) production that infringes privacy must be limited as reasonably as possible to fulfil the right to make full answer and defence; (3) the arguments urging production rest on permissible chains of reasoning, rather than discriminatory assumptions and stereotypes; and (4) there is proportionality between the salutary and deleterious effects of production. The common law should not accord pre-eminence to the right to a fair trial, over other constitutionally protected rights. A balance must be struck that places the *Charter* rights of complainants on an equal footing with those of accused persons.

Cette relation se fonde sur la confiance, la confidentialité est essentielle à son maintien et elle a l'appui et le soutien du public. Le quatrième critère renvoie à la pondération des valeurs qui favorisent la reconnaissance d'un privilège et des valeurs qui militent en faveur de la production des dossiers. La décision d'accorder un privilège dans un cas donné se fonde uniquement sur des considérations de principe et n'engage pas une pondération des droits garantis par la *Charte*. Bien qu'il y ait lieu de reconnaître un privilège fondé sur des circonstances particulières de cas précis pour des dossiers privés de plaignants d'agression sexuelle, il ne convient pas d'encourager ces exceptions à la règle générale d'admissibilité et de divulgation de la preuve. De plus, cette approche *ad hoc* ne permettra pas de remédier aux principaux problèmes associés à la production des dossiers privés notamment son effet dissuasif sur le dépôt de plaintes et les demandes de consultation.

Une approche plus appropriée, préconisée dans l'arrêt *O'Connor*, consiste à soupeser les droits du plaignant à la protection de sa vie privée et à l'égalité, garantis par la *Charte*, et les droits de l'accusé à un procès équitable et à une défense pleine et entière, également garantis par la *Charte*.

Lorsqu'il décide s'il doit ordonner la production de dossiers privés détenus par des tiers, le tribunal doit exercer son pouvoir discrétionnaire dans le respect des valeurs de la *Charte*. Les valeurs constitutionnelles en jeu dans le présent pourvoi sont le droit de présenter une défense pleine et entière, le droit à la protection de la vie privée et le droit à l'égalité sans discrimination.

L'utilisation du pouvoir de l'État d'imposer la production de dossiers privés sera justifiée dans une société libre et démocratique lorsque les critères suivants seront remplis: (1) il est prouvé que l'accusé ne peut pas obtenir les renseignements demandés par d'autres moyens raisonnables; (2) la production qui viole le droit à la protection de la vie privée doit être aussi limitée qu'il est raisonnablement possible pour respecter le droit de présenter une défense pleine et entière; (3) les arguments en faveur de la production doivent se fonder sur un raisonnement permis et non sur des suppositions et des stéréotypes discriminatoires; et (4) il doit y avoir proportionnalité entre les effets bénéfiques et les effets préjudiciables de la production. La common law ne devrait pas faire prévaloir le droit à un procès équitable sur d'autres droits consacrés par la Constitution. Il faut trouver un équilibre qui place les droits des plaignants en vertu de la *Charte* sur le même pied que ceux des accusés.

The first step for an accused who seeks production of private records held by a third party is to obtain and serve on the third party a *subpoena duces tecum*. The Crown, the subject of the records, and any other person with an interest in the confidentiality of the records should be notified at this time that the accused will be seeking an order for production of the records.

At the trial, when the accused requests an order for production of the records, the judge should follow a two-stage approach. First, the accused must demonstrate that the information contained in the records is likely relevant either to an issue in the proceedings or to the competence to testify of the subject of the records. Although the subject's privacy interest does not enter into consideration at this stage, the information must be sought because of its relevance, rather than for illegitimate purposes. Moreover, the accused's demonstration of likely relevance must be based on evidence, not on speculative assertions or on discriminatory or stereotypical reasoning. It may be useful at this stage for the third party to prepare a list of the records in its possession.

If the court is satisfied that the information is likely to be relevant, then the analysis proceeds to the second stage, which has two parts. First, if the accused can show that the salutary effects of producing the documents to the court for inspection outweigh the deleterious effects of such production, the judge should so order. Then, after examining the records, the judge should balance the conflicting constitutional rights to determine whether and to what extent production to the defence should be ordered. Only those parts of records that have a significant probative value to the issues at trial or the competence of the witness which is not substantially outweighed by prejudice to the administration of justice or to the witness' privacy and equality rights should be produced.

Even if production is ordered, it must still be determined whether the produced records are admissible.

The court's inquiry into the relevance of the information and its balancing of the competing interests should be made at the time of the trial. Prospective defence witnesses in sexual assault cases, like other potential witnesses in criminal cases, are not obliged to cooperate with either party before the trial, and may not be compelled to provide the defence with a preview of their evidence. Private records of this kind will in most cases be irrelevant and inadmissible. Moreover, the creation

La première étape, pour l'accusé qui cherche à obtenir la production de dossiers privés détenus par des tiers, consiste à obtenir un *subpoena duces tecum*. Le ministère public, le sujet des dossiers et toute autre personne ayant un intérêt dans le caractère confidentiel des dossiers, doivent recevoir avis, à ce moment, que l'accusé demandera leur production.

Au procès, lorsque l'accusé demande une ordonnance de production des dossiers, le juge devrait suivre une démarche en deux étapes. Premièrement, l'accusé doit démontrer que les renseignements contenus dans les dossiers sont probablement pertinents soit quant à une question en litige dans l'instance soit quant à l'habilité à témoigner de la personne visée par les dossiers. Quoique à cette étape, le droit à la vie privée de cette personne n'entre pas en considération, les renseignements doivent être recherchés pour leur pertinence plutôt que pour des fins illégitimes. De plus, la démonstration par l'accusé que les renseignements sont probablement pertinents doit se fonder sur la preuve et non sur des affirmations spéculatives ou sur un raisonnement discriminatoire ou stéréotypé. À ce stade, il peut être utile pour le tiers de préparer une liste des dossiers en sa possession.

Si le tribunal est convaincu que les renseignements sont probablement pertinents, l'analyse passe alors à l'étape suivante qui comporte deux volets. D'abord, si l'accusé peut établir que les effets bénéfiques de la production des documents en cour pour inspection sont plus importants que les effets préjudiciables de la production, le juge devrait l'ordonner. Ensuite, après avoir examiné les dossiers, le juge doit pondérer les droits constitutionnels en conflit pour déterminer si, et dans quelle mesure, la communication à la défense devrait être ordonnée. Seules devraient être produites les parties des dossiers ayant une valeur probante qui est importante quant aux points en litige ou quant à l'habilité à témoigner et qui n'est pas substantiellement surpassée par le préjudice à l'administration de la justice ou l'atteinte aux droits du témoin à la protection de sa vie privée et à l'égalité.

Même si la production est ordonnée, il faut encore déterminer si les dossiers produits sont admissibles.

L'examen par le tribunal de la pertinence des renseignements et la pondération des intérêts en jeu devraient être faits au moment du procès. Un témoin de la défense, dans une affaire d'agression sexuelle, comme d'autres témoins éventuels dans des affaires criminelles, n'est pas obligé de collaborer avec l'une ou l'autre partie avant le procès, et ne peut être contraint à donner à la défense un aperçu de sa preuve. Dans la plupart des cas, de tels dossiers privés ne seront pas pertinents et ne

of a pre-trial procedure would inconvenience witnesses, invite fishing expeditions and entail unnecessary delays. Finally, the trial judge would not be in a position, before the beginning of the trial, to determine the relevance, much less the admissibility, of the records sought, or to balance effectively the constitutional rights affected by an order for production.

In this case, the respondent's application for production should not have been entertained before the beginning of the trial. Moreover, no notice was given to L.L.A. who had an interest in the confidentiality of the records. As well, the trial judge erred by ordering the records produced without first determining their likely relevance and balancing the competing *Charter* rights. Ultimately, the respondent's application could not meet the threshold of likely relevance either to the issues at trial or to the competence of the subject of the records, and constituted nothing more than a fishing expedition.

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seront pas admissibles. De plus, la création d'une procédure préalable aurait pour effet d'incommoder les témoins, encouragerait les recherches à l'aveuglette et occasionnerait des délais inutiles. Enfin le juge du procès ne serait pas en mesure, avant le début de l'instance, de décider de la pertinence, encore moins de l'admissibilité, des dossiers demandés, ou de pondérer efficacement les droits constitutionnels touchés par une ordonnance de production des dossiers.

En l'espèce, la demande de production présentée par l'appelant n'aurait pas dû être traitée au début du procès. De plus, L.L.A. qui avait un intérêt dans le caractère confidentiel des dossiers n'a pas été avisée. En outre, le juge du procès a commis une erreur en ordonnant la production des dossiers sans déterminer d'abord leur pertinence probable et sans pondérer les droits garantis par la *Charte*. Enfin, la demande de l'intimé ne pouvait satisfaire au critère préliminaire de la pertinence probable à l'égard des questions en litige dans l'instance ou à l'égard de l'habileté à témoigner de la personne visée par les dossiers, et ne constituait rien de plus qu'une recherche à l'aveuglette.

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Williamson, Kim E. "Confidentiality of Sexual Assault Victim-Counselor Communication: A Proposed Model Statute" (1984), 26 *Ariz. L. Rev.* 461.

APPEAL to the Supreme Court of Canada pursuant to s. 40(1) of the *Supreme Court Act*, with leave, [1995] 1 S.C.R. viii, from an interlocutory judgment of Loukidelis J. ordering production of documents. Appeal allowed.

Diane Oleskiw and Freya Kristjanson, for the appellants.

Clayton C. Ruby, John Norris, David Paciocco and Chris Thompson, for the respondent.

Susan Chapman and Kenneth L. Campbell, for the intervener Her Majesty the Queen.

Donna R. Valgardson and Nancy L. Irving, for the intervener the Attorney General of Canada.

Marva J. Smith, for the intervener the Attorney General of Manitoba.

Sheena Scott and David Mikelberg, for the intervener the Canadian Foundation for Children, Youth and the Law.

Anne S. Derrick and Sharon McIvor, for the interveners the Aboriginal Women's Council, the Canadian Association of Sexual Assault Centres, DAWN Ontario: DisAbled Women's Network Ontario and the Women's Legal Education and Action Fund ("LEAF").

Alan D. Gold, for the intervener the Criminal Lawyers Association.

The judgment of Lamer C.J. and Sopinka, Cory and Major JJ. was delivered by

LAMER C.J. AND SOPINKA J. — This appeal, along with the companion case of *R. v. O'Connor*, [1995] 4 S.C.R. 411, released concurrently, concerns the procedure and substantive law governing the production of sexual assault counselling records in the possession of third parties. In addi-

Williamson, Kim E. «Confidentiality of Sexual Assault Victim-Counselor Communication: A Proposed Model Statute» (1984), 26 *Ariz. L. Rev.* 461.

POURVOI à la Cour suprême du Canada, sur autorisation, [1995] 1 R.C.S. viii, en vertu du par. 40(1) de la *Loi sur la Cour suprême*, visant un jugement interlocutoire du juge Loukidelis ordonnant la production de documents. Pourvoi accueilli.

Diane Oleskiw et Freya Kristjanson, pour les appelants.

Clayton C. Ruby, John Norris, David Paciocco et Chris Thompson, pour l'intimé.

Susan Chapman et Kenneth L. Campbell, pour l'intervenante Sa Majesté la Reine.

Donna R. Valgardson et Nancy L. Irving, pour l'intervenant le procureur général du Canada.

Marva J. Smith, pour l'intervenant le procureur général du Manitoba.

Sheena Scott et David Mikelberg, pour l'intervenante la Canadian Foundation for Children, Youth and the Law.

Anne S. Derrick et Sharon McIvor, pour les intervenants l'Aboriginal Women's Council, l'Association canadienne des centres contre le viol, DAWN Ontario: DisAbled Women's Network Ontario et le Fonds d'action et d'éducation juridiques pour les femmes («FAEJ»).

Alan D. Gold, pour l'intervenante la Criminal Lawyers Association.

Version française du jugement du juge en chef Lamer et des juges Sopinka, Cory et Major rendu par

LE JUGE EN CHEF LAMER ET LE JUGE SOPINKA — Le présent pourvoi, comme le pourvoi connexe *R. c. O'Connor*, [1995] 4 R.C.S. 411, rendu simultanément, porte sur la procédure et le droit substantiel qui régissent la production de dossiers de soins socio-psychologiques à la suite d'une agression

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tion, the present appeal raises the issue of this Court's jurisdiction to entertain a third party's appeal from a trial judge's interlocutory ruling in a sexual assault trial. On this latter issue, we agree with the decision of our colleague Justice L'Heureux-Dubé.

Our views concerning the procedure and substantive law to be followed where the accused seeks the production of therapeutic records in the hands of third parties are set out in our reasons in *O'Connor*. As the respondent in the instant case has failed to follow the requisite procedure and substantive law, we agree with L'Heureux-Dubé J. that the appeal must be allowed. However, we wish to make it clear that in allowing this appeal, we do not prejudice the right of the respondent to renew his request for production via the procedure and substantive law developed by this Court in *O'Connor*.

The reasons of La Forest, L'Heureux-Dubé and Gonthier JJ. were delivered by

L'HEUREUX-DUBÉ J. — This appeal raises two issues. The first issue is a jurisdictional question as to whether third parties, here the appellants, can appeal a trial judge's interlocutory ruling in a sexual assault criminal proceeding. As such, it is necessary to determine whether this Court has jurisdiction to entertain this appeal. The second issue is substantive in character and deals with the nature and extent of production to the defence of medical and therapeutic records relating to complainants held by third parties in sexual assault trials.

Several fundamental values are at stake in this appeal: the right to full answer and defence, the right to privacy and the right to equality without discrimination.

At the outset, a reference to the relevant statutory provisions and a review of the facts and judgments are in order.

sexuelle, qui sont en la possession d'un tiers. Il soulève en outre la question de la compétence de notre Cour d'entendre l'appel d'un tiers contre une décision interlocutoire rendue dans un procès pour agression sexuelle. Sur cette dernière question, nous sommes d'accord avec la décision de notre collègue le juge L'Heureux-Dubé.

Notre point de vue quant à la procédure et au droit substantiel à appliquer lorsque l'accusé cherche à obtenir la production de dossiers thérapeutiques en la possession de tiers est exposé dans nos motifs de l'arrêt *O'Connor*. Puisque l'intimé en l'espèce n'a pas suivi la procédure et le droit substantiel applicables, nous partageons l'avis du juge L'Heureux-Dubé que le pourvoi doit être accueilli. Nous voulons toutefois qu'il soit bien compris que, en accueillant le pourvoi, nous ne portons pas atteinte au droit de l'intimé de présenter une nouvelle demande de production selon la procédure et le droit substantiel que notre Cour a élaborés dans l'arrêt *O'Connor*.

Les motifs des juges La Forest, L'Heureux-Dubé et Gonthier ont été rendus par

LE JUGE L'HEUREUX-DUBÉ — Le présent pourvoi soulève deux questions. La première, d'ordre juridictionnel, est de savoir si des tiers, en l'occurrence les appelants, peuvent en appeler d'un jugement interlocutoire de première instance rendu dans le cadre d'une poursuite criminelle pour agression sexuelle. Il faut, en outre, déterminer si, dans un tel cas, notre Cour a juridiction pour entendre le pourvoi. La seconde question est substantielle et porte sur la nature et l'étendue de la production à la défense, dans les procès pour agression sexuelle, de dossiers médicaux et thérapeutiques qui concernent des plaignantes et qui sont en la possession de tiers.

Plusieurs valeurs fondamentales sont en jeu dans ce pourvoi: le droit à une défense pleine et entière, le droit à la protection de la vie privée et le droit à l'égalité indépendamment de toute discrimination.

Dès le départ, il y a lieu de reproduire les dispositions législatives applicables et de faire une revue des faits ainsi que des jugements rendus.

I. Relevant Statutory Provisions

6 The jurisdictional issue concerns the application of s. 40(1) and the definition of "final judgment" in s. 2(1) of the *Supreme Court Act*, R.S.C., 1985, c. S-26. These provisions read as follows:

2. (1) ...

"final judgment" means any judgment, rule, order or decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding;

40. (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

II. Facts and Judgments

7 On March 2, 1993, the respondent A.B. was arrested and charged that, between February 15, 1980, and December 31, 1980, in Sault Ste. Marie, he indecently assaulted the appellant L.L.A., then six years of age, contrary to s. 140 of the *Criminal Code*, R.S.C. 1970, c. C-34 (now R.S.C., 1985, c. C-46, s. 151).

8 L.L.A. sought counselling at both appellant counselling institutions. The appellant Sexual Assault Care Centre of the Plummer Memorial Public Hospital is a division of the public hospital at which L.L.A. attended for counselling in January, 1992. The appellant Women in Crisis (Algoma) Inc., operating as "Women's Outreach", is a partially publicly funded organization where L.L.A. sought counselling in November, 1992. It provides counselling to adult women who are

I. Les dispositions législatives applicables

La question juridictionnelle met en cause l'application du par. 40(1) ainsi que la définition du terme «jugement définitif» au par. 2(1) de la *Loi sur la Cour suprême*, L.R.C. (1985), ch. S-26. Ces dispositions sont ainsi libellées:

2. (1) ...

«jugement définitif» Jugement ou toute autre décision qui statue au fond, en tout ou en partie, sur un droit d'une ou plusieurs des parties à une instance.

40. (1) Sous réserve du paragraphe (3), il peut être interjeté appel devant la Cour de tout jugement, définitif ou autre, rendu par la Cour d'appel fédérale ou par le plus haut tribunal de dernier ressort habilité, dans une province, à juger l'affaire en question, ou par l'un des juges de ces juridictions inférieures, que l'autorisation d'en appeler à la Cour ait ou non été refusée par une autre juridiction, lorsque la Cour estime, compte tenu de l'importance de l'affaire pour le public, ou de l'importance des questions de droit ou des questions mixtes de droit et de fait qu'elle comporte, ou de sa nature ou importance à tout égard, qu'elle devrait en être saisie et lorsqu'elle accorde en conséquence l'autorisation d'en appeler.

II. Les faits et les jugements

Le 2 mars 1993, l'intimé A.B. a été arrêté et accusé d'avoir, entre le 15 février 1980 et le 31 décembre 1980, à Sault Ste-Marie, commis un attentat à la pudeur contre l'appelante L.L.A., alors âgée de six ans, contrairement à l'art. 140 du *Code criminel*, S.R.C. 1970, ch. C-34 (maintenant L.R.C. (1985), ch. C-46, art. 151).

L.L.A. a eu recours aux deux établissements de services de consultation appelants. Le Sexual Assault Care Centre du Plummer Memorial Public Hospital est une division de l'hôpital public où L.L.A. s'est présentée en janvier 1992. L'appellant Women in Crisis (Algoma) Inc., exploité sous le nom de Women's Outreach, est un organisme financé en partie par des fonds publics, auquel L.L.A. s'est adressée en novembre 1992. Il fournit des services de consultation psychologique aux

victims/survivors of sexual abuse, sexual assault, family violence and other types of violence against women.

At the preliminary inquiry on June 2, 1993, the respondent was committed to stand trial. The trial was scheduled to start on February 14, 1994. On February 3, 1994, the respondent served subpoenas *duces tecum* on the appellants Sexual Assault Care Centre and Women's Outreach, commanding them to bring to court, on February 14, 1994, all records relating to the proceedings and to the appellant L.L.A. At the same time, the respondent served the appellants Sexual Assault Care Centre and Women's Outreach as well as the Crown with a notice of motion for an order that the appellants Sexual Assault Care Centre and Women's Outreach produce to the defence, before the scheduled trial date, all records relating to the appellant L.L.A. The motion came before Whalen J. on February 9, 1994, and was adjourned to be dealt with by the trial judge on February 14. On February 10, 1994, the Crown served and filed a notice of application for an order quashing the subpoenas.

On February 14, 1994, Loukidelis J. of the Ontario Court of Justice, General Division, heard both applications separately. He dealt first with the application from the Crown to quash the subpoenas, which he dismissed, concluding that "there may be information at hand that is relevant to the issue". Loukidelis J. then heard the motion from the respondent for production of the records. He held:

In view of the way that these matters were brought before me, the issue is not whether this is a fishing expedition because that is an issue of a bona fide need for the evidence which was subsumed under the question of relevance. This argument advances the issue of privilege.

Loukidelis J. observed that there was no statutory basis for the claim of privilege and that the traditional classes of privilege created by the common law, such as the solicitor-client privilege, were not applicable. He concluded that the records were not privileged and ordered that all records sought be

femmes adultes victimes ou survivantes d'abus sexuel, d'agression sexuelle, de violence familiale et d'autres types de violence contre les femmes.

À l'enquête préliminaire le 2 juin 1993, l'intimé a été renvoyé à procès. Celui-ci a été fixé au 14 février 1994. Le 3 février 1994, l'intimé a assigné par *subpoena duces tecum* les appelants Sexual Assault Care Centre et Women's Outreach, leur enjoignant d'apporter en cour, le 14 février 1994, tous les dossiers se rapportant à l'instance et à l'appelante L.L.A. En même temps, l'intimé a donné avis aux appelants Sexual Assault Care Centre et Women's Outreach, ainsi qu'au ministère public, qu'il présenterait une requête en vue d'obtenir une ordonnance obligeant les appelants Sexual Assault Care Centre et Women's Outreach à communiquer à la défense, avant la date fixée pour le procès, tous les dossiers relatifs à l'appelante L.L.A. La requête a été présentée devant le juge Whalen le 9 février 1994, et fut ajournée pour être entendue par le juge du procès le 14 février. Le 10 février 1994, le ministère public a signifié et déposé un avis de présentation d'une requête en cassation des subpoenae.

Le 14 février 1994, le juge Loukidelis de la Cour de justice de l'Ontario, Division générale, a entendu les deux requêtes séparément. Examinant d'abord la requête en cassation des subpoenae présentée par le ministère public, il l'a rejetée en concluant que [TRADUCTION] «il peut y avoir des renseignements pertinents quant à la question en litige». Le juge Loukidelis a ensuite entendu la requête de l'intimé visant la production des dossiers. Il est arrivé à la conclusion suivante:

[TRADUCTION] Étant donné la façon dont ces problèmes m'ont été présentés, la question n'est pas de savoir si on est en présence d'une partie de pêche puisqu'il s'agit d'une question de preuve véritablement nécessaire abordée sous l'angle de la pertinence. Cet argument soulève la question du privilège.

Le juge Loukidelis a fait observer que le privilège revendiqué ne reposait sur aucun fondement législatif et que les catégories traditionnelles de privilèges issues de la common law, tel le secret professionnel de l'avocat, étaient inapplicables. Ayant donc conclu que les dossiers ne bénéficiaient d'au-

produced to the respondent, subject to the condition that no copies be made. He then granted an adjournment to allow the parties to assess their respective positions. Given the appellants' intention to appeal the order for production, Loukidelis J. ordered a stay of his order until the appeals were disposed of. The appellants filed notices of appeal on March 17, 1994, at which time the respondent brought applications to quash the appeals.

cun privilège, il a ordonné la communication de tous les dossiers à l'intimé, sous réserve qu'aucune copie n'en soit faite. Il a ensuite ajourné l'audience pour permettre aux parties d'évaluer leur position respective. Vu l'intention des appelants d'interjeter appel de l'ordonnance de production, le juge Loukidelis a ordonné le sursis de son ordonnance jusqu'à ce qu'il soit disposé des appels. Les appelants ont déposé les avis d'appel le 17 mars 1994, date à laquelle l'intimé a présenté des requêtes en cassation des appels.

11 On January 6, 1995, the Ontario Court of Appeal quashed the appeal for want of jurisdiction in a unanimous decision (*A. (L.L.) v. B. (A.)* (1995), 37 C.R. (4th) 170). Relying upon the decision of this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, the Court of Appeal concluded that there was no provision under the *Code* allowing for interlocutory appeals either for parties or third parties from rulings at trial relating to the admissibility of evidence or documents. As such, it held that the appellants had no right to appeal to the Court of Appeal until there had been a final verdict at trial. As a result, the Court of Appeal ordered the production of the documents and directed that the trial before Loukidelis J. proceed.

Le 6 janvier 1995, la Cour d'appel de l'Ontario, dans une décision unanime, a cassé l'appel pour absence de juridiction (*A. (L.L.) c. B. (A.)* (1995), 37 C.R. (4th) 170). Se fondant sur l'arrêt de notre Cour *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, la Cour d'appel a conclu qu'aucune disposition du *Code* n'autorisait les parties elles-mêmes ou les tierces parties à former des appels à l'encontre de décisions interlocutoires rendues en première instance relativement à l'admissibilité d'éléments de preuve ou de documents. À ce titre, elle a estimé que les appelants n'avaient pas de droit d'appel à la Cour d'appel avant que ne soit rendu le verdict définitif au procès. En conséquence, la Cour d'appel a ordonné la production des documents ainsi que la reprise du procès devant le juge Loukidelis.

12 Pursuant to s. 40(1) of the *Supreme Court Act*, the appellants applied for leave to appeal to this Court from Loukidelis J.'s order for the production of the documents. They also applied for a stay of the trial pending this Court's decision on their appeal. The trial date was set for June 5, 1995. On March 17, 1995, this Court remitted the question of the stay to the trial judge and, on March 27, the application for leave to appeal was granted: [1995] 1 S.C.R. viii.

En vertu du par. 40(1) de la *Loi sur la Cour suprême*, les appelants ont demandé l'autorisation de se pourvoir devant notre Cour contre la décision du juge Loukidelis ordonnant la production des documents. Ils ont également demandé qu'il soit sursis au procès en attendant la décision de la Cour. La date du procès a été fixé au 5 juin 1995. Le 17 mars 1995, notre Cour a renvoyé la question du sursis au juge du procès et, le 27 mars, la demande d'autorisation d'appel a été accordée: [1995] 1 R.C.S. viii.

III. Arguments of the Parties and the Intervenors

III. Arguments des parties et des intervenants

13 A number of issues were raised by the parties and the intervenors, which I will attempt to summarize without entering into all the detailed approaches which were suggested.

Les parties et les intervenants ont soulevé un bon nombre d'arguments que je m'efforcerai de résumer sans pour autant entrer dans le détail de toutes les avenues suggérées.

The appellants submit, first, that the threshold evidentiary basis, which must be established by the accused's seeking the production of private records held by third parties, must take into consideration the right to privacy of the complainant as guaranteed in ss. 7 and 8 of the *Canadian Charter of Rights and Freedoms*. Accordingly, the initial burden would rest upon the accused to establish that the records are necessary for full answer and defence. The relevance of the records would have to be clearly established and a substantial foundation would have to be laid by material extraneous to the records themselves, the subject of records and the record holder. Secondly, the appellants submit that a common law privilege exists in favour of private records held by third parties and that, in balancing both the right of the accused to a full defence and the privacy right of the complainant, such records should be held privileged.

The respondent's first contention is to the effect that this Court does not have jurisdiction to hear third party interlocutory appeals arising out of sexual assault criminal proceedings. As to the question of production and disclosure, the respondent starts from the proposition that the principles elaborated in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, with respect to documents in the possession of the Crown should apply to documents in the possession of third parties. Consequently, whenever the records at issue may be useful to the defence, disclosure should be the rule. According to the respondent, the privacy interest of sexual assault complainants in records held by third parties is not protected by the *Charter*. Therefore, there are no conflicting constitutional rights and the accused's right to full answer and defence must prevail. After the issuance of a *subpoena duces tecum* for the production of such private records, the respondent asserts that the onus is on the Crown to show that the documents are clearly irrelevant. In his supplementary factum, the respondent argues that there is no infringement of s. 15 of the *Charter* in the case at hand. With regard to privilege, the respondent argues that the onus of establishing the existence of a privilege rests upon the party opposing production and disclosure. Further, no privilege would

Les appelants soutiennent, en premier lieu, que la preuve initiale que doit apporter l'accusé demandant la production de dossiers privés en la possession de tiers, doit tenir compte du droit de la plaignante à sa vie privée, droit garanti aux art. 7 et 8 de la *Charte canadienne des droits et libertés*. Par conséquent, c'est à l'accusé qu'incomberait la charge initiale d'établir que les dossiers sont nécessaires à sa pleine et entière défense. La pertinence des dossiers devrait être clairement démontrée et une base solide devrait être établie à l'aide d'éléments extrinsèques aux dossiers eux-mêmes, à la personne visée et au détenteur de ces dossiers. En second lieu, les appelants soutiennent qu'il existe, en common law, un privilège en faveur des dossiers privés en la possession de tiers, et que si l'on soupèse le droit de l'accusé à une défense pleine et entière et le droit à la protection de la vie privée de la plaignante, ces dossiers devraient être tenus pour privilégiés.

Comme premier argument, l'intimé fait valoir que notre Cour n'a pas juridiction pour entendre les appels interlocutoires formés par des tiers dans le cadre de procédures criminelles pour agression sexuelle. Sur la question de la production et de la divulgation, l'intimé part de la prémisse voulant que les principes énoncés dans l'arrêt *R. c. Stinchcombe*, [1991] 3 R.C.S. 326, relativement aux documents en la possession du ministère public, devraient s'appliquer aux documents en la possession de tiers. Conséquemment, chaque fois que les dossiers en cause pourraient être utiles à la défense, la divulgation devrait être la règle. Selon l'intimé, l'intérêt des plaignantes victimes d'agression sexuelle dans la protection du caractère confidentiel des dossiers en la possession de tiers n'est pas protégé par la *Charte*. Il n'y a donc pas conflit de droits constitutionnels et le droit de l'accusé à une défense pleine et entière doit prévaloir. L'intimé soutient qu'après l'émission d'un *subpoena duces tecum* requérant la production de tels dossiers privés, il incombe au ministère public d'établir que ceux-ci sont manifestement non pertinents. Dans son mémoire supplémentaire, l'intimé prétend qu'il n'y a aucune atteinte à l'art. 15 de la *Charte* en l'espèce. En ce qui concerne la question de privilège, il fait valoir que c'est à la partie s'op-

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exist because the traditional rules of confidentiality are trumped by the right of the accused to make full answer and defence.

posant à la production et à la divulgation qu'il appartient d'en prouver l'existence. Par ailleurs, il n'existerait aucun privilège parce que le droit à une défense pleine et entière prime sur les règles traditionnelles en matière de confidentialité.

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The intervener Criminal Lawyers Association ("CLA") agrees with the respondent that the *Stinchcombe* disclosure principles apply for the production and disclosure of private records held by third parties. CLA submits that the accused must have all available tools in order to exercise his right to make full answer and defence, including all potentially relevant information. According to CLA, the *Charter* is not engaged by the disclosure of private records held by third parties. Concerning privilege, CLA argues that, in weighing the complainant's privacy interest with the accused's right to make full answer and defence, the balance must be struck in favour of the latter.

L'intervenante Criminal Lawyers Association («CLA») est d'accord avec l'intimé que les principes de divulgation énoncés dans l'arrêt *Stinchcombe* s'appliquent à la production et à la divulgation de dossiers privés en la possession de tiers. La CLA soutient que l'accusé doit pouvoir se prévaloir de tous les moyens disponibles afin d'exercer son droit de présenter une défense pleine et entière, y compris tous les renseignements potentiellement pertinents. Selon la CLA, la divulgation de dossiers privés en la possession de tiers ne met pas en cause la *Charte*. En ce qui concerne le privilège, la CLA prétend que si l'on soupèse l'intérêt de la plaignante à la protection de sa vie privée et le droit de l'accusé à une défense pleine et entière, la balance doit pencher en faveur de ce dernier.

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On behalf of the intervener Crown, the Attorney General of Ontario asserts that the proper procedure in the present case consists in the issuance of a *subpoena duces tecum* coupled with a formal application for production of the records, including stated grounds and supporting materials. As to the onus, it would be up to the defence to demonstrate, through evidence, that disclosure is necessary in order to make full answer and defence, as well as to establish a substantial likelihood that, without the court compelled infringement of the complainant's ss. 7, 8 and 15 *Charter* rights, the accused's right to make full answer and defence at trial would be violated. The evaluation of the relevance and probative value of the private records should be based on a factual foundation, within the context of the trial as a whole and in light of *Charter* values. With regard to privilege, the Attorney General of Ontario endorses the appellants' position that the private records in this case are protected by a class privilege. Alternatively, the proper application of the four Wigmore criteria leads to

Au nom du ministère public, intervenant, le procureur général de l'Ontario affirme que la procédure à suivre en l'espèce consiste en l'émission d'un *subpoena duces tecum* jumelé à une requête formelle pour production des documents, appuyée des motifs et documents pertinents. Quant au fardeau de preuve, c'est à la défense qu'il appartiendrait d'établir, preuve à l'appui, que la divulgation est nécessaire à la présentation d'une défense pleine et entière, en plus de démontrer qu'il existe une probabilité substantielle que, en l'absence d'une ordonnance judiciaire de production en violation des droits de la plaignante en vertu des art. 7, 8 et 15 de la *Charte*, il y aura atteinte au droit de l'accusé de présenter une défense pleine et entière au procès. L'appréciation de la pertinence et de la force probante des dossiers privés devrait s'appuyer sur un fondement factuel, dans le contexte du procès dans son ensemble et au regard des valeurs de la *Charte*. Sur la question du privilège, le procureur général de l'Ontario endosse la position des appelants selon laquelle les dossiers privés en l'espèce sont protégés par un privilège générique. Subsidiairement, une application adéquate

the conclusion that this is an appropriate case for finding a case-by-case privilege.

The intervener Attorney General of Canada takes the position that the proper approach to the production of private records held by third parties should balance the rights of the accused to make full answer and defence with the rights of the complainant to security of the person, privacy and equality. The procedure would be initiated by *subpoena duces tecum* and the threshold test would be the likely materiality of the records, i.e., that they are capable of affecting the outcome of the trial. Likely materiality must be determined with regard to the purpose to which the evidence is put and must be based on a proper factual foundation. Hypothetical allegations based on erroneous assumptions informed by stereotypes and myths would be inappropriate and unfair to sexual assault complainants. The Attorney General of Canada further submits that the communications between sexual assault complainants and their counsellors enjoy a class privilege similar to solicitor-client communications. In the alternative, private records of sexual assault complainants are protected by a case-by-case privilege.

The intervener Attorney General of Manitoba submits that trial judges do not have jurisdiction to make pre-trial orders for the production of private records held by third parties. The subpoena procedure could only be used in order to have witnesses attend court to give evidence and not as a means of pre-trial discovery. As to the onus, the applicant seeking disclosure would have to establish that such records are likely to be necessary and useful for full answer and defence. In undertaking this exercise, the court would have to weigh the potential value of such records for ensuring the accused's full answer and defence against the prejudicial effect of disclosure. According to the Attorney General of Manitoba, no class privilege exists in favour of private records held by third

des quatre critères de Wigmore mène à la conclusion qu'il convient dans la présente affaire de reconnaître un privilège fondé sur les circonstances particulières du dossier.

Le procureur général du Canada, intervenant, fait valoir que, pour trancher la question de la production de dossiers privés en la possession de tiers, il convient de soupeser les droits de l'accusé à une défense pleine et entière avec les droits de la plaignante à la sécurité de sa personne, à la protection de sa vie privée et à l'égalité. La procédure serait mise en marche par un *subpoena duces tecum* et le critère préliminaire serait l'importance vraisemblable des dossiers, c.-à-d. leur capacité d'influencer l'issue du procès. Cette importance doit être appréciée eu égard à la fin à laquelle la preuve doit servir et doit reposer sur un fondement factuel suffisant. Des allégations hypothétiques fondées sur des présomptions erronées découlant de mythes et de stéréotypes seraient inappropriées et injustes pour les plaignantes victimes d'agression sexuelle. Le procureur général du Canada soutient, de plus, que les communications entre les plaignantes victimes d'agression sexuelle et leurs conseillers bénéficient d'un privilège générique analogue à celui qui protège les communications avocat-client. Subsidiairement, les dossiers privés des plaignantes victimes d'agression sexuelle sont protégés par un privilège fondé sur les circonstances de chaque cas.

Le procureur général du Manitoba, intervenant, soutient que les juges du procès n'ont pas juridiction pour prononcer des ordonnances préliminaires de production de dossiers privés en la possession de tiers. Le subpoena ne peut servir qu'à enjoindre aux témoins de se présenter en cour pour y témoigner et non comme moyen de communication préalable de la preuve au procès. Quant au fardeau de preuve, il incomberait à la partie demandant la divulgation d'établir que ces dossiers seront vraisemblablement nécessaires et utiles à une défense pleine et entière. En procédant à cet exercice, le tribunal devrait soupeser la valeur potentielle de ces dossiers pour assurer la défense pleine et entière de l'accusé par opposition à l'effet préjudiciable de la divulgation. Selon le procureur général

parties but a case-by-case privilege may exist if Wigmore's four criteria are met.

du Manitoba, aucun privilège générique n'existe en faveur de dossiers privés en la possession de tiers, mais il pourrait y avoir un privilège fondé sur les circonstances de chaque cas s'il est satisfait aux quatre critères de Wigmore.

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The intervener Canadian Foundation for Children, Youth and the Law ("CFCYL") favours a consideration of the complainant's *Charter* right to privacy in the determination of the relevance of private records held by third parties. In the CFCYL's opinion, the right to privacy is broader than the privilege under the fourfold Wigmore test. This privacy interest must be weighed against the right of the accused to make full answer and defence. The threshold should be the rational or likely connection between the private records requested and the defence being raised by the accused. If the defence satisfies this threshold, the onus falls on the complainant to demonstrate an expectation of privacy or a common law privilege, to be weighed and reconciled with the accused's right to make full answer and defence.

La Canadian Foundation for Children, Youth and the Law («CFCYL»), intervenante, est en faveur de tenir compte du droit de la plaignante à la protection de sa vie privée garanti par la *Charte* dans l'appréciation de la pertinence des dossiers privés en la possession de tiers. Selon la CFCYL, le droit à la vie privée est plus large que le privilège fondé sur le test en quatre volets de Wigmore. Cet intérêt à la vie privée doit être soupesé en regard du droit de l'accusé à une défense pleine et entière. Le seuil préliminaire devrait être l'existence d'un lien rationnel ou vraisemblable entre les dossiers privés demandés et le moyen de défense soulevé par l'accusé. Si le moyen de défense satisfait à ce seuil préliminaire, il incombe alors à la plaignante d'établir l'existence d'une attente en matière de protection de sa vie privée ou d'un privilège de common law, qu'il faut alors équilibrer et concilier avec le droit de l'accusé à une défense pleine et entière.

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The interveners Aboriginal Women's Council *et al.* (the "Coalition"), for their part, are of the view that, in the context of a sex-unequal legal and social culture, disclosure of sexual assault complainants' private records involves a balancing not only of the right to privacy and the right to make full answer and defence, but also of the right to equality without discrimination. The Coalition submits that disclosure of private records relating to sexual assault complainants would aggravate women's inequality by perpetuating the discriminatory stereotyping and discrediting of women. Further, disclosure of private records would undermine the integrity of the justice system by deterring reporting of sexual assaults and distorting the fact-finding process. As a consequence, the vindication of complainants' constitutional rights and the interests of justice can only be achieved by an absolute prohibition against the production of

La Coalition, c.-à-d. les intervenants Aboriginal Women's Council et autres, quant à elle, est d'avis que, dans le contexte d'une culture juridique et sociale marquée par l'inégalité des sexes, la divulgation de dossiers privés concernant des plaignantes victimes d'agression sexuelle supposent que l'on soupèse non seulement le droit à la protection de la vie privée et le droit à une défense pleine et entière, mais aussi le droit à l'égalité indépendamment de toute discrimination. La Coalition soutient que la divulgation de dossiers privés relatifs aux plaignantes victimes d'agression sexuelle aggraverait l'inégalité des femmes en perpétuant les stéréotypes discriminatoires et le discrédit dont elles font l'objet. De plus, la divulgation de dossiers privés minerait l'intégrité du système de justice en dissuadant la dénonciation d'agressions sexuelles et en créant des distorsions dans le processus de recherche des faits. Par conséquent, la défense des droits constitutionnels des plaignantes et l'intérêt de la justice ne peuvent être

complainants' private records in sexual offence proceedings.

IV. Jurisdiction

The first issue raised in this appeal concerns the jurisdiction of this Court to hear the present appeal, which the respondent puts into question. The narrow issue is whether and how sexual assault complainants and other third parties can appeal an interlocutory order for the production of private records. A larger question is whether and how third parties can challenge interlocutory court orders arising out of criminal proceedings. This Court addressed this larger question in *Dagenais*, *supra*, and recently applied the approach developed in that case in *R. v. Primeau*, [1995] 2 S.C.R. 60; and *R. v. Jobin*, [1995] 2 S.C.R. 78.

In *Dagenais*, this Court had to decide whether the Canadian Broadcasting Corporation, a third party to a criminal proceeding, could challenge the interlocutory broadcast ban of the mini-series "The Boys of St. Vincent". The majority, by which I am bound, set out two distinct appeal routes from orders made in criminal proceedings depending on whether the appeal is sought by a party to the proceedings or by third parties. In the former situation, the accused and the Crown must await the end of the trial to appeal such orders. In the case of third parties, they can appeal court orders affecting them before the end of the trial through two procedural avenues. In *Primeau*, Sopinka and Iacobucci JJ., writing for the majority, outlined the rationale for appeals of interlocutory orders by third parties (at para. 12):

The procedure for third parties differs for two reasons. First, a third party, being outside the actual proceedings, cannot apply to the trial judge for relief. Second, an order deciding an issue with respect to a third party is a final order. Such a characterization is impor-

assurés que par une prohibition absolue, dans les procédures pour infraction sexuelle, à l'encontre de la production des dossiers privés des plaignantes.

IV. La compétence

La première question soulevée ici a trait à la juridiction de notre Cour d'entendre le présent pourvoi, juridiction que l'intimé conteste. Plus particulièrement, il s'agit de savoir si et comment les plaignantes victimes d'agression sexuelle de même que d'autres tiers peuvent porter en appel une ordonnance interlocutoire de production de dossiers privés. De façon plus générale, la question est de savoir si et comment des tiers peuvent contester des ordonnances judiciaires interlocutoires dans le cadre de procédures criminelles. Notre Cour a traité de cette question générale dans l'arrêt *Dagenais*, précité, et a récemment appliqué l'analyse qui y a été élaborée dans les arrêts *R. c. Primeau*, [1995] 2 R.C.S. 60, et *R. c. Jobin*, [1995] 2 R.C.S. 78.

Dans *Dagenais*, notre Cour devait décider si la Société Radio-Canada, un tiers à l'instance criminelle, pouvait contester l'interdiction de diffusion de la mini-série «Les garçons de Saint-Vincent». L'arrêt de la majorité, par lequel je suis liée, a reconnu deux procédures distinctes pour en appeler d'ordonnances rendues dans le cadre d'une instance criminelle, selon que l'appel est formé par une partie à l'instance ou par un tiers. Dans le premier cas, l'accusé et le ministère public doivent attendre la fin du procès pour en appeler de cette ordonnance. Dans le cas de tiers, ils peuvent, avant la fin du procès, interjeter appel des décisions judiciaires qui les touchent par le biais de deux voies procédurales. Dans l'arrêt *Primeau*, les juges Sopinka et Iacobucci ont expliqué ainsi, au nom de la majorité, les raisons pour lesquelles il est permis aux tiers d'interjeter appel d'ordonnances interlocutoires (au par. 12):

La procédure applicable aux tierces parties diffère pour deux raisons. Premièrement, du fait qu'elle n'est pas partie aux procédures, une tierce partie ne peut demander réparation au juge du procès. Deuxièmement, une ordonnance qui tranche une question relativement à

tant in order to comply with the general rule barring interlocutory appeals in criminal matters.

une tierce partie est définitive. Cette qualification est importante si l'on veut se conformer à la règle générale qui interdit les appels interlocutoires en matière criminelle.

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Third parties must follow a different procedural avenue depending on the level of court that issued the order being appealed. A provincial court order is to be challenged through an enlarged remedy of *certiorari*, which falls within the ambit of superior courts. This decision can then be appealed through the regular channels of our judicial system. On the other hand, where a court order is issued by a superior court judge in the first place, as in the present case, third parties can challenge it by seeking leave to appeal directly to this Court, pursuant to s. 40(1) of the *Supreme Court Act*. These procedures were outlined in *Dagenais* with regard to publication bans but, as was pointed out in *Primeau* and *Jobin*, they generally apply to other court orders related to criminal proceedings. As a result, the proper procedure to appeal the interlocutory order for production of records issued by Loukidelis J., a superior court judge, was through leave to appeal to this Court pursuant to s. 40(1) of the *Supreme Court Act*.

Les tiers doivent suivre une procédure différente selon le tribunal qui a rendu l'ordonnance frappée d'appel. Pour contester une ordonnance d'une cour provinciale, il faut procéder par voie de *certiorari* élargi, lequel relève de la juridiction des cours supérieures. Il y a appel de cette décision selon les règles ordinaires de notre système judiciaire. D'autre part, si l'ordonnance est d'abord rendue par un juge d'une cour supérieure, comme c'est le cas ici, les tiers peuvent la contester par requête en autorisation de pourvoi directement à notre Cour, conformément au par. 40(1) de la *Loi sur la Cour suprême*. Ces procédures ont été exposées dans l'arrêt *Dagenais* concernant des interdictions de publication mais, comme on le souligne dans les arrêts *Primeau* et *Jobin*, elles s'appliquent de manière générale aux autres ordonnances judiciaires rendues en matière criminelle. En conséquence, pour en appeler de l'ordonnance interlocutoire de production de dossiers rendue par le juge Loukidelis, de la cour supérieure, il fallait procéder par voie d'autorisation d'appel devant notre Cour, conformément au par. 40(1) de la *Loi sur la Cour suprême*.

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The respondent attempts to argue that because the term "final judgment" is defined in s. 2(1) of the *Supreme Court Act* as being "any judgment, rule, order or decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding", the appellants, who are third parties in the criminal proceeding, do not have standing to appeal before this Court. With respect, this argument does not take into account the full scope of s. 40(1) of the *Supreme Court Act* as interpreted by this Court in *Dagenais*. The section provides for an appeal not only of a "final" judgment but also of "other judgment[s]". This, in the opinion of the Court, encompasses interlocutory appeals of court orders in criminal matters sought by third parties (see *Dagenais*, at p. 861). Furthermore, the majority of this Court in *Primeau* and *Jobin* expressed the view that an interlocutory order affecting third par-

L'intimé tente de faire valoir que, vu les termes du par. 2(1) de la *Loi sur la Cour suprême* où l'expression «jugement définitif» désigne un «[j]ugement ou toute autre décision qui statue au fond, en tout ou en partie, sur un droit d'une ou plusieurs des parties à une instance», les appelants, qui sont des tiers à la procédure criminelle, n'ont pas qualité pour se pourvoir devant notre Cour. Avec égards, c'est se méprendre sur le sens global du par. 40(1) de la *Loi sur la Cour suprême*, tel que notre Cour l'a interprété dans l'arrêt *Dagenais*. Cette disposition porte qu'il peut être interjeté appel de «tout jugement, définitif ou autre». Cette expression englobe, de l'avis de la Cour, les appels interlocutoires d'ordonnances judiciaires rendues en matière criminelle formés par des tierces parties (voir *Dagenais*, à la p. 861). De plus, dans les arrêts *Primeau* et *Jobin*, la Cour, à la majorité, a exprimé l'avis qu'une ordonnance interlocutoire

ties is a final order and, accordingly, s. 40(1) is available to appeal an order of a superior court judge, such as the one at issue. Finally, it is worth noting that s. 2(1) of the *Supreme Court Act* uses the terms “any of the parties in controversy” rather than any of the parties in the proceedings. There is no doubt that third parties’ substantive rights might be affected by the outcome of the trial judge’s order. They are “parties in controversy” before the Court.

The respondent further argues that the *Dagenais* line of cases is distinguishable on the ground that, in the case at bar, it was the Crown, a party to the proceedings, not third parties, who brought the original application to quash the subpoenas before the trial judge. In the respondent’s view, this is significant because in *Dagenais*, *Primeau* and *Jobin* the majority of this Court did not allow for interlocutory appeals in criminal matters by parties to the proceedings. While the dismissal by the trial judge of a motion to quash the subpoenas may not open the door to an interlocutory appeal of that order by parties to the proceedings during the trial, the records here subpoenaed were not in the possession of the Crown but in that of third parties. The parties who seek to appeal the order are third parties, not the Crown. According to *Dagenais*, no appeal lies to the Court of Appeal, which rightly declined jurisdiction, but an appeal by third parties lies to this Court, with leave from the Court. Since this is the procedure followed by the third party appellants in this case, I must, therefore, conclude that this Court has jurisdiction to hear the appeal.

The one question that remains is whether both a complainant, a third party to the proceedings (whether or not an appellant, but here one of the appellants), and the Crown, a party to the proceedings, have standing in third party appeals. There is no doubt in my mind that they do. The *audi alteram partem* principle, which is a rule of natural

touchant des tiers est une ordonnance définitive et qu’en conséquence, le par. 40(1) permet d’interjeter appel d’une ordonnance d’un juge d’une cour supérieure, comme celle rendue en l’espèce. Enfin, il importe de souligner que, selon le texte anglais, le par. 2(1) de la *Loi sur la Cour suprême* renvoie à «*any of the parties in controversy*» («une ou plusieurs des parties à une instance»), plutôt qu’à *any of the parties in the proceedings*. Or, il ne fait aucun doute que l’ordonnance du juge du procès peut affecter les droits matériels de tiers. Ceux-ci sont donc des «*parties in controversy*» devant la Cour.

L’intimé soutient, en outre, qu’il faut distinguer l’arrêt *Dagenais* et sa lignée d’arrêts au motif que, en l’espèce, c’est le ministère public, partie à la procédure, et non des tiers, qui a présenté au juge du procès la requête initiale en cassation des subpoenae. À son avis, cet élément est important puisque dans les arrêts *Dagenais*, *Primeau* et *Jobin*, notre Cour à la majorité n’a pas autorisé les parties à l’instance à interjeter appel d’une décision interlocutoire dans le cadre d’une instance criminelle. Alors que le rejet par le juge du procès d’une requête en cassation des subpoenae n’est pas susceptible de donner lieu à un appel interlocutoire de cette ordonnance par les parties à l’instance, les dossiers requis ici par subpoena n’étaient pas en la possession du ministère public mais bien en celle de tiers. Ce sont les tiers qui cherchent à en appeler de l’ordonnance, non pas le ministère public. Suivant l’arrêt *Dagenais*, il ne peut y avoir appel devant la Cour d’appel qui, à bon droit, a décliné juridiction, mais les tiers peuvent en appeler devant notre Cour, sous réserve de l’autorisation de la Cour. Étant donné que c’est la procédure qu’ont suivie les tiers appelants dans le cas qui nous occupe, force m’est donc de conclure que notre Cour a juridiction pour entendre le pourvoi.

Une seule question demeure, soit celle de savoir si un plaignant, tiers à l’instance (appellant ou non, mais en l’occurrence l’un des appelants), et le ministère public, partie à l’instance, ont tous deux qualité pour agir dans le cadre d’appels formés par des tiers. À mon avis, cela ne fait aucun doute. Le principe *audi alteram partem*, règle de justice

justice and one of the tenets of our legal system, requires that courts provide an opportunity to be heard to those who will be affected by the decisions. The rules of natural justice or of procedural fairness are most often discussed in the context of judicial review of the decisions of administrative bodies, but they were originally developed in the criminal law context. In *Blackstone's Criminal Practice* (Murphy rev. 1993), the authors remark at p. 1529:

Traditionally, the rules of natural justice have been defined with a little more precision, and are said to involve two main principles — no man may be a judge in his own cause, and the tribunal must hear both sides of the case. [Emphasis added.]

See *Forsythe v. The Queen*, [1980] 2 S.C.R. 268; and *Attorney General of Quebec v. Cohen*, [1979] 2 S.C.R. 305.

naturelle et précepte fondamental de notre système juridique, exige que les tribunaux accordent aux personnes visées par leurs décisions l'occasion d'être entendues. Les règles de justice naturelle ou d'équité procédurale sont le plus souvent abordées dans le contexte du contrôle judiciaire des décisions d'organismes administratifs, mais c'est en droit criminel qu'on en retrace l'origine. Dans *Blackstone's Criminal Practice* (Murphy rev. 1993), les auteurs font remarquer ceci, à la p. 1529:

[TRADUCTION] Traditionnellement, les règles de justice naturelle furent définies de façon un peu plus précise par deux principes majeurs — nul ne peut être à la fois juge et partie, et le tribunal doit entendre les deux parties au litige. [Je souligne.]

Voir *Forsythe c. La Reine*, [1980] 2 R.C.S. 268; et *Procureur général du Québec c. Cohen*, [1979] 2 R.C.S. 305.

Here, both the complainant and the Crown possess a direct and necessary interest in making representations. Both would be directly affected by a decision regarding the production of the complainant's private records. The decision is susceptible of affecting the course of the criminal trial. Both, therefore, must be afforded an opportunity to be heard.

The respondent's argument on this first issue must accordingly be dismissed.

I now turn to the second issue of the extent of production of private records in the possession of third parties. In that regard, the claim by the appellants and the interveners that those records are privileged must first be addressed.

V. Privilege

At the outset, it is useful to determine what is to be understood by private records. The context in which the question of production of private records not in the possession of the Crown generally arises is not limited to medical and therapeutic records of complainants in sexual assault cases. It extends generally to any record, in the hands of a third

En l'espèce, tant la plaignante que le ministère public possèdent un intérêt direct et suffisant pour faire des représentations. Tous deux seront directement affectés par la décision concernant la production des dossiers privés de la plaignante. La décision est susceptible d'influer sur le cours du procès criminel. Tous deux doivent donc avoir l'occasion d'être entendus.

L'argument de l'intimé quant à cette première question doit, en conséquence, être rejeté.

J'en viens maintenant à la seconde question, celle de l'étendue de la production des dossiers privés en la possession de tiers. À cet égard, il faut d'abord discuter de la prétention des appelants et des intervenants selon laquelle ces dossiers sont privilégiés.

V. Le privilège

À titre préliminaire, il est utile de définir ce que l'on entend par dossiers privés. Le contexte dans lequel se pose généralement la question de la production de dossiers privés qui ne sont pas en la possession du ministère public ne se limite pas aux dossiers médicaux et thérapeutiques de plaignantes victimes d'agression sexuelle. Elle s'étend en

party, in which a reasonable expectation of privacy lies. These records may include medical or therapeutic records, school records, private diaries, social worker activity logs and so on. For the sake of convenience, I refer to such documents as "private records held by third parties".

The appellants and the interveners who favour recognizing a class privilege at common law for communications between counsellors and sexual assault complainants invoke several arguments in support of their view. Before addressing each of them, however, a brief reference to the principles and rationales for privilege as well as a review of the law of privilege in Canada and in other common law countries are in order.

A. Principles and Rationales

The doctrine of privilege acts as an exception to the truth-finding process of our adversarial trial procedure. Although all relevant information is presumptively admissible at trial, some probative and trustworthy evidence will be excluded to serve other overriding social interests. The same principles apply to exempt, completely or partially, particular communications arising out of certain defined relationships from disclosure in judicial proceedings. Since the existence of privilege impedes the realization of the central objective of our legal system in order to advance other goals, the question of privilege is essentially one of public policy.

Traditionally, the justification for the law of privilege has been based on utilitarian (or "instrumental") considerations. Essentially, this rationale asserts that communications made within a given relationship should be privileged only if the benefit derived from protecting the relationship outweighs

général à tout dossier en la possession d'un tiers dont le caractère confidentiel est raisonnablement susceptible de protection. Il peut s'agir de dossiers médicaux ou thérapeutiques, de dossiers scolaires, de journaux intimes, de notations de travailleurs sociaux, etc. Par souci de commodité, je réfère à ce type de documents sous la rubrique «dossiers privés en la possession de tiers». De même, l'expression «plaignantes» emporte le masculin.

Les appelants et les intervenants qui préconisent la reconnaissance d'un privilège générique de common law protégeant les communications entre conseillers et plaignantes victimes d'agression sexuelle invoquent plusieurs arguments à l'appui de leur position. Avant de les examiner un à un, il convient toutefois d'exposer brièvement les principes et les fondements des privilèges et de faire une revue de la loi en matière de privilège telle qu'elle existe au Canada et dans d'autres pays de common law.

A. Principes et fondements

Le privilège constitue une exception au processus de recherche de la vérité qui caractérise notre système de procédure contradictoire. Ainsi, bien que toute preuve pertinente soit présumée recevable au procès, certains éléments de preuve probants et fiables seront exclus pour répondre à d'autres préoccupations sociales prépondérantes. Les mêmes principes font obstacle à la divulgation à la défense avant le procès de certains renseignements pertinents. En fait, l'existence d'un privilège a pour but d'empêcher la divulgation, en tout ou en partie, de communications particulières découlant de certains rapports définis, lors de procédures judiciaires. Étant donné que l'existence de privilèges entrave la réalisation de l'objectif central de notre système judiciaire afin de promouvoir d'autres buts, il s'agit essentiellement d'une question de politique judiciaire.

Traditionnellement, la loi en matière de privilège a cherché sa justification dans des considérations d'ordre utilitaire (ou «instrumental»). Essentially, selon cette philosophie, les communications effectuées dans le cadre de rapports donnés ne doivent être privilégiées que si

the detrimental effects of privilege on the search for the truth. The utilitarian theory of privilege focuses on the societal importance of certain relationships. Maxine H. Neuhauser, in "The Privilege of Confidentiality and Rape Crisis Counselors" (1985), 8 *Women's Rts. L. Rep.* 185, remarks at p. 188:

It [the utilitarian rationale] is based on the notion that if people fear that their confidences may be revealed in court they will choose not to form particular, valued relationships or will fail to communicate information necessary to the fostering of these relationships, and that, consequently, society will suffer.

See also, Robert Weisberg, "Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges" (1978), 30 *Stan. L. Rev.* 935, at pp. 940-42.

More recently, an additional rationale based on privacy has emerged to justify the recognition of privileged communications (see Charles T. McCormick, *McCormick on Evidence* (4th ed. 1992), vol. 1, at §§ 72 and 77; also *R. v. Gruenke*, [1991] 3 S.C.R. 263, at pp. 302-3, *per* L'Heureux-Dubé J., concurring). This non-utilitarian view is founded on more abstract premises, for example, that privilege is vital to the protection of fundamental individual values. In "Developments in the Law — Privileged Communications" (1985), 98 *Harv. L. Rev.* 1450, the authors observe at pp. 1480-81:

Rather than focusing on the systemic impact that compelled disclosures might have on behavior, the privacy rationale focuses on the protection that privileges afford to individual privacy. The confidentiality of communications is regarded as a privacy interest that itself justifies whatever impairment of truth-seeking that privileges may cause.

In the context of counsellor and sexual assault complainant communications, Anna Y. Joo, in "Broadening the Scope of Counselor-Patient Privi-

l'avantage qui découle de la protection de ces relations l'emporte sur les effets préjudiciables du privilège sur la recherche de la vérité. La théorie utilitaire du privilège met l'accent sur l'importance de certaines relations pour la société. Maxine H. Neuhauser, fait la remarque suivante dans «The Privilege of Confidentiality and Rape Crisis Counselors» (1985), 8 *Women's Rts. L. Rep.* 185, à la p. 188:

[TRADUCTION] Il [le raisonnement utilitaire] est fondé sur la notion que, si les gens craignent que leurs confidences soient révélées en cour, ils préféreront ne pas créer de relations spéciales, précieuses ou s'abstiendront de transmettre des renseignements nécessaires au soutien de ces relations et que, en conséquence, la société en souffrira.

Voir également Robert Weisberg, «Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges» (1978), 30 *Stan. L. Rev.* 935, aux pp. 940 à 942.

Plus récemment, la reconnaissance du principe des communications privilégiées a trouvé une justification additionnelle, fondée sur la protection de la vie privée (voir Charles T. McCormick, *McCormick on Evidence* (4^e éd. 1992), vol. 1, aux §§ 72 et 77; également *R. c. Gruenke*, [1991] 3 R.C.S. 263, aux pp. 302 et 303, le juge L'Heureux-Dubé, souscrivant aux motifs). Cette vision non utilitaire se fonde sur des prémisses plus abstraites, tel le caractère vital du privilège pour la protection de valeurs individuelles fondamentales. Dans «Developments in the Law — Privileged Communications» (1985), 98 *Harv. L. Rev.* 1450, les auteurs notent ceci aux pp. 1480 et 1481:

[TRADUCTION] Plutôt que de s'attacher à l'effet systémique que la divulgation forcée peut avoir sur le comportement, le raisonnement fondé sur la vie privée met l'accent sur la protection que le privilège offre pour la vie privée individuelle. La confidentialité des communications est considérée comme répondant à une préoccupation en matière de vie privée qui, en soi, justifie toute entrave à la recherche de la vérité pouvant résulter du privilège.

Dans le contexte des communications entre la plaignante victime d'agression sexuelle et son conseiller, Anna Y. Loo, fait l'observation suivante dans

lege to Protect the Privacy of the Sexual Assault Survivor" (1995), 32 *Harv. J. on Legis.* 255, makes these observations, at p. 260:

Whereas the utilitarian rationale views the goal of the counselor-patient privilege as promoting beneficial future relations, the privacy justification perceives the main purpose of the privilege as shielding the patient from the harm that disclosure may cause. According to the privacy justification, some human relationships are fundamental to human dignity and should be free from state interference. [Emphasis added.]

See also, Stephen A. Saltzburg, "Privileges and Professionals: Lawyers and Psychiatrists" (1980), 66 *Va. L. Rev.* 597, at pp. 621-22.

It is useful at this stage to review briefly how the law of privilege has developed so far in Canada, as well as in other common law countries, particularly as regards the issue now before the Court.

B. A Comparative View

In Canada, very few communications are recognized as privileged either at common law or under statutory law. At common law, the solicitor-client privilege as well as the informer privilege are fully recognized. These privileges are not absolute however; they must yield, in some circumstances, to the accused's right to make full answer and defence. For example, in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 607, McLachlin J., speaking for the majority of the Court, held that informer privilege and solicitor-client privilege may yield in the context of a criminal trial if the accused's innocence is at stake. Similarly, in *Stinchcombe*, *supra*, at p. 340, Sopinka J. noted that existing privileges may, in certain circumstances, constitute unreasonable limits on the constitutional right to make full answer and defence. See also Loretta N. Colton,

«Broadening the Scope of Counselor-Patient Privilege to Protect the Privacy of the Sexual Assault Survivor» (1995), 32 *Harv. J. on Legis.* 255, à la p. 260:

[TRADUCTION] Alors que dans la vision utilitaire, on considère que le privilège des communications conseiller-patient vise à favoriser des relations futures bénéfiques, le principal objet du privilège est, selon la justification fondée sur la vie privée, de protéger le patient du préjudice que pourrait lui causer la divulgation. Suivant cette thèse, certaines relations humaines sont essentielles à la dignité de la personne et devraient être à l'abri de l'ingérence de l'État. [Je souligne.]

Voir également Stephen A. Saltzburg, «Privileges and Professionals: Lawyers and Psychiatrists» (1980), 66 *Va. L. Rev.* 597, aux pp. 621 et 622.

Il convient, à ce stade, de voir brièvement comment la loi en matière de privilège s'est développée jusqu'à maintenant au Canada ainsi que dans d'autres pays de common law, particulièrement en ce qui a trait à la question dont la Cour est présentement saisie.

B. Une approche comparative

Au Canada, très peu de communications sont reconnues comme privilégiées, que ce soit en common law ou dans la législation. En common law, le secret professionnel de l'avocat de même que le privilège relatif aux indicateurs de police sont pleinement reconnus. Ces privilèges ne sont toutefois pas absolus; ils doivent céder le pas, dans certaines circonstances, au droit de l'accusé de présenter une défense pleine et entière. Ainsi, dans l'arrêt *R. c. Seaboyer*, [1991] 2 R.C.S. 577, à la p. 607, la Cour, sous la plume du juge McLachlin, a conclu à la majorité que le privilège relatif aux indicateurs de police et le secret professionnel de l'avocat pouvaient devoir s'effacer dans le contexte d'un procès criminel lorsque se joue l'innocence de l'accusé. De même, dans l'arrêt *Stinchcombe*, précité, à la p. 340, le juge Sopinka a souligné que l'existence d'un privilège peut, dans certains cas, constituer une limite déraisonnable au droit constitutionnel de présenter une défense pleine et entière. Voir également Loretta N. Colton, «*R. v. Stinchcombe* :

"*R. v. Stinchcombe: Defining Disclosure*" (1995), 40 *McGill L.J.* 525, at p. 556.

Defining Disclosure» (1995), 40 *R.D. McGill* 525, à la p. 556.

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By statute, as regards criminal law, communications between spouses are the only ones regarded as privileged (s. 4(3) of the *Canada Evidence Act*, R.S.C., 1985, c. C-5; see *R. v. Salituro*, [1991] 3 S.C.R. 654, regarding separated spouses without any reasonable possibility of reconciliation). Similarly, provincial legislation generally provides for spousal communications privilege in civil proceedings. Two Canadian provinces, Quebec and Newfoundland, have enacted statutes recognizing religious communications privilege: see Quebec's *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, s. 9; and Newfoundland's *Evidence Act*, R.S.N. 1970, c. 115, s. 6. With regard to doctor-patient relationships, Quebec is the only province which has recognized a statutory privilege in civil matters: see s. 42 of the *Medical Act*, R.S.Q. 1977, c. M-9. Neither at common law nor by statute have communications between counsellors and sexual assault complainants been recognized as privileged in Canada.

Si on regarde du côté de la législation, les communications entre conjoints sont, en matière criminelle, les seules qui soient considérées comme privilégiées (par. 4(3) de la *Loi sur la preuve au Canada*, L.R.C. (1985), ch. C-5; voir *R. c. Salituro*, [1991] 3 R.C.S. 654, concernant des conjoints séparés sans possibilité raisonnable de réconciliation). De même, les communications entre conjoints jouissent généralement d'un privilège en matières civiles en vertu des lois provinciales. Deux provinces canadiennes, Québec et Terre-Neuve, ont adopté des lois reconnaissant le secret des communications religieuses: voir la *Charte des droits et libertés de la personne* du Québec, L.R.Q. 1977, ch. C-12, art. 9; et l'*Evidence Act* de Terre-Neuve, R.S.N. 1970, ch. 115, art. 6. En ce qui concerne les relations médecin-patient, le Québec est la seule province à avoir reconnu un privilège législatif en matières civiles: voir l'art. 42 de la *Loi médicale*, L.R.Q. 1977, ch. M-9. Ni la common law ni la législation, au Canada, ne reconnaissent de statut privilégié aux communications entre conseillers et plaignantes victimes d'agression sexuelle.

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The question of privilege has recently been visited by our Court in *Gruenke*, *supra*. In that case, the Court had to decide whether communications from an accused to her pastor and to a lay counsellor were privileged in criminal proceedings at common law and under the freedom of religion guarantee in s. 2 of the *Charter*. The majority discussed the two categories of privilege at common law: first, a "class" privilege, and second, a "case-by-case" privilege. A class privilege entails a *prima facie* presumption that such communications are inadmissible or not subject to disclosure in criminal or civil proceedings and the onus lies on the party seeking disclosure of the information to show that an overriding interest commands disclosure. In order for the privilege to attach, compelling policy reasons must exist, similar to those underlying the privilege for solicitor-client

La question du privilège a été examinée récemment par notre Cour dans l'arrêt *Gruenke*, précité. Dans cette affaire, la Cour devait décider si les communications d'une accusée avec son pasteur et avec une conseillère laïque étaient privilégiées, dans une procédure criminelle, en vertu de la common law et de la liberté de religion garantie à l'art. 2 de la *Charte*. La Cour, à la majorité, a analysé les deux catégories de privilège reconnues en common law: les privilèges «génériques» et les privilèges «fondés sur les circonstances de chaque cas». Un privilège générique comporte une présomption *prima facie* que ces communications sont inadmissibles ou non sujettes à divulgation dans le cadre de procédures criminelles ou civiles et la partie demandant la divulgation assume le fardeau d'établir qu'un intérêt prépondérant l'exige. Pour qu'il y ait privilège, il faut qu'existent des raisons de principe contraignantes, semblables à celles qui sous-tendent le privilège en matière de

communications, and the relationship must be inextricably linked with the justice system.

In a case-by-case privilege, the communications are not privileged unless the party opposing disclosure can show they should be privileged according to the fourfold utilitarian test elaborated by Wigmore (*Evidence in Trials at Common Law* (McNaughton rev. 1961), vol. 8, at § 2285). These criteria are:

(1) The communications must originate in a *confidence* that they will not be disclosed.

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.

(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation. [Emphasis in original.]

See *Gruenke*, at p. 286, *per* Lamer C.J. for the majority; also *Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario)*, [1981] 2 S.C.R. 494, at p. 512, *per* Laskin C.J., dissenting; and *Slavutych v. Baker*, [1976] 1 S.C.R. 254, at p. 260.

The issue of whether private records held by third parties are privileged at common law has never been decided by this Court. The Nova Scotia Court of Appeal did, however, consider it in *R. v. Ryan* (1991), 69 C.C.C. (3d) 226. The question was whether social agency records of two sexual assault complainants were privileged in a criminal trial for sexual assault and narcotic trafficking. The trial judge had recognized that the records were privileged and had ordered a stay of proceedings for denial of the accused's right to make full answer and defence. The Court of Appeal held that the competing interests at stake weighed in favour of disclosure and overruled the stay. Similarly, in *R. v. R.S.* (1985), 19 C.C.C. (3d) 115, the Ontario

communications avocat-client, et les relations doivent être inextricablement liées au système de justice.

Dans le cas du privilège fondé sur les circonstances particulières de chaque cas, les communications ne sont privilégiées que dans la mesure où la partie s'opposant à leur divulgation établit qu'elles devraient l'être suivant le test utilitaire à quatre volets élaboré par Wigmore (*Evidence in Trials at Common Law* (McNaughton rev. 1961), vol. 8, au § 2285):

[TRADUCTION] (1) Les communications doivent avoir été transmises *confidentiellement* avec l'assurance qu'elles ne seraient pas divulguées.

(2) Le *caractère confidentiel doit être* un élément *essentiel* au maintien complet et satisfaisant des rapports entre les parties.

(3) Les *rapports* doivent être de la nature de ceux qui, selon l'opinion de la collectivité, doivent être *entretenus* assidûment.

(4) Le *préjudice* permanent que subiraient les rapports par la divulgation des communications doit être *plus considérable que l'avantage* à retirer d'une juste décision. [En italique dans l'original.]

Voir *Gruenke*, à la p. 286, le juge en chef Lamer au nom de la majorité; également *Solliciteur général du Canada c. Commission royale d'enquête (Dossiers de santé en Ontario)*, [1981] 2 R.C.S. 494, à la p. 512, le juge en chef Laskin, dissident; et *Slavutych c. Baker*, [1976] 1 R.C.S. 254, à la p. 260.

La question de savoir si des dossiers privés en la possession de tiers sont privilégiés en common law n'a jamais été tranchée par notre Cour. La Cour d'appel de la Nouvelle-Écosse a toutefois examiné cette question dans l'arrêt *R. c. Ryan* (1991), 69 C.C.C. (3d) 226. Il s'agissait de décider si les dossiers de deux plaignantes victimes d'agression sexuelle, que détenait un organisme de services sociaux, étaient privilégiés dans le cadre d'un procès criminel pour agression sexuelle et trafic de stupéfiants. Le juge du procès avait reconnu que les dossiers bénéficiaient d'un privilège et avait ordonné l'arrêt des procédures pour atteinte au droit de l'accusé à une défense pleine et entière. La Cour d'appel a conclu que les intérêts opposés en

Court of Appeal had to decide whether records relating to family group therapy sessions were privileged in the criminal trial of a man accused of having sexually assaulted his two step-daughters. The Court of Appeal opined that, in the context of child abuse, the search for the truth overcomes the interests in family therapy and, therefore, the records could be produced at trial. See also the decisions of the British Columbia Supreme Court in *R. v. Kliman*, [1994] B.C.W.L.D. No. 587, and of the Ontario Court, General Division, in *R. v. Coon* (1991), 74 C.C.C. (3d) 146.

présence penchaient en faveur de la divulgation et a annulé le jugement. De même, dans l'arrêt *R. c. R.S.* (1985), 19 C.C.C. (3d) 115, la Cour d'appel de l'Ontario devait décider si les dossiers relatifs à des séances de thérapie familiale de groupe étaient privilégiés dans le procès criminel d'un homme accusé d'avoir agressé sexuellement ses deux belles-filles. La Cour d'appel a estimé que, dans le contexte d'abus envers les enfants, la recherche de la vérité avait préséance sur les intérêts de la thérapie familiale et donc que les dossiers pouvaient être produits au procès. Voir également la décision de la Cour suprême de la Colombie-Britannique dans *R. c. Kliman*, [1994] B.C.W.L.D. No. 587, et celle de la Cour de l'Ontario, Division générale dans *R. c. Coon*, (1991), 74 C.C.C. (3d) 146.

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42 In the context of civil litigation, some courts and masters have examined claims of privilege. In *M.(A.) v. Ryan*, [1993] 7 W.W.R. 480, the British Columbia Supreme Court considered whether psychiatric records had to be produced in a civil suit for sexual abuse. The court held that, while confidentiality was essential to the psychiatrist-patient relationship, the interest in the proper administration of justice prevailed over the need to maintain confidentiality. In *M.(E.) v. Martinson* (1993), 81 B.C.L.R. (2d) 184 (Master), the defendant sought production of the plaintiff's counselling records of treatment for sexual abuse, alcoholism and drug addiction, in an attempt to show that the alleged pain and suffering did not result from the automobile accident which was the object of the suit. It was held that, in the circumstances, the interest in maintaining the confidentiality of the records outweighed the benefit there may have been to the administration of justice by their disclosure.

Dans le cadre de procès civils, des demandes de privilège ont été examinées par quelques tribunaux et protonotaires. Dans la décision *M.(A.) c. Ryan*, [1993] 7 W.W.R. 480, la Cour suprême de la Colombie-Britannique s'est penchée sur la question de savoir si des dossiers psychiatriques devaient être produits dans une poursuite civile pour abus sexuels. La cour a estimé que, bien que la confidentialité soit essentielle à la relation psychiatre-patient, l'intérêt d'assurer la bonne administration de la justice l'emportait sur la nécessité de préserver la confidentialité. Dans l'affaire *M.(E.) c. Martinson* (1993), 81 B.C.L.R. (2d) 184 (Protonotaire), le défendeur a demandé la production des dossiers du demandeur relatifs aux traitements pour abus sexuels, alcoolisme et toxicomanie, afin de tenter d'établir que les douleurs et souffrances alléguées ne résultaient pas de l'accident d'automobile faisant l'objet de la poursuite. Il a été décidé que, dans les circonstances, la préservation de la confidentialité des dossiers avait préséance sur l'avantage que pouvait présenter leur divulgation pour l'administration de la justice.

43 The Law Reform Commission of Canada has recommended the recognition of a general privilege for professionals in criminal proceedings in its *Report on Evidence* (1975), although not without a caveat. Section 41 of the proposed Evidence Code provides:

Dans son *Rapport sur la preuve* (1975), la Commission de réforme du droit du Canada a recommandé que soit reconnu aux professionnels un privilège général dans les procédures criminelles, non toutefois sans un caveat. L'article 41 du Code de la preuve proposé prévoit:

41. A person who has consulted a person exercising a profession for the purpose of obtaining professional services, or who has been rendered such services by a professional person, has a privilege against disclosure of any confidential communication reasonably made in the course of the relationship if, in the circumstances, the public interest in the privacy of the relationship outweighs the public interest in the administration of justice. [Emphasis added.]

The American position with regard to privilege at common law is somewhat similar to the Canadian approach. The rationales underlying the recognition of privileged communications are also analogous (see *McCormick on Evidence, supra*, at § 72). However, in the United States, a number of communications, including those between counselors and sexual assault complainants, are considered privileged as a result of the enactment of statutory privilege, both by the Federal Government and by the states, for communications that are not privileged at common law. See Scott N. Stone and Robert K. Taylor, in *Testimonial Privileges* (2nd ed. 1993), for a more detailed compilation of the statutes granting such privilege in the United States as well as the degree and the extent of confidentiality it affords to such communications.

Without going into a detailed analysis, it is fair to say that many states in the United States have enacted some statute limiting disclosure and testimony by doctors, psychiatrists, psychologists, social workers, and other psychotherapists. An increasing number of states are according privileged status to communications between counselors and sexual assault complainants; they include Alaska, California, Connecticut, Florida, Illinois, Kentucky, Maine, Massachusetts, Minnesota, Pennsylvania, Utah, and Wyoming. Most of these privileges provide an absolute protection of private records relating to sexual assault complainants in criminal trials.

There is, however, a constitutional element to the law of privilege in the United States. The right to a fair trial (or "due process"), as guaranteed by

41. Celui qui s'adresse à un professionnel dans le but d'obtenir ses services ou qui les obtient, peut s'opposer à la divulgation d'une communication confidentielle issue de cette relation si, eu égard aux circonstances, la sauvegarde du droit à l'intimité l'emporte sur l'intérêt de l'administration de la justice. [Je souligne.]

La position américaine en matière de privilège de common law est assez semblable à l'approche canadienne. Les principes sur lesquels se fonde la reconnaissance de communications privilégiées sont également analogues (voir *McCormick on Evidence, op. cit.*, au § 72). Aux États-Unis toutefois, un certain nombre de communications, dont celles entre conseillers et plaignantes victimes d'agression sexuelle, sont considérées comme privilégiées en vertu de législations, tant par le gouvernement fédéral que par les États, concernant des communications dont le privilège n'est pas reconnu en common law. Voir Scott N. Stone et Robert K. Taylor, dans *Testimonial Privileges* (2^e éd. 1993), pour une compilation détaillée des lois accordant ce genre de privilège aux États-Unis et un examen du degré et de l'étendue de la confidentialité ainsi reconnue aux communications.

Sans entrer dans les détails, il est juste de dire que de nombreux États américains ont adopté des lois limitant l'obligation pour les médecins, psychiatres, psychologues, travailleurs sociaux et autres psychothérapeutes de venir témoigner et de divulguer des renseignements. De plus en plus d'États accordent un statut privilégié aux communications entre conseillers et plaignantes victimes d'agression sexuelle dont l'Alaska, la Californie, le Connecticut, la Floride, l'Illinois, le Kentucky, le Maine, le Massachusetts, le Minnesota, la Pennsylvanie, l'Utah et le Wyoming. La plupart de ces privilèges accordent, dans le cadre de procès criminels, une protection absolue aux dossiers privés relatifs aux plaignantes victimes d'agression sexuelle.

Aux États-Unis, toutefois, il y a un aspect constitutionnel en matière de privilège. Le droit à un procès équitable («*due process*» ou application

the Fourteenth Amendment, as well as the rights guaranteed by the confrontation clause and the compulsory process clause of the Sixth Amendment, impose limits on statutory privilege (see *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *United States v. Nixon*, 418 U.S. 683 (1974); *Davis v. Alaska*, 415 U.S. 308 (1974); and *Washington v. Texas*, 388 U.S. 14 (1967)). The Supreme Court of the United States has determined the constitutionality of privilege in general as regards the disclosure and the admissibility of evidence through a balancing process, weighing the rights of the accused, as guaranteed by the American Constitution, against the public interests served by privilege. That court has yet to decide the question of constitutionality of absolute privilege attaching to private records of sexual assault complainants, but there are a number of commentators who have dealt with this issue: see Maureen B. Hogan, "The Constitutionality of an Absolute Privilege for Rape Crisis Counseling: A Criminal Defendant's Sixth Amendment Rights Versus a Rape Victim's Right to Confidential Therapeutic Counseling" (1989), 30 *Boston College L. Rev.* 411, at pp. 470-74; Welsh S. White, "Evidentiary Privileges and the Defendant's Constitutional Right to Introduce Evidence" (1989), 80 *J. Crim. L. & Criminology* 377, at pp. 423-25; and Robert Weisberg, *supra*, at pp. 968-73.

régulière de la loi), garanti par le Quatorzième amendement, ainsi que les droits garantis par la clause de confrontation des témoins («*confrontation clause*») et la clause de citation forcée des témoins («*compulsory clause*») en vertu du Sixième amendement, imposent des limites aux privilèges législatifs (voir *Pennsylvania c. Ritchie*, 480 U.S. 39 (1987); *United States c. Nixon*, 418 U.S. 683 (1974); *Davis c. Alaska*, 415 U.S. 308 (1974); et *Washington c. Texas*, 388 U.S. 14 (1967)). La Cour suprême des États-Unis a décidé de la constitutionnalité des privilèges en général eu égard à la divulgation et à la recevabilité de la preuve en soupesant les intérêts en présence, soit les droits constitutionnels de l'accusé et les intérêts du public dans la reconnaissance du privilège. Cette cour n'a pas encore tranché la question de la constitutionnalité d'un privilège absolu attaché aux dossiers privés de plaignantes victimes d'agression sexuelle, mais un bon nombre d'auteurs se sont penchés sur la question: voir Maureen B. Hogan, «The Constitutionality of an Absolute Privilege for Rape Crisis Counseling: A Criminal Defendant's Sixth Amendment Rights Versus a Rape Victim's Right to Confidential Therapeutic Counseling» (1989), 30 *Boston College L. Rev.* 411, aux pp. 470 à 474; Welsh S. White, «Evidentiary Privileges and the Defendant's Constitutional Right to Introduce Evidence» (1989), 80 *J. Crim. L. & Criminology* 377, aux pp. 423 à 425; et Robert Weisberg, *loc. cit.*, aux pp. 968 à 973.

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On the other hand, several state courts have addressed the conflict between sexual assault defendants' constitutional rights and absolute confidentiality privilege for sexual assault counselling communications. Most have ruled that such absolute privilege is unconstitutional because it infringes upon defendants' constitutional rights: see *In re Robert H.*, 509 A.2d 475 (Conn. 1986); *Commonwealth v. Two Juveniles*, 491 N.E.2d 234 (Mass. 1986); *Commonwealth v. Samuels*, 511 A.2d 221 (Penn. 1986); *Advisory Opinion to the House of Representatives*, 469 A.2d 1161 (R.I. 1983). Both the Supreme Court of Pennsylvania, in *Commonwealth v. Wilson*, 602 A.2d 1290 (1992), and the Supreme Court of Illinois, in *People v.*

D'autre part, plusieurs tribunaux des États américains, ont traité de la question du conflit entre les droits constitutionnels des défendeurs dans les causes d'agression sexuelle et le privilège de confidentialité absolue des communications faites dans le cadre de consultations psychologiques. La plupart ont conclu à l'inconstitutionnalité d'un tel privilège absolu au motif qu'il portait atteinte aux droits constitutionnels des défendeurs: voir *In re Robert H.*, 509 A.2d 475 (Conn. 1986); *Commonwealth c. Two Juveniles*, 491 N.E.2d 234 (Mass. 1986); *Commonwealth c. Samuels*, 511 A.2d 221 (Penn. 1986); *Advisory Opinion to the House of Representatives*, 469 A.2d 1161 (R.I. 1983). La Cour suprême de la Pennsylvanie, dans l'arrêt

Foggy, 521 N.E.2d 86 (1988), have found the same kind of absolute privilege constitutional.

Most Commonwealth countries, including England, Scotland, Ireland, New Zealand and Australia, use a different qualification of privilege. These countries distinguish between private privilege and public interest immunity. See Sir Rupert Cross, *Cross on Evidence* (7th ed. 1990), at pp. 416 *et seq.* and 456 *et seq.*; David Field, *The Law of Evidence in Scotland* (1988), at pp. 248 *et seq.*; Caroline Fennell, *The Law of Evidence in Ireland* (1992), at pp. 165 *et seq.* and 193 *et seq.*; Sir Rupert Cross, *Evidence*, (3rd ed. 1979), at pp. 254 *et seq.* and 284 *et seq.*; and Andrew Ligertwood, *Australian Evidence* (2nd ed. 1993), at pp. 207 *et seq.* and 280 *et seq.*

Private privilege at common law is limited to legal professional relationships. As regards other relationships, such as doctor-patient, pastor-penitent, journalist-informants and spousal relationships, no privilege is recognized in the absence of statutory provisions. England, for example, has no statutory provision providing for a general privilege for doctor-patient communications, with only limited exceptions in civil proceedings; there is nothing specifically relating to counsellor-sexual assault complainant communications either. The situation is the same in both Scotland and Ireland. New Zealand and the states of Victoria and Tasmania and the Northern Territory in Australia have enacted civil proceeding privilege regarding communications between physicians and their patients. The legislation, however, is silent on sexual assault counselling communications and the case law has not extended the existing privileges to cover such communications.

In these Commonwealth countries, public interest immunity (formally referred to as Crown privilege) constitutes the residual basis to prevent relevant evidence from being disclosed or being found

Commonwealth c. Wilson, 602 A.2d 1290 (1992), et la Cour suprême de l'Illinois, dans l'arrêt *People c. Foggy*, 521 N.E.2d 86 (1988), ont toutes deux reconnu, quant à elles, la constitutionnalité du même privilège absolu.

La plupart des pays du Commonwealth, dont l'Angleterre, l'Écosse, l'Irlande, la Nouvelle-Zélande et l'Australie, qualifient différemment les privilèges. Ces pays distinguent en effet entre le privilège privé et l'immunité de droit public. Voir Sir Rupert Cross, *Cross on Evidence* (7^e éd. 1990), aux pp. 416 *et suiv.* et 456 *et suiv.*; David Field, *The Law of Evidence in Scotland* (1988), aux pp. 248 *et suiv.*; Caroline Fennell, *The Law of Evidence in Ireland* (1992), aux pp. 165 *et suiv.* et 193 *et suiv.*; Sir Rupert Cross, *Evidence* (3^e éd. 1979), aux pp. 254 *et suiv.* et 284 *et suiv.*; et Andrew Ligertwood, *Australian Evidence* (2^e éd. 1993), aux pp. 207 *et suiv.* et 280 *et suiv.*

Le privilège privé en common law se limite aux relations juridiques professionnelles. Pour les autres relations, telles les relations médecin-patient, pasteur-pénitent, journaliste-informateur et les relations entre conjoints, aucun privilège n'existe en l'absence de dispositions législatives. En Angleterre, par exemple, aucune disposition législative n'accorde de privilège général pour les communications médecin-patient, hormis quelques exceptions limitées en matières civiles; rien n'est non plus expressément prévu pour les communications entre conseillers et plaignantes victimes d'agression sexuelle. La situation est identique en Écosse et en Irlande. La Nouvelle-Zélande et les États de Victoria et de Tasmanie ainsi que le Territoire du Nord en Australie ont décrété qu'en matière civile les communications entre les médecins et leurs patients étaient privilégiées. La législation est, toutefois, muette en ce qui a trait aux communications relatives aux consultations psychologiques en matière d'agression sexuelle et la jurisprudence n'a pas étendu les privilèges existants à ce type de communications.

Dans ces pays du Commonwealth, c'est l'immunité de droit public (appelée anciennement privilège de la Couronne) qui permet, à titre subsidiaire, d'empêcher qu'une preuve pertinente soit divul-

admissible when considerations of public policy are found to be more important than the full disclosure of facts. See *D. v. National Society for the Prevention of Cruelty to Children*, [1978] A.C. 171 (H.L.); *Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners (No. 2)*, [1974] A.C. 405 (H.L.), and *Rogers v. Home Secretary*, [1973] A.C. 388 (H.L.). The immunity is founded in the common law; it is not a creature of statute. It gives protection to state interests, reports of proceedings in Parliament, police matters and other confidential subjects, including educational records, social worker logs and medical documents: see *Campbell v. Tameside Metropolitan Borough Council*, [1982] 1 Q.B. 1065 (C.A.); and *Gaskin v. Liverpool City Council*, [1980] 1 W.L.R. 1549 (C.A.).

guée ou jugée recevable lorsque des considérations d'ordre public sont considérées plus importantes que la divulgation complète des faits. Voir *D. c. National Society for the Prevention of Cruelty to Children*, [1978] A.C. 171 (H.L.), *Alfred Crompton Amusement Machines Ltd. c. Customs and Excise Commissioners (No. 2)*, [1974] A.C. 405 (H.L.), et *Rogers c. Home Secretary*, [1973] A.C. 388 (H.L.). Cette immunité tire son fondement de la common law et non de la législation; elle protège les intérêts étatiques, les rapports des délibérations au Parlement, les affaires de police et autres sujets confidentiels, dont les dossiers pédagogiques, les notations des travailleurs sociaux et les documents médicaux: voir *Campbell c. Tameside Metropolitan Borough Council*, [1982] 1 Q.B. 1065 (C.A.), et *Gaskin c. Liverpool City Council*, [1980] 1 W.L.R. 1549 (C.A.).

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In the criminal law context, public interest immunity cannot prevent the disclosure or bar the admissibility of documents that can enable the accused to resist an allegation of crime or to establish innocence: see *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624 (H.L.). In that respect, English courts have held that the public interest in ensuring a fair trial for a defendant outweighs the interest in protecting such confidential records if their disclosure is necessary for the defendant's full answer and defence. See, in the context of governmental documents, *R. v. Governor of Brixton Prison, Ex parte Osman*, [1991] 1 W.L.R. 281 (Q.B.); concerning the identity of police informants, *R. v. Agar*, [1990] 2 All E.R. 442 (C.A.); and in the context of social worker logs, *Re M (A Minor) (Disclosure of Material)*, [1990] 2 F.L.R. 36 (C.A.). See also Rachel Langdale and Simeon Maskrey, "Public Interest Immunity: Disclosure of Social Work Records" (1994), 24 *Fam. L.* 513.

En matière criminelle, l'immunité de droit public ne peut empêcher la divulgation ou entraîner l'irrecevabilité de documents susceptibles de permettre à l'accusé de réfuter une allégation de crime ou d'établir son innocence: voir *Duncan c. Cammell, Laird & Co.*, [1942] A.C. 624 (H.L.). À cet égard, les tribunaux anglais ont statué que l'intérêt du public d'assurer au défendeur un procès équitable avait préséance sur l'intérêt de protéger de tels dossiers confidentiels si leur divulgation est nécessaire à la défense pleine et entière du défendeur. Voir, dans le contexte de documents gouvernementaux, *R. c. Governor of Brixton Prison, Ex parte Osman*, [1991] 1 W.L.R. 281 (Q.B.); concernant l'identité d'indicateurs de police, *R. c. Agar*, [1990] 2 All E.R. 442 (C.A.); et dans le contexte de notations de travailleurs sociaux, *Re M (A Minor) (Disclosure of Material)*, [1990] 2 F.L.R. 36 (C.A.). Voir également Rachel Langdale et Simeon Maskrey, «Public Interest Immunity: Disclosure of Social Work Records» (1994), 24 *Fam. L.* 513.

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Courts of Commonwealth countries have not addressed the issue of whether private records of sexual assault complainants must be disclosed in criminal proceedings. However, given how this issue has been decided in other contexts, it is doubtful that public interest immunity would bar

Les tribunaux des pays du Commonwealth n'ont pas examiné la question de savoir si les dossiers privés des plaignantes victimes d'agression sexuelle doivent être divulgués dans le cadre d'instances criminelles. Toutefois, étant donné la façon dont la question a été tranchée dans d'autres con-

disclosure of such records when the accused's guilt or innocence is at stake. In the general context of medical records, the Lord Chancellor in England made the following statement (reported at (1956) 197 H.L. Official Report (5th series), col. 745):

We also propose that if medical documents, or indeed other documents, are relevant to the defence in criminal proceedings, Crown privilege [public interest immunity] should not be claimed.

This statement was quoted with approval by Lord Reid in *Conway v. Rimmer*, [1968] A.C. 910 (H.L.), at p. 942. Therefore, in England at least, in criminal proceedings, it appears that the balance between the right to full answer and defence and the public policies supporting the recognition of a privilege for sexual assault counselling communications is likely to be struck in favour of the former.

With this background in mind, I now turn to the question raised by the appellants and the interveners: Whether, as a matter of law, private records of complainants in sexual assault criminal proceedings should, as a class, be considered privileged communications. In my view, they should not for the reasons that follow.

C. *Privilege for Private Records of Sexual Assault Complainants*

Under this heading, the appellants and the interveners who favour recognizing a class privilege at common law for communications between counsellors and sexual assault complainants raise five arguments. They can be summarized as follows: (1) sexual assault counselling relationships are based upon and depend on confidentiality; (2) without confidentiality, sexual assault victims will be deterred from seeking counselling; (3) the deterrent effect of disclosure which leads to under-reporting of sexual assault cases, undermines the effectiveness of the criminal justice system; (4) records of statements made in the course of sexual

textes, il est douteux que l'immunité de droit public empêcherait la divulgation de ces dossiers lorsque la culpabilité ou l'innocence de l'accusé est en jeu. Dans le contexte général des dossiers médicaux, le lord chancelier d'Angleterre a fait la déclaration suivante (rapportée à (1956) 197 H.L. Official Report (5th series), col. 745):

[TRADUCTION] Nous proposons également que si des documents médicaux ou autres documents sont pertinents pour la défense dans des instances criminelles, le privilège de la Couronne [immunité de droit public] ne puisse être revendiqué.

Cette déclaration a été reprise par lord Reid qui l'a fait sienne dans l'arrêt *Conway c. Rimmer*, [1968] A.C. 910 (H.L.), à la p. 942. Par conséquent, en Angleterre à tout le moins, il appert qu'en matière criminelle l'équilibre entre le droit à une défense pleine et entière et les considérations de politique judiciaire justifiant la reconnaissance d'un privilège pour les communications faites à un conseiller par une plaignante victime d'agression sexuelle penchera vraisemblablement en faveur du premier.

Ces considérations à l'esprit, j'en viens maintenant à la question que soulèvent les appelants et les intervenants: est-ce que, en droit, les dossiers privés des plaignantes dans les affaires d'agression sexuelle devraient, de manière générique, être considérés comme des communications privilégiées? À mon avis, ils ne le devraient pas pour les motifs qui suivent.

C. *Privilege relatif aux dossiers privés de plaignantes victimes d'agression sexuelle*

Sous cette rubrique, les appelants et les intervenants qui favorisent la reconnaissance en common law d'un privilège générique en faveur des communications entre conseillers et plaignantes victimes d'agression sexuelle soulèvent cinq arguments. Ils peuvent se résumer comme suit: (1) les services de consultation en matière d'agression sexuelle sont fondés sur la confidentialité et en dépendent; (2) en l'absence de confidentialité, les victimes d'agression sexuelle seront dissuadées d'avoir recours à des services de consultation; (3) l'effet dissuasif de la divulgation, qui entraîne la réduction du nombre de plaintes pour agression

assault counselling are both hearsay and inherently unreliable; and (5) the common law principles governing privilege need to be in step with *Charter* values. The appellants and the interveners elaborate on each of those arguments and their points are well taken.

sexuelle, mine l'efficacité du système de justice pénale; (4) les dossiers relatifs aux déclarations faites dans le cadre de consultations en matière d'agression sexuelle constituent du oui-dire et ne sont en soi aucunement fiables; et (5) les principes de common law régissant les privilèges doivent être en harmonie avec les valeurs de la *Charte*. Les appelants et les intervenants élaborent sur chacun de ces arguments, et j'en prends bonne note.

55 Firstly, victims of sexual assaults are subject to the lingering and debilitating effects of sexual assault trauma syndrome. The sexual assault counsellors are specifically trained to help victims recover from sexual assault trauma syndrome. Sexual assault victims often take the first step to recovery by talking about the sexual assault experience in a non-judgmental and confidential atmosphere: see Kim E. Williamson, "Confidentiality of Sexual Assault Victim-Counselor Communication: A Proposed Model Statute" (1984), 26 *Ariz. L. Rev.* 461, at pp. 466-67; and Carrie J. Scarneas, "Rape Victim-Rape Crisis Counselor Communications: A New Testimonial Privilege" (1982), 86 *Dick. L. Rev.* 539, at pp. 543-44.

Premièrement, les victimes d'agression sexuelle subissent les effets persistants et débilitants d'un syndrome d'assaut sexuel traumatique. Les conseillers en matière d'agression sexuelle sont spécifiquement formés pour aider les victimes à se remettre de ce traumatisme. Les victimes d'agression sexuelle font souvent le premier pas vers leur rétablissement en parlant en toute confidentialité de leur expérience d'agression sexuelle dans une atmosphère où elles savent qu'elles ne seront pas jugées: voir Kim E. Williamson, «Confidentiality of Sexual Assault Victim-Counselor Communication: A Proposed Model Statute» (1984), 26 *Ariz. L. Rev.* 461, aux pp. 466 et 467; et Carrie J. Scarneas, «Rape Victim-Rape Crisis Counselor Communications: A New Testimonial Privilege» (1982), 86 *Dick. L. Rev.* 539, aux pp. 543 et 544.

56 Confidentiality in sexual assault counselling is essential in creating the sense of security necessary to encourage the free flow of discussion which is crucial to the victim's recovery. Unless the victim is guaranteed confidentiality she will be inhibited in her discussions and unable to receive the full benefits of counselling: see Michael Laurence, in "Rape Victim-Crisis Counselor Communications: An Argument for an Absolute Privilege" (1984), 17 *U.C. Davis L. Rev.* 1213, at pp. 1223-24.

Lors de consultations psychologiques par suite d'agression sexuelle, la confidentialité est essentielle à la création d'un sentiment de sécurité nécessaire pour favoriser la libre discussion cruciale pour le rétablissement de la victime. À moins que la confidentialité ne lui soit garantie, la victime sera inhibée dans ses discussions et ne pourra bénéficier pleinement des services de consultation: voir Michael Laurence, «Rape Victim-Crisis Counselor Communications: An Argument for an Absolute Privilege» (1984), 17 *U.C. Davis L. Rev.* 1213, aux pp. 1223 et 1224.

57 Secondly, without the assurance of confidentiality, sexual assault victims will be more likely to be deterred from seeking counselling or from divulging all the information to their counsellors. This deterrent effect of disclosure is not only detrimental to the victims but also to society as a whole. In *R. v. Osolin*, [1993] 4 S.C.R. 595, I made the fol-

Deuxièmement, sans une assurance de confidentialité, les victimes d'agression sexuelle seront vraisemblablement moins encouragées à demander assistance ou à révéler tous les renseignements à leurs conseillers. Cet effet dissuasif de la divulgation nuit non seulement aux victimes, mais aussi à l'ensemble de la société. Dans l'arrêt *R. c. Osolin*,

lowing observation regarding the disclosure of medical records (at p. 622):

First, common sense dictates that if people are aware that medical records can and may very well be obtained to attack the credibility of a witness, they may be reluctant to seek needed and valuable treatment if there is any prospect that they may be required to testify at trial, particularly if there is any connection between the events at trial and the subjects of discussion in the treatment process.

Thirdly, this deterrent effect has further repercussions on the functioning of the criminal legal process. Because sexual assault counselling and therapy may lead victims to report the crime to the authorities, anything that deters victims from seeking treatment will accentuate the under-reporting of offences. This Court has recognized that chronic under-reporting of sexual assault cases undermines the effectiveness of the criminal justice system. See, in the context of publication bans, *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122, at pp. 131-32; and, in the context of sexual assaults, *Seaboyer, supra*, at pp. 649-50, *per* L'Heureux-Dubé J., dissenting but not on this point, and *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, at pp. 441-42, *per* L'Heureux-Dubé J. for the Court in the result.

According to Statistics Canada, only six percent of the sexual assaults surveyed in 1993 were reported to the police. Fear of the attitudes likely to be shown by the police and the courts toward complainants continues to deter significant numbers of women from reporting. See J. Roberts, "Criminal Justice Processing of Sexual Assault Cases" (1994), 14:7 *Juristat* 1; see also Canadian Panel on Violence Against Women, *Changing the Landscape: Ending Violence — Achieving Equality* (1993), at pp. 28-29.

The legal system has a direct and vital interest in promoting the reporting of sexual assaults. It is important to recognize the impact that procedural and substantive rules have upon the resolve of sex-

[1993] 4 R.C.S. 595, j'ai fait l'observation suivante concernant la divulgation de dossiers médicaux (à la p. 622):

En premier lieu, le bon sens nous enseigne qu'une personne, consciente de la possibilité, voire de la probabilité, que des dossiers médicaux servent à contester la crédibilité d'un témoin, pourrait être réticente à demander un traitement nécessaire et valable s'il y a risque qu'elle soit appelée à témoigner à un procès, en particulier s'il existe un lien entre les événements en cause et l'objet du traitement.

Troisièmement, cet effet dissuasif a des repercussions additionnelles sur le fonctionnement du processus de justice pénale. Étant donné que la consultation et la thérapie suite à une agression sexuelle peuvent conduire les victimes à signaler le crime aux autorités, tout ce qui dissuade les victimes de se faire traiter augmentera le nombre des infractions non signalées. Notre Cour a reconnu que la sous-dénonciation chronique des affaires d'agression sexuelle mine l'efficacité du système de justice pénale. Voir, dans le contexte des interdictions de publication, *Canadian Newspapers Co. c. Canada (Procureur général)*, [1988] 2 R.C.S. 122, aux pp. 131 et 132; et, en matière d'agression sexuelle, *Seaboyer*, précité, aux pp. 649 et 650, le juge L'Heureux-Dubé, dissidente mais non sur ce point, et *R. c. L. (D.O.)*, [1993] 4 R.C.S. 419, aux pp. 441 et 442, le juge L'Heureux-Dubé au nom de la Cour quant au résultat.

Selon Statistique Canada, seulement six pour cent des agressions sexuelles passées en revue lors de l'enquête de 1993 furent rapportées à la police. La peur de l'attitude de la police et des tribunaux envers les plaignantes continue de dissuader un nombre important de femmes de dénoncer ces agressions. Voir J. Roberts, «L'administration de la justice pénale dans les cas d'agression sexuelle» (1994), 14:7 *Juristat* 1; voir également Comité canadien sur la violence faite aux femmes, *Un nouvel horizon: éliminer la violence — atteindre l'égalité* (1993), aux pp. 31 et 32.

Le système juridique a un intérêt direct et vital à encourager la dénonciation des cas d'agression sexuelle. Il est important de reconnaître l'impact qu'ont les règles de fond et de procédure sur la

ual assault victims to obtain treatment and upon the reporting of crimes of this nature. Therefore, the societal importance of the relationships between counsellors and sexual assault complainants necessarily goes beyond the benefit to the victims; it is also vitally linked to the effectiveness of the criminal justice system to deal with sexual assault crimes.

décision des victimes d'agression sexuelle d'obtenir un traitement et sur le signalement des crimes de cette nature. Par conséquent, l'importance pour la société des relations entre les conseillers et les plaignantes victimes d'agression sexuelle va nécessairement au-delà du bénéfice qu'en tirent les victimes; elle est également intimement liée à la capacité du système de justice pénale de répondre aux crimes d'agression sexuelle.

61 As a fourth point, the appellants and the interveners note that records of statements made in the course of medical or therapeutic treatments are both hearsay and inherently unreliable (see *Osolin*, *supra*, at pp. 622-23). The information given by sexual assault victims expressed in the course of counselling sessions constitutes second-hand communications. The rule against hearsay evidence requires that such communications be considered inadmissible at trial because of its lack of trustworthiness. The same reasoning supports the conclusion that private records of sexual assault complainants ought not to be produced or serve as a basis for the defence.

En quatrième lieu, les appelants et les intervenants soulignent que les dossiers relatifs aux déclarations faites dans le cadre de traitements médicaux ou thérapeutiques constituent du oui-dire et ne sont en soi aucunement fiables (voir *Osolin*, précité, aux pp. 622 et 623). Les renseignements fournis par des victimes d'agression sexuelle lors de séances de consultation constituent des communications de seconde main. Suivant la règle d'exclusion de la preuve par oui-dire, ces communications doivent être considérées comme inadmissibles au procès vu leur manque de véracité. Le même raisonnement étaye la conclusion selon laquelle les dossiers privés des plaignantes victimes d'agression sexuelle ne doivent pas être produits ou servir de fondement aux moyens de défense.

62 These records are inherently unreliable because they were gathered in a medical or therapeutic treatment context: see Marilyn T. MacCrimmon and Christine Boyle, "Equality, Fairness and Relevance: Disclosure of Therapists' Records in Sexual Assault Trials", in Canadian Institute for the Administration of Justice, *Filtering and Analyzing Evidence in an Age of Diversity* (1995), 81, at pp. 103-5. The questions asked by sexual assault counsellors encompass more than the particular events in issue at trial; they include a wide range of elements such as personal history, thoughts, emotions and other irrelevant information. In fact, sexual assault counsellors' records are prepared for the sole purpose of assisting counselling, not for the purpose of establishing accurate historical records for criminal proceedings. Further, private records do not necessarily represent the precise words spoken by the sexual assault complainants. Even if they did, the records would not qualify as state-

Ces dossiers ne sont en soi aucunement fiables parce qu'ils ont été préparés dans un contexte de traitement médical ou thérapeutique: voir Marilyn T. MacCrimmon et Christine Boyle, «Equality, Fairness and Relevance: Disclosure of Therapists' Records in Sexual Assault Trials», dans Institut canadien d'administration de la justice, *La recevabilité et l'appréciation de la preuve dans un monde complexe* (1995), 81, aux pp. 103 à 105. Les questions que posent les conseillers en matière d'agression sexuelle vont au-delà des événements spécifiquement en cause au procès; elles regroupent une vaste gamme d'éléments, tels l'historique personnel, les pensées, les émotions et toute autre information non pertinente. En fait, les dossiers des conseillers en matière d'agression sexuelle sont préparés aux seules fins de la consultation et non afin d'établir un compte rendu historique fidèle en vue de procédures criminelles. De plus, les dossiers privés ne consignent pas nécessairement les

ments under s. 10(1) of the *Canada Evidence Act*, unless the complainants reviewed and ratified the content of the records. As well, sexual assault counselling records are not necessarily prepared contemporaneously with the counselling session, or even immediately afterwards. As a result, the reliability or even the relevance of private records relating to sexual assault complainants are highly questionable.

Finally, the common law principles governing privilege must be consistent with the constitutional values enshrined in the *Charter*: see Marilyn T. MacCrimmon, "Developments in the Law of Evidence: The 1991-92 Term: Truth, Fairness and Equality" (1993), 4 *Sup. Ct. L. Rev.* (2d) 225, at pp. 258-59. As regards private records of sexual assault complainants, these values include the complainant's privacy and equality interests. In *Gruenke*, *supra*, Lamer C.J.'s analysis of a case-by-case privilege in favour of communications made in confidence to a pastor was informed by the right to freedom of religion in s. 2(a) and by the multicultural interpretation clause in s. 27 of the *Charter*. He wrote at pp. 290-91:

The Wigmore criteria will be informed both by the *Charter* guarantee of freedom of religion and by the general interpretative statement in s. 27 of the *Charter*. . . .

In applying the Wigmore criteria to particular cases, both s. 2(a) and s. 27 must be kept in mind. This means that the case-by-case analysis must begin with a "non-denominational" approach. The fact that the communications were not made to an ordained priest or minister or that they did not constitute a formal confession will not bar the possibility of the communications' being excluded. All of the relevant circumstances must be considered and the Wigmore criteria applied in a manner which is sensitive to the fact of Canada's multicultural heritage.

paroles exactes des plaignantes victimes d'agression sexuelle. Même si c'était le cas, ils ne constitueraient pas des déclarations au sens du par. 10(1) de la *Loi sur la preuve au Canada*, à moins que la plaignante n'en ait revu et approuvé le contenu. De plus, les dossiers en matière d'agressions sexuelles ne sont pas nécessairement préparés au moment de la consultation, ou même immédiatement après. Il en résulte que la fiabilité, voire même la pertinence des dossiers privés relatifs aux plaignantes victimes d'agression sexuelle est fort douteuse.

Enfin, les principes de common law en matière de privilège doivent être compatibles avec les valeurs constitutionnelles enchâssées dans la *Charte*: voir Marilyn T. MacCrimmon, «Developments in the Law of Evidence: The 1991-92 Term: Truth, Fairness and Equality» (1993), 4 *Sup. Ct. L. Rev.* (2d) 225, aux pp. 258 et 259. En ce qui a trait aux dossiers privés des plaignantes victimes d'agression sexuelle, ces valeurs comprennent l'intérêt des plaignantes à la protection de leur vie privée et à l'égalité. Dans l'arrêt *Gruenke*, précité, l'analyse du juge en chef Lamer d'un privilège fondé sur les circonstances particulières à chaque cas en faveur de communications faites confidentiellement à un pasteur s'est inspirée du droit à la liberté de religion, garanti à l'al. 2a), et de la clause d'interprétation multiculturelle à l'art. 27 de la *Charte*. Il a écrit aux pp. 290 et 291:

Le critère de Wigmore s'inspirera à la fois de la liberté de religion garantie par la *Charte* et de la déclaration d'interprétation générale de l'art. 27 de la *Charte*. . . .

Pour appliquer le critère de Wigmore à des cas particuliers, il faut garder à l'esprit l'al. 2a) et l'art. 27. Cela signifie que l'analyse de chaque cas doit commencer par l'adoption d'un point de vue «non confessionnel». Le fait que les communications n'ont pas été faites à un prêtre ou à un pasteur ordonné ou qu'elles ne constituaient pas une confession formelle n'écartera pas la possibilité de les exclure. Il faut tenir compte de toutes les circonstances pertinentes et le critère de Wigmore doit être appliqué d'une manière qui tient compte du patrimoine multiculturel du Canada.

See also *Re Church of Scientology and The Queen* (No. 6) (1987), 31 C.C.C. (3d) 449, at p. 540, where the Ontario Court of Appeal stated that the common law interpretation of privilege might have to be reconsidered in relation to the constitutional rights affected.

Voir également *Re Church of Scientology and The Queen* (No. 6) (1987), 31 C.C.C. (3d) 449, à la p. 540, où la Cour d'appel de l'Ontario a déclaré que l'interprétation en common law du privilège devrait peut-être être réexaminée au regard des droits constitutionnels en cause.

This is consistent with the approach adopted by this Court in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, where McIntyre J. said at p. 603: "the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution". More recently, in *Dagenais*, *supra*, the Court had to consider the common law rule governing the issuance of publication bans in the context of conflicting constitutional rights, namely freedom of expression and the presumption of innocence. Lamer C.J., speaking for the majority of the Court, after relying on this *dicta* of McIntyre J., added (at p. 878):

Ceci est conforme au point de vue adopté par notre Cour dans l'arrêt *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573, où le juge McIntyre a observé à la p. 603: «le judiciaire devrait expliquer et développer des principes de *common law* d'une façon compatible avec les valeurs fondamentales enchâssées dans la Constitution». Plus récemment, dans l'arrêt *Dagenais*, précité, la Cour devait examiner la règle de common law régissant les ordonnances de non-publication dans le contexte de droits constitutionnels opposés, soit la liberté d'expression et la présomption d'innocence. Exprimant l'opinion majoritaire de la Cour, le juge en chef Lamer, après avoir cité l'*obiter dictum* du juge McIntyre, a ajouté ceci (à la p. 878):

I am, therefore, of the view that it is necessary to reformulate the common law rule governing the issuance of publication bans in a manner that reflects the principles of the *Charter*. Given that publication bans, by their very definition, curtail the freedom of expression of third parties, I believe that the common law rule must be adapted so as to require a consideration both of the objectives of a publication ban, and the proportionality of the ban to its effect on protected *Charter* rights.

Je suis par conséquent d'avis qu'il est nécessaire de reformuler la règle de common law en matière d'ordonnance de non-publication de manière à la rendre compatible avec les principes de la *Charte*. Puisque, par définition même, les ordonnances de non-publication restreignent la liberté d'expression de tiers, j'estime que la règle de common law doit être adaptée de façon à exiger l'examen, d'une part, des objectifs de l'ordonnance de non-publication et, d'autre part, de la proportionnalité de l'ordonnance quant à ses effets sur les droits garantis par la *Charte*.

See also *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at paras. 95-97, *per* Cory J. for the Court in the result, and at para. 206, *per* L'Heureux-Dubé J., concurring; *R. v. Park*, [1995] 2 S.C.R. 836, at para. 51, *per* L'Heureux-Dubé J. for the Court in the result; and *Salituro*, *supra*, at p. 675.

Voir également *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130, aux par. 95 à 97, le juge Cory au nom de la Cour quant au résultat, et au par. 206, le juge L'Heureux-Dubé, souscrivant aux motifs; *R. c. Park*, [1995] 2 R.C.S. 836, au par. 51, le juge L'Heureux-Dubé au nom de la Cour quant au résultat; et *Salituro*, précité, à la p. 675.

As can be seen from the above discussion, there are strong arguments of public policy which militate in favour of protecting the confidentiality of counsellor-sexual assault complainant communications in criminal trials. They do not, however, necessarily support the recognition of a class privilege in favour of private records. There are many ave-

Ainsi qu'il appert de l'examen qui précède, de puissants arguments de politique judiciaire militent en faveur de la protection, dans les procès criminels, de la confidentialité des communications entre conseillers et plaignantes victimes d'agression sexuelle. Ils ne justifient toutefois pas nécessairement la reconnaissance d'un privilège généré

nues open to prevent production of such records if the need arises. Hearsay and irrelevance constitute one of these avenues; as discussed in *R. v. O'Connor*, [1995] 4 S.C.R. 411, released concurrently, the balancing of competing constitutional rights is another avenue, to which I will return later. The recognition of a class privilege for private records is not, in my view, the proper approach and I agree with the reasoning advanced by the Attorney General of Manitoba in this respect. Generally, class privilege presents many impediments to the proper administration of justice and, for that reason, has not been favoured in Canada and elsewhere in criminal trials. A class privilege is a complete bar to the information contained in such records, whether or not relevant, and the onus to override it is a heavy one indeed. The particular concerns raised by the recognition of a class privilege in favour of private records in criminal law relate to: (1) the truth-finding process of our adversarial trial procedure; (2) the possible relevance of some private records; (3) the accused's right to make full answer and defence; (4) the categories of actors included in a class privilege; and (5) the experience of other countries.

The principal aim of our adversarial trial process is the search for the truth. In order for justice to be rendered, the judicial system must have the right to all relevant information: see Pierre Tessier, "La vérité et la justice" (1988), 19 *R.G.D.* 29, at p. 32. This is the foundation of the requirement that everyone must testify in court if requested by subpoena and, in civil cases, of the rules relating to the disclosure of documents in the pre-trial discovery process. Accordingly, relevant information is presumptively admissible and subject to disclosure, while the recognition of privilege is confined to limited communications. In that respect, Professor Mewett, in *Witnesses* (1991), makes the following observations at p. 15-2:

rique en faveur des dossiers privés. Il existe en effet plusieurs moyens d'empêcher la production de tels dossiers si cela s'avère nécessaire. Le ouï-dire et la non-pertinence sont de ceux-là, ainsi que la pondération des droits constitutionnels opposés; tel que discuté dans l'arrêt *R. c. O'Connor*, [1995] 4 R.C.S. 411, rendu simultanément, point sur lequel je reviendrai plus loin. La reconnaissance d'un privilège générique pour les dossiers privés n'est donc pas, à mon avis, la démarche qu'il convient de suivre et je suis d'accord avec le raisonnement du procureur général du Manitoba à cet égard. Généralement, un privilège générique gêne à plusieurs égards l'administration de la justice et, pour cette raison, il ne connaît pas la faveur au Canada et ailleurs dans les procès criminels. Un privilège générique constitue une entrave complète aux renseignements contenus dans ce type de dossiers, peu importe leur pertinence, et le fardeau de preuve pour en contester l'application est onéreux. La reconnaissance en droit criminel d'un privilège générique en faveur de dossiers privés soulève les préoccupations suivantes: (1) le processus de recherche de la vérité de notre procédure judiciaire contradictoire; (2) la pertinence possible de certains dossiers privés; (3) le droit de l'accusé à une défense pleine et entière; (4) les catégories d'acteurs inclus dans un privilège générique; et (5) l'expérience d'autres pays.

Notre système judiciaire contradictoire a pour but principal la recherche de la vérité. Afin que justice soit rendue, le système judiciaire doit pouvoir disposer de toutes les informations pertinentes: voir Pierre Tessier, «La vérité et la justice» (1988), 19 *R.G.D.* 29, à la p. 32. C'est là le fondement de l'obligation voulant que tous doivent témoigner devant le tribunal s'ils y sont assignés par subpoena et, en matière civile, de la règle relative à la divulgation de documents au moment de la communication préalable de la preuve. En conséquence, l'information pertinente est présumée admissible et sujette à divulgation, alors que la reconnaissance d'un privilège est limitée à certaines communications restreintes. À cet égard, dans *Witnesses* (1991), le professeur Mewett fait les observations suivantes, à la p. 15-2:

[T]he objective of all testimony is the eliciting of information from which conclusions may be drawn. It is therefore fundamental to the litigation process that the court or other tribunal have available to it all relevant evidence, unless some other social value is perceived to exist that takes priority over the ascertainment of the truth. All claims of privilege hinder the search for the truth since they result in the concealment of what may be helpful and, indeed, crucial information. It is not surprising, therefore, that claims to privilege should be carefully scrutinised by the courts and only rarely upheld. [Emphasis added.]

See also S. A. Tacon, "A Question of Privilege: Valid Protection or Obstruction of Justice?" (1979), 17 *Osgoode Hall L.J.* 332; and Beverley McLachlin (now of this Court), "Confidential Communications and the Law of Privilege" (1977), 11 *U.B.C. L. Rev.* 266.

Even if most private records relating to sexual assault complainants are generally irrelevant, some of them can contain information which may be "likely to be relevant either to an issue in the trial or to the competence to testify of the subject of the records" (see *O'Connor, supra*, at para. 134). The recognition of a class privilege for communications that can contain highly relevant information in criminal proceedings must be limited to situations where the other social interests are indubitably "compelling" (see *Gruenke, supra*, at p. 288). The recognition of a class privilege in favour of private records relating to sexual assault complainants would be a complete bar to the production and disclosure of the information contained therein, irrespective of its relevance. Because there can be instances where private records will be likely relevant, either to an issue in the proceedings or to the competence of the witness to testify, class privilege does not constitute the proper legal doctrine to govern the issue of production of private records held by third parties.

As a third point related to the possible relevancy of private records of sexual assault complainants,

[TRADUCTION] [D]ans tout témoignage, l'objectif est d'obtenir des éléments d'information susceptibles de permettre de tirer des conclusions. Il est donc essentiel au débat que le tribunal judiciaire ou autre dispose de toute la preuve pertinente, à moins que d'autres valeurs sociales soient perçues comme étant prioritaires à l'établissement de la vérité. Toute demande de privilège fait obstacle à la recherche de la vérité étant donné qu'elle a pour effet de dissimuler de l'information qui peut être utile, voire même cruciale. Aussi ne faut-il pas s'étonner que les tribunaux examinent attentivement les demandes de privilège et ne les accordent que rarement. [Je souligne.]

Voir également S. A. Tacon, «A Question of Privilege: Valid Protection or Obstruction of Justice?» (1979), 17 *Osgoode Hall L.J.* 332; et Beverley McLachlin (maintenant juge de notre Cour), «Confidential Communications and the Law of Privilege» (1977), 11 *U.B.C. L. Rev.* 266.

Même si la plupart des dossiers privés relatifs aux plaignantes victimes d'agression sexuelle sont généralement non pertinents, certains d'entre eux peuvent contenir des renseignements «susceptibles de se rapporter soit à une question en litige dans l'instance soit à l'habilité à témoigner de la personne visée par les dossiers» (voir l'arrêt *O'Connor*, précité, au par. 134). La reconnaissance d'un privilège générique pour les communications pouvant contenir des renseignements hautement pertinents dans des procédures criminelles doit se limiter aux situations où les autres intérêts sociaux sont incontestablement «sérieux» (voir l'arrêt *Gruenke*, précité, à la p. 288). Dans le cas des plaignantes victimes d'agression sexuelle, la reconnaissance d'un tel privilège écarterait complètement la production et la divulgation des renseignements qui y sont contenus, quelle que soit leur pertinence. Étant donné qu'il peut y avoir des cas où les dossiers privés seront susceptibles de se rapporter soit à une question en litige dans l'instance soit à l'habilité à témoigner, le privilège générique n'est pas la doctrine légale qu'il convient d'appliquer pour régir la question de la production des dossiers privés en la possession de tiers.

Troisième point relié à la possible pertinence des dossiers privés relatifs aux plaignantes vic-

the accused's right to make full answer and defence militates against the recognition of class privilege in criminal proceedings. Privilege constitutes a limit upon the truth-finding principle of our justice system and, consequently, may impair the accused's full enjoyment of his or her right to respond to criminal accusations.

When the enforcement of a privilege means that the accused will be limited as to his or her right to make full answer and defence to criminal accusations, this Court has strongly tended to favour disclosure. The informer privilege, for instance, will be set aside if the confidential material can demonstrate the innocence of an accused person: see *R. v. Scott*, [1990] 3 S.C.R. 979, at pp. 995-96, *per* Cory J. for the majority; and *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at p. 93. Even the solicitor-client privilege, which has been elevated to a "fundamental civil and legal right" (see *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, at p. 383, *per* Wilson J.; and *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 839), will be overridden to allow the accused to make full answer and defence to criminal charges: see *Seaboyer*, *supra*, at p. 607, *per* McLachlin J. for the majority; and *R. v. Dunbar and Logan* (1982), 68 C.C.C. (2d) 13 (Ont. C.A.), at pp. 43-45.

At common law, the main condition for a class privilege to be recognized in favour of certain communications is that the category of actors be limited to specific people. The solicitor-client class privilege, for example, involves definite actors: one is a qualified lawyer and the other is the client. In that regard, John Sopinka (of this Court), Sidney N. Lederman and Alan W. Bryant, in *The Law of Evidence in Canada* (1992), remark at p. 649:

The protection [of the privilege], however, does not extend to communications with persons who are not duly qualified legal advisers even though the advice they might give is legal in nature.

times d'agression sexuelle, le droit de l'accusé de présenter une défense pleine et entière milite contre la reconnaissance d'un privilège générique en matière criminelle. Le privilège constitue une restriction au principe de la recherche de la vérité sous-jacent à notre système de justice et conséquemment, il peut porter atteinte à la capacité de l'accusé de jouir pleinement de son droit de répondre à une accusation criminelle.

Lorsque la reconnaissance d'un privilège signifie que sera limité le droit de l'accusé de présenter une défense pleine et entière à une accusation criminelle, notre Cour a eu fortement tendance à favoriser la divulgation. Ainsi, le privilège relatif aux indicateurs de police sera écarté si les documents confidentiels peuvent démontrer l'innocence de la personne accusée: voir *R. c. Scott*, [1990] 3 R.C.S. 979, aux pp. 995 et 996, le juge Cory au nom de la majorité; et *Bisaillon c. Keable*, [1983] 2 R.C.S. 60, à la p. 93. Même le secret professionnel de l'avocat, élevé au rang de «droit civil fondamental» (voir *Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353, à la p. 383, le juge Wilson; et *Solosky c. La Reine*, [1980] 1 R.C.S. 821, à la p. 839), sera écarté pour permettre à l'accusé de présenter une défense pleine et entière à des accusations criminelles: voir *Seaboyer*, précité, à la p. 607, le juge McLachlin au nom de la majorité; et *R. c. Dunbar and Logan* (1982), 68 C.C.C. (2d) 13 (C.A. Ont.), aux pp. 43 à 45.

En common law, la principale condition pour qu'un privilège générique soit reconnu en faveur de certaines communications est que la catégorie des acteurs visés soit restreinte. Ainsi, le secret professionnel de l'avocat fait intervenir des acteurs définis: l'avocat qualifié et le client. À cet égard, John Sopinka (de notre Cour), Sidney N. Lederman et Alan W. Bryant, font remarquer ceci dans *The Law of Evidence in Canada* (1992), à la p. 649:

[TRADUCTION] La protection [du privilège], toutefois, ne s'étend pas aux communications avec des personnes qui ne sont pas des conseillers juridiques dûment qualifiés, même si les conseils qu'elles peuvent donner sont d'ordre juridique.

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By contrast, the category of actors involved in sexual assault counselling relationships is not restricted to a defined group of qualified professionals and their clients. Whereas counselling in such cases may be provided by medical professionals, such as physicians, psychiatrists and psychologists, sexual assault complainants may also resort to community resources, sexual assault crisis centres, pastors, parents, friends, etc. To extend a class privilege to all these interveners might mean that information gathered in group therapy or communications relating to mental health exchanged on pay-per-call telephone service lines could attract such privilege. At common law, as it now exists, such a wide category of actors militates against the recognition of a class privilege since it would considerably limit the defense and close avenues of information which the search for the truth and justice may warrant in some circumstances.

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In the context of privileged communications for psychotherapist-patient relationships, which are very similar to sexual assault counselling relationships, Catharina J. H. Dubbelday, in "The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved" (1985), 34 *Emory L.J.* 777, makes these observations at p. 812:

In the case of doctors, lawyers, and spouses, determining the individual to whom communications are privileged is usually not difficult because of state regulation of these professions and relationships. In the case of clergymen, courts look to the tenets of the clergyman's faith for assistance when definitional problems arise. In the context of the psychotherapist-client privilege, however, determining who is a "psychotherapist" is a problem that is not easily resolved. On the one hand, the strong policy considerations supporting a psychotherapist-client privilege do not seem to apply only to clients of licensed individuals. On the other hand, the court's need for truth will not permit a privilege that is

Par contre, la catégorie d'acteurs que met en cause une relation de consultation socio-psychologique en matière d'agression sexuelle n'est pas restreinte à un groupe défini de professionnels qualifiés et leurs clients. Bien que les services de consultation socio-psychologique en pareils cas puissent être fournis par des professionnels de la médecine, tels des médecins, des psychiatres et des psychologues, les plaignantes peuvent également avoir recours aux ressources communautaires, aux centres d'urgence en matière d'agression sexuelle, aux pasteurs, aux parents, aux amis, etc. Élargir un privilège générique en faveur de tous ces intervenants pourrait signifier que les renseignements recueillis dans des thérapies de groupe ou les communications liées à la santé mentale échangées par l'entremise de services téléphoniques payants pourraient bénéficier du privilège. Or dans l'état actuel de la common law, une catégorie aussi étendue d'acteurs en cause milite contre la reconnaissance d'un privilège générique, étant donné que celui-ci limiterait considérablement les moyens de défense et préviendrait l'obtention d'informations qui seraient, dans certaines circonstances, justifiées aux fins de la recherche de la vérité et de la justice.

Dans le contexte des communications privilégiées dans le cadre des relations psychothérapeute-patient, qui sont très semblables aux relations de consultation socio-psychologique en matière d'agression sexuelle, Catharina J. H. Dubbelday fait les observations suivantes dans «The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved» (1985), 34 *Emory L.J.* 777, à la p. 812:

[TRADUCTION] Dans le cas des médecins, des avocats et des conjoints, il n'est habituellement pas difficile de déterminer envers qui les communications sont privilégiées en raison de la réglementation étatique. Dans le cas des membres du clergé, les tribunaux s'en reportent aux préceptes de leur foi s'il se présente un problème de délimitation. Toutefois, dans le contexte du privilège psychothérapeute-client, la question de savoir qui est un «psychothérapeute» pose un problème qu'il n'est pas aisé de résoudre. D'une part, les importantes considérations de principe justifiant la reconnaissance d'un tel privilège ne semblent pas s'appliquer uniquement aux clients de professionnels qualifiés. D'autre part, l'impé-

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so broad that almost every communication to any individual is covered. [Emphasis added.]

See also Kerry L. Morse, "A Uniform Testimonial Privilege for Mental Health Professionals" (1990), 51 *Ohio St. L.J.* 741, at p. 745.

Lastly, a review of the position of other common law countries demonstrates that, in criminal proceedings, a class (or absolute) privilege for counsellor-sexual assault complainant communications is not generally supported. In the United States, no privilege exists at common law for sexual assault counselling communications and although many states have enacted a statutory class privilege for such communications, many of these absolute privileges have been struck down as unconstitutional by state courts on the basis that they infringe upon defendants' rights as guaranteed by the Sixth and Fourteenth Amendments: see *In re Robert H.*, *supra*; *Commonwealth v. Two Juveniles*, *supra*; *Commonwealth v. Samuels*, *supra*; and *Advisory Opinion to the House of Representatives*, *supra*. In Commonwealth countries, such as England, Scotland, Ireland, New Zealand and Australia, no private privilege exists, at common law or under statutory law, for communications between counsellors and sexual assault complainants. Where limited doctor-patient privileges exist, they are restricted to civil proceedings and have not been extended to cover sexual assault counselling communications. Public interest immunity in Commonwealth countries is different from class privilege as it exists in Canada. It is decided on an *ad hoc* basis and is more analogous to case-by-case privilege.

In the end, balancing those arguments, I am of the view that recognizing a class privilege in criminal trials for private records relating to sexual assault complainants is not the best way to serve the interests of justice. As argued by the appellants and the interveners, there are strong public policy considerations which may favour non-production

ratif judiciaire de recherche de la vérité ne permettra pas la reconnaissance d'un privilège si large qu'il couvrirait la presque totalité des communications faites à toute personne. [Je souligne.]

Voir également Kerry L. Morse, «A Uniform Testimonial Privilege for Mental Health Professionals» (1990), 51 *Ohio St. L.J.* 741, à la p. 745.

Enfin, un examen de la position adoptée dans d'autres pays de common law démontre que, de façon générale, on ne reconnaît pas, en matière criminelle, de privilège générique (ou absolu) relatif aux communications entre une plaignante victime d'agression sexuelle et son conseiller. Aux États-Unis, aucun privilège n'existe en common law pour ce type de communications et bien que de nombreux États aient créé par voie législative un privilège générique pour ces communications, plusieurs de ces privilèges absolus ont été déclarés inconstitutionnels par les tribunaux des États au motif qu'ils portent atteinte aux droits garantis aux défendeurs par les Sixième et Quatorzième amendements: voir *In re Robert H.*, précité; *Commonwealth c. Two Juveniles*, précité; *Commonwealth c. Samuels*, précité; et *Advisory Opinion to the House of Representatives*, précité. Dans les pays du Commonwealth tels l'Angleterre, l'Écosse, l'Irlande, la Nouvelle-Zélande et l'Australie, aucun privilège privé n'existe, en common law ou dans la législation, pour les communications entre conseillers et plaignantes victimes d'agression sexuelle. Lorsqu'un privilège limité médecin-patient existe, il est restreint aux procédures civiles et n'a pas été étendu aux communications relatives aux consultations pour agression sexuelle. Quant à l'immunité de droit public reconnue dans les pays du Commonwealth, elle diffère du privilège générique tel qu'il existe au Canada. Elle est établie de façon *ad hoc* et s'apparente davantage au privilège fondé sur les circonstances particulières à chaque cas.

En définitive, après avoir soupesé ces arguments, je suis d'avis que ce n'est pas en reconnaissant, dans les procès criminels, un privilège générique pour les dossiers privés relatifs aux plaignantes victimes d'agression sexuelle que les intérêts de la justice seront le mieux servis. Certes, comme l'ont fait valoir les appelants et les interve-

of private records relating to sexual assault complainants in criminal trials, but on balance, I conclude that class privilege is not the avenue which should govern the extent of production of private records held by third parties in criminal trials.

nants, il existe d'importantes considérations de politique judiciaire en faveur de la non-production, dans les procès criminels, de dossiers privés des plaignantes victimes d'agression sexuelle, mais tout compte fait, j'en viens à la conclusion que ce n'est pas par la voie du privilège générique qu'il convient de décider de la question de la production en matière criminelle de dossiers privés en la possession de tiers.

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This does not mean, however, that the granting of a case-by-case privilege may not be appropriate in some circumstances, where the Wigmore criteria are met. The determination of whether such a privilege ought to attach will, of course, depend on the facts of each case as they relate to the four Wigmore criteria. Given the nature of the relationship between counsellors and sexual assault complainants, the first three criteria will easily be met in most cases. As it appears from the foregoing discussion, such relationships are founded on trust and confidence, confidentiality is essential to their maintenance and the public fosters and supports these counselling relationships. The fourth criterion involves the balancing of the relative values which favour finding these records privileged with those which favour production, if, of course, the records are found to be likely relevant either to an issue in the proceedings or to the competence of the witness to testify (see *O'Connor, supra*). This is where the arguments for and against production, which I have discussed earlier, will be examined.

Cela ne veut pas dire, cependant, que l'octroi d'un privilège fondé sur les circonstances particulières à chaque cas ne soit pas indiqué dans certaines circonstances, lorsqu'il est satisfait au test de Wigmore. L'opportunité de reconnaître un tel privilège dépendra naturellement des faits de chaque cause eu égard aux quatre critères de Wigmore. Étant donné la nature de la relation entre conseillers et plaignantes victimes d'agression sexuelle, les trois premiers critères seront facilement satisfaits dans la plupart des cas. Ainsi qu'il appert de la discussion qui précède, ces relations se fondent sur la confiance, la confidentialité est essentielle à leur maintien et elles ont l'appui et le soutien du public. Le quatrième critère renvoie à la pondération des valeurs en jeu soit d'une part celles qui favorisent la reconnaissance d'un privilège en faveur de ces dossiers avec celles qui, d'autre part, militent en faveur de leur production dans la mesure, naturellement, où l'on juge qu'ils sont pertinents soit à une question en litige dans l'instance soit à l'habilité à témoigner (voir l'arrêt *O'Connor*, précité). C'est sous cet angle que les arguments favorables et défavorables à la production, dont j'ai déjà discuté, seront considérés.

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It must be remembered that the determination as to whether privilege should be granted in a particular case is based purely on public policy considerations; it does not involve the balancing of the complainant's *Charter* rights to privacy and equality with those of the accused to make full answer and defense. Even though the confidentiality of private records relating to sexual assault complainants does engage privacy and equality interests, the

On doit se rappeler que la décision d'accorder un privilège dans un cas donné se fonde uniquement sur des considérations de politique judiciaire; elle n'engage pas la pondération des droits de la plaignante à la protection de sa vie privée et à l'égalité, garantis par la *Charte*, avec ceux de l'accusé de présenter une défense pleine et entière. Bien que la confidentialité de dossiers privés relatifs aux plaignantes victimes d'agression sexuelle mette effectivement en cause des intérêts liés à la vie privée et à l'égalité, la revendication de droits

assertion of constitutional rights of privacy and equality is distinct from the issue of privilege.

In brief, while there is surely ground to recognize a case-by-case privilege for private records of sexual assault complainants in some instances, I do not think that such exceptions to the general evidentiary rule of admissibility and disclosure should be encouraged. This *ad hoc* approach to privilege will not serve the main policy consideration behind the granting of privilege for sexual assault counselling communications, i.e., that the complainants should be assured at the outset that information shared with counsellors will be kept confidential. Consequently, it will not cure the most important ills associated with production of private records, notably the deterrent effect that such production has on reporting and counselling.

A better approach to this difficult problem, in my view, lies in the balancing of, on the one hand, the *Charter* rights to privacy and equality of the sexual assault complainant with, on the other hand, the accused's *Charter* rights to a fair trial and to full answer and defence. While this approach may suffer from some of the shortcomings discussed previously as regards the granting of class and case-by-case privileges, it ensures that proper consideration is equally given to competing constitutional rights (*Dagenais, supra*, at p. 877). This is the approach advocated in *O'Connor, supra*, which should be read as herein recited at length and which I will briefly summarize.

VI. Balancing *Charter* Values

When deciding whether to order production of private records held by third parties, the court must exercise its discretion in a manner that is respectful of *Charter* values: *Dagenais, supra*, at p. 875. The constitutional values involved here are: (1) the

constitutionnels en la matière est une question distincte de celle du privilège.

En somme, bien qu'il y ait certainement lieu, dans certaines circonstances, de reconnaître un privilège fondé sur les circonstances particulières de chaque cas pour les dossiers privés des plaignantes victimes d'agression sexuelle, je ne crois pas qu'il faille encourager ces exceptions à la règle générale d'admissibilité et de divulgation de la preuve. Cette approche *ad hoc* ne permettra pas, en effet, d'atteindre le but recherché par la philosophie sous-jacente à l'octroi d'un privilège pour les communications relatives aux consultations en matière d'agression sexuelle, c.-à-d. l'assurance donnée dès le départ aux plaignantes que l'information qu'elles partagent avec leurs conseillers sera tenue confidentielle. Conséquemment, elle ne remédierait pas aux principaux problèmes associés à la production de dossiers privés, notamment l'effet dissuasif de cette production sur la signalisation de ces crimes et les recours à la consultation.

Une approche qui me paraît plus appropriée pour aborder ce difficile problème consiste à soulever les droits de la plaignante victime d'agression sexuelle à la protection de sa vie privée et à l'égalité, droits garantis par la *Charte*, d'une part, avec le droit de l'accusé à un procès équitable et à une défense pleine et entière, droits également garantis par la *Charte*, d'autre part. Même si cette démarche peut souffrir de certains des défauts examinés précédemment en ce qui concerne l'octroi de privilèges génériques et de privilèges fondés sur les circonstances particulières de chaque cas, elle permet cependant d'assurer qu'une égale considération sera accordée aux droits constitutionnels qui s'affrontent (*Dagenais, précité*, à la p. 877). C'est l'approche préconisée dans l'arrêt *O'Connor, précité*, auquel je réfère comme si ici reproduit intégralement, et que je résumerai brièvement.

VI. Pondération des valeurs de la *Charte*

Lorsqu'il décide s'il doit ordonner la production de dossiers privés en la possession de tiers, le tribunal doit exercer sa discrétion d'une manière qui respecte les valeurs de la *Charte*: *Dagenais, précité*, à la p. 875. Les valeurs constitutionnelles en

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right to full answer and defence; (2) the right to privacy; and (3) the right to equality without discrimination. These rights are well recognized and are discussed at length in *O'Connor*, *supra*. I will only briefly refer to them here.

cause en l'espèce sont: (1) le droit à une défense pleine et entière; (2) le droit à la protection de la vie privée; et (3) le droit à l'égalité indépendamment de toute discrimination. Ces droits sont bien établis et sont longuement discutés dans l'arrêt *O'Connor*, précité, auquel je ferai brièvement référence ici.

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The right to full answer and defence, as guaranteed in s. 7 of the *Charter*, does not need much elaboration. The ability for an accused to make full answer and defence constitutes a principle of fundamental justice (see *Stinchcombe*, *supra*; and *R. v. Egger*, [1993] 2 S.C.R. 451). However, the extent of all principles of fundamental justice varies according to the context in which they are invoked (see *R. v. Lyons*, [1987] 2 S.C.R. 309).

Le droit à une défense pleine et entière, garanti à l'art. 7 de la *Charte*, ne nécessite pas beaucoup d'explication. La capacité de l'accusé de présenter une défense pleine et entière constitue un principe de justice fondamentale (voir l'arrêt *Stinchcombe*, précité; et *R. c. Egger*, [1993] 2 R.C.S. 451). Toutefois, la portée de tous les principes de justice fondamentale varie selon le contexte dans lequel ils sont invoqués (voir *R. c. Lyons*, [1987] 2 R.C.S. 309).

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This Court has on many occasions recognized privacy as an interest protected by the *Charter* (see *R. v. Dymont*, [1988] 2 S.C.R. 417; *R. v. Beare*, [1988] 2 S.C.R. 387; *R. v. Pohoretsky*, [1987] 1 S.C.R. 945; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145) and by the common law (see *McInerney v. MacDonald*, [1992] 2 S.C.R. 138; *Hill v. Church of Scientology of Toronto*, *supra*). The civil law in Quebec also provides legal protection to privacy interests (see arts. 35 and 36 of the *Civil Code of Québec*, S.Q. 1991, c. 64; and art. 5 of the *Quebec Charter of Human Rights and Freedoms*). It is interesting to note, in passing, that the Supreme Court of the United States has also conferred constitutional status upon certain aspects of privacy: see *Roe v. Wade*, 410 U.S. 113 (1973); and *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Notre Cour a reconnu à maintes reprises que le respect de la vie privée est un intérêt protégé par la *Charte* (voir *R. c. Dymont*, [1988] 2 R.C.S. 417; *R. c. Beare*, [1988] 2 R.C.S. 387; *R. c. Pohoretsky*, [1987] 1 R.C.S. 945; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145) ainsi que par la common law (voir *McInerney c. MacDonald*, [1992] 2 R.C.S. 138; *Hill c. Église de scientologie de Toronto*, précité). Le droit civil au Québec reconnaît également une protection légale de la vie privée (voir les art. 35 et 36 du *Code civil du Québec*, L.Q. 1991, ch. 64; et l'art. 5 de la *Charte des droits et libertés de la personne* du Québec). Il est intéressant de noter, en passant, que la Cour suprême des États-Unis a également conféré un statut constitutionnel à certains aspects de la vie privée: voir *Roe c. Wade*, 410 U.S. 113 (1973); et *Griswold c. Connecticut*, 381 U.S. 479 (1965).

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In *O'Connor*, *supra*, I concluded that private records of sexual assault complainants attract a reasonable expectation of privacy (at para. 118):

Dans l'arrêt *O'Connor*, précité, j'ai conclu qu'une attente raisonnable en matière de protection de la vie privée s'attache aux dossiers privés des plaignantes victimes d'agression sexuelle (au par. 118):

In *R. v. Plant*, [1993] 3 S.C.R. 281, albeit in the context of a discussion of s. 8 of the *Charter*, a majority of this Court identified one context in which the right to privacy would generally arise in respect of documents and records (at p. 293):

Dans l'arrêt *R. c. Plant*, [1993] 3 R.C.S. 281, bien que dans le contexte de l'art. 8 de la *Charte*, notre Cour, à la majorité, a identifié un contexte dans lequel le droit à la protection de la vie privée serait généralement soulevé relativement à des documents et à des dossiers (à la p. 293):

In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.

Although I prefer not to decide today whether this definition is exhaustive of the right to privacy in respect of all manners of documents and records, I am satisfied that the nature of the private records which are the subject matter of this appeal properly brings them within that rubric. Such items may consequently be viewed as disclosing a reasonable expectation of privacy which is worthy of protection under s. 7 of the *Charter*. [Emphasis added in *O'Connor*.]

Finally, the right to equality without discrimination, as guaranteed in s. 15 of the *Charter*, is relevant to the analysis because private records of sexual assault complainants relate to a crime which overwhelmingly affects women, children and the disabled. I had the opportunity in *O'Connor*, to consider the right to equality without discrimination and the following comment applies *mutatis mutandis* to the instant case (at para. 124):

Routine insistence on the exposure of complainants' personal backgrounds has the potential to reflect a built-in bias in the criminal justice system against those most vulnerable to repeat victimization. Such requests, in essence, rest on the assumption that the personal and psychological backgrounds and profiles of complainants of sexual assault are relevant as to whether or not the complainant consented to the sexual contact, or whether the accused honestly believed that she consented.

After a more detailed analysis of each of these rights and their constitutional basis in the *Charter*, I concluded in *O'Connor* (at para. 132):

The use of state power to compel production of private records will be justified in a free and democratic society when the following criteria are applied. First,

Étant donné les valeurs sous-jacentes de dignité, d'intégrité et d'autonomie qu'il consacre, il est normal que l'art. 8 de la *Charte* protège un ensemble de renseignements biographiques d'ordre personnel que les particuliers pourraient, dans une société libre et démocratique, vouloir constituer et soustraire à la connaissance de l'État. Il pourrait notamment s'agir de renseignements tendant à révéler des détails intimes sur le mode de vie et les choix personnels de l'individu.

Bien que je préfère ne pas décider aujourd'hui s'il s'agit d'une définition exhaustive du droit à la protection de la vie privée à l'égard de toutes sortes de documents et de dossiers, je suis convaincue sans l'ombre d'un doute que la nature des dossiers privés qui font l'objet du présent pourvoi sont inclus sous cette rubrique. Ces renseignements peuvent, par conséquent, être considérés comme comportant une attente raisonnable qu'ils demeureront privés et donc sont dignes de protection en vertu de l'art. 7 de la *Charte*. [Souligné dans l'arrêt *O'Connor*.]

Enfin, le droit à l'égalité indépendamment de toute discrimination, garanti à l'art. 15 de la *Charte*, est pertinent aux fins de notre analyse étant donné que les dossiers privés des plaignantes victimes d'agression sexuelle se rapportent à un crime qui touche en très grande majorité les femmes, les enfants et les personnes handicapées. J'ai eu l'occasion, dans l'arrêt *O'Connor*, de traiter du droit à l'égalité indépendamment de toute discrimination et le commentaire suivant s'applique ici *mutatis mutandis* (au par. 124):

Insister sur la révélation routinière des antécédents personnels des plaignantes peut refléter une partialité inhérente au système de justice pénale contre les personnes les plus vulnérables d'être victimisées à nouveau. De telles demandes reposent essentiellement sur l'affirmation que les antécédents et profils personnels et psychologiques des plaignantes victimes d'agression sexuelle sont pertinents pour déterminer si la plaignante a consenti aux relations sexuelles ou si l'accusé a cru sincèrement qu'elle y consentait.

Après une analyse plus détaillée de chacun de ces droits et de leur fondement constitutionnel dans la *Charte*, j'ai conclu ainsi dans l'arrêt *O'Connor* (au par. 132):

L'utilisation du pouvoir de l'État d'ordonner la production de dossiers privés sera justifiée dans une société libre et démocratique lorsque les critères suivants seront

production should only be granted when it is shown that the accused cannot obtain the information sought by any other reasonably available and effective alternative means. Second, production which infringes upon a right to privacy must be as limited as reasonably possible to fulfil the right to make full answer and defence. Third, arguments urging production must rest upon permissible chains of reasoning, rather than upon discriminatory assumptions and stereotypes. Finally, there must be a proportionality between the salutary effects of production on the accused's right to make full answer and defence as compared with the deleterious effects on the party whose private records are being produced.

appliqués. Premièrement, la production ne devrait être accordée que lorsqu'il est prouvé que l'accusé ne peut obtenir les renseignements demandés par d'autres moyens raisonnablement disponibles et efficaces. Deuxièmement, la production qui viole le droit à la protection de la vie privée doit être aussi limitée qu'il est raisonnablement possible pour respecter le droit de présenter une défense pleine et entière. Troisièmement, les arguments en faveur de la production doivent se fonder sur un raisonnement permis et non pas sur des suppositions et des stéréotypes discriminatoires. En dernier lieu, il doit y avoir proportionnalité entre les effets bénéfiques de la production sur le droit de l'accusé de présenter une défense pleine et entière et les effets préjudiciables pour la partie dont les dossiers privés sont divulgués.

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In summary, in addition to the public policy considerations which the appellants and interveners have underlined, and which I have recounted earlier, militating against the production of private records held by third parties, a balancing of the *Charter* rights of complainants and accuseds also militates against such production. As Lamer C.J. said in *Dagenais*, *supra*, at p. 877, in the context of a publication ban, the common law should not accord pre-eminence to the right to a fair trial, over other constitutionally entrenched rights:

En résumé, outre les considérations de politique judiciaire qu'ont fait valoir les appelants et les intervenants, et que j'ai reprises plus haut, qui militent contre la production des dossiers privés en la possession de tiers, la pondération des droits garantis par la *Charte* aux plaignantes et aux accusés milite également à l'encontre de cette production. Comme le notait le juge en chef Lamer dans l'arrêt *Dagenais*, précité, à la p. 877, dans le contexte d'une interdiction de publication, la common law ne devrait pas faire prévaloir le droit à un procès équitable au détriment d'autres droits consacrés par la Constitution:

The pre-*Charter* common law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those affected by the ban. In my view, the balance this rule strikes is inconsistent with the principles of the *Charter*, and in particular, the equal status given by the *Charter* to ss. 2(b) and 11(d). It would be inappropriate for the courts to continue to apply a common law rule that automatically favoured the rights protected by s. 11(d) over those protected by s. 2(b). A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.

La règle de common law qui, avant l'adoption de la *Charte*, régissait les ordonnances de non-publication, accordait une plus grande importance au droit à un procès équitable qu'à la liberté d'expression de ceux qui étaient touchés par l'interdiction. À mon sens, l'équilibre que cette règle fixe est incompatible avec les principes de la *Charte*, en particulier avec l'égalité de rang qu'accorde la *Charte* aux al. 2b) et 11d). Il ne conviendrait pas que les tribunaux continuent d'appliquer une règle de common law qui privilégie systématiquement les droits garantis à l'al. 11d) par rapport à ceux que garantit l'al. 2b). Il faut se garder d'adopter une conception hiérarchique qui donne préséance à certains droits au détriment d'autres droits, tant dans l'interprétation de la *Charte* que dans l'élaboration de la common law. Lorsque les droits de deux individus sont en conflit, comme cela peut se produire dans le cas d'une interdiction de publication, les principes de la *Charte* commandent un équilibre qui respecte pleinement l'importance des deux catégories de droits.

Similarly, as regards the production of private records held by third parties, a balance must be struck that places the *Charter* rights of complainants on an equal footing with those of accused persons.

VII. Procedure for Obtaining Production

The procedure for obtaining production of private records held by a third party is outlined in *O'Connor, supra*. Essentially, the first step for an accused who seeks production of such records is to obtain and serve on the third party a *subpoena duces tecum*. The form of the subpoena and the procedure for its issuance are described in Part XXII of the *Code*. When the subpoena is served, the Crown and the subject of the records referred to in the subpoena, as well as any other person with an interest in the confidentiality of the records, should be notified that the accused will ask the trial judge to order the production of the records.

At the trial, when the accused requests an order for production of the records, the judge should follow a two-stage approach. First, the accused must demonstrate that the information contained in the records is likely relevant either to an issue in the proceedings or to the competence to testify of the person who is the subject of the records. At this stage, the subject's privacy interest does not enter into consideration. At the same time, however, the information must be sought because of its relevance, rather than for illegitimate purposes.

It may be useful at this stage for the third party to prepare a list of the records in its possession (*R. v. Barbosa* (1994), 92 C.C.C. (3d) 131 (Ont. Ct. (Gen. Div.)), at p. 136). In an appropriate case, the trial judge may require such a list to be provided to the accused, the Crown and the court.

However, I wish to emphasize that, as with any other motion, an application for an order for production of private records held by a third party must be accompanied by affidavit evidence which establishes to the judge's satisfaction that the

De même, en ce qui a trait à la production de dossiers privés en la possession de tiers, faut-il atteindre un équilibre qui place les droits des plaignantes garantis par la *Charte* sur le même pied que ceux des accusés.

VII. Procédure visant à obtenir la production

La procédure à suivre pour obtenir la production de dossiers privés en la possession d'un tiers est exposée dans l'arrêt *O'Connor*, précité. Essentiellement, l'accusé qui cherche à obtenir la production de tels dossiers doit obtenir un *subpoena duces tecum* et le signifier au tiers. La Partie XXII du *Code* décrit la forme que prend le subpoena et la procédure relative à son émission. Après signification du subpoena, le ministère public et la personne faisant l'objet des dossiers mentionnés dans le subpoena, de même que toute autre personne ayant un intérêt dans la confidentialité des dossiers, doivent recevoir avis que l'accusé demandera au juge du procès d'ordonner la production des dossiers.

Lorsque, lors du procès, l'accusé demande une ordonnance de production des dossiers, le juge devrait suivre une démarche en deux étapes. Premièrement, l'accusé doit démontrer que les renseignements contenus dans les dossiers sont probablement pertinents soit quant à une question en litige dans l'instance soit quant à l'habilité à témoigner de la personne visée par les dossiers. À cette étape, le droit à la vie privée de cette personne n'entre pas en considération. Parallèlement toutefois, les renseignements doivent être recherchés pour leur pertinence plutôt que pour des fins illégitimes.

À ce stade, il peut être utile pour le tiers de préparer une liste des dossiers en sa possession (*R. c. Barbosa* (1994), 92 C.C.C. (3d) 131 (C. Ont. (Div. gén.)), à la p. 136). Le cas échéant, le juge du procès peut exiger qu'une telle liste soit fournie à l'accusé, au ministère public et au tribunal.

Toutefois, je tiens à souligner que, comme toute autre requête, une demande visant à obtenir une ordonnance de production de dossiers privés en la possession d'un tiers doit être accompagnée d'une preuve par affidavit établissant à la satisfaction du

information sought is likely to be relevant. The accused's demonstration that information is likely to be relevant must be based on evidence, not on speculative assertions or on discriminatory or stereotypical reasoning.

juge que les renseignements demandés sont susceptibles d'être pertinents. La démonstration par l'accusé que les renseignements sont susceptibles d'être pertinents doit se fonder sur la preuve et non sur des affirmations spéculatives ou sur un raisonnement discriminatoire ou stéréotypé.

90 If the court is satisfied that the information contained in the records is likely to be relevant, then the analysis proceeds to the balancing stage, which has two parts. The accused must first show that the salutary effects of ordering the documents produced to the court for inspection outweigh the deleterious effects of such production. If the judge decides that production to the court is warranted, he or she should so order. Then, after examining the records, the judge must balance and reconcile the conflicting constitutional rights discussed above to determine whether and to what extent production to the defence should be ordered. Only those parts of records that have a significant probative value to the issues at trial or the competence of the witness which is not substantially outweighed by prejudice to the administration of justice or to the witness' privacy and equality rights should be produced.

Si le tribunal est satisfait que les renseignements contenus dans les dossiers sont susceptibles d'être pertinents, l'analyse passe alors à l'étape de la pondération qui comporte deux volets. L'accusé doit d'abord établir que les effets bénéfiques d'ordonner la production des documents en cour pour inspection sont plus importants que les effets préjudiciables de la production. Si le juge décide que la production des documents en cour se justifie, il devrait l'ordonner. Alors, après avoir examiné les dossiers, le juge doit pondérer et concilier les droits constitutionnels en conflit, examinés précédemment, pour déterminer si et dans quelle mesure la production à la défense devrait être ordonnée. Seules devraient être produites les parties de dossiers ayant une valeur probante qui est importante quant aux points en litige ou quant à l'habilité à témoigner et qui n'est pas substantiellement surpassée par le préjudice à l'administration de la justice ou l'atteinte aux droits du témoin à la protection de sa vie privée et à l'égalité.

91 Of course, even if production is ordered, it must still be determined whether the produced records are admissible. Questions of voluntariness and hearsay, for example, may arise.

De toute évidence, même si la production est ordonnée, encore faut-il déterminer si les dossiers produits sont admissibles. Des questions relatives au caractère volontaire ou au oui-dire peuvent, par exemple, se poser.

92 It is apparent from the procedure I have described that the court's inquiry into the relevance of the information and its balancing of the competing interests for and against production should be made at the time of the trial. Although the respondent has argued forcefully in favour of a pre-trial determination of these issues, I have not been persuaded by his arguments.

Il ressort de la procédure décrite ci-haut que l'examen auquel se livre le tribunal quant à la pertinence des renseignements et la pondération des intérêts favorables et défavorables à la production devraient être faits au moment du procès. Bien que l'intimé ait plaidé fortement en faveur d'une détermination préliminaire sur ces questions, ses arguments ne m'ont pas convaincue.

93 Although a pre-trial order for the production of documents held by a third party may be obtained in civil matters, such an order is alien to criminal proceedings. In criminal matters, witnesses are called at trial, whether by way of *subpoena duces*

Bien qu'il soit possible, en matière civile, d'obtenir une ordonnance préliminaire de production de documents en la possession d'un tiers, une telle ordonnance est étrangère à la procédure criminelle. En matière criminelle en effet, les témoins sont

tecum or otherwise. Only at that time can a witness be ordered to give evidence. In this respect, Professor Lee Stuesser, in "Reconciling Disclosure and Privilege" (1994), 30 C.R. (4th) 67, remarks at p. 75:

Under the rules of civil procedure a court may order production of documents from non-parties, but nowhere in the *Criminal Code* do you find comparable authority for pre-trial disclosure by witnesses in a criminal case. Nor does *Stinchcombe* provide any such authority.

Before the trial, a prospective witness is not obliged to cooperate with either the Crown or the defence, and a court should not compel a witness to provide the defence with a preview of his or her evidence. The respondent has advanced no persuasive argument why prospective defence witnesses in sexual assault cases should be treated differently.

The respondent points out that, should the witness be uncooperative, the defence will have little means to verify, before the trial begins, whether the private records in question are relevant to its case. However, the situation would be no different in any other trial in which a witness has refused to cooperate with the defence. Moreover, regardless of the cooperation of the witness before the trial, the evidence in any trial is only ascertained once the witness is actually in the witness box.

Furthermore, one must not lose sight of the fact that, in most cases, private records of the kind here in question will be irrelevant and inadmissible hearsay evidence. As I have discussed above, notes of statements made by complainants in a therapeutic context are not necessarily contemporaneous with the counselling session, have not been ratified by the complainant, and are not intended to be an accurate record of what the complainant said. Moreover, they touch on a multitude of topics irrelevant to the issues in the trial or to the competence of the complainant to testify. Because of their unreliability and irrelevance, documents of this kind will be inadmissible in most cases.

assignés au procès, que ce soit par voie de *subpoena duces tecum* ou autrement. Ce n'est qu'à ce moment qu'il peut leur être ordonné de témoigner. À cet égard, le professeur Lee Stuesser, fait remarquer ceci dans «Reconciling Disclosure and Privilege» (1994), 30 C.R. (4th) 67, à la p. 75:

[TRADUCTION] Suivant les règles de procédure civile, le tribunal peut ordonner la production de documents par des non-parties, mais nulle part le *Code criminel* ne confère-t-il un pouvoir comparable d'ordonner aux témoins, dans une affaire criminelle, de divulguer avant procès. L'arrêt *Stinchcombe* ne donne pas ce genre de pouvoir non plus.

Avant le procès, un témoin éventuel n'est pas obligé de collaborer avec le ministère public ou la défense, et le tribunal ne devrait pas contraindre un témoin à donner à la défense un aperçu de sa preuve. L'intimé n'a pas fait valoir d'argument convaincant justifiant d'accorder un traitement différent aux témoins éventuels de la défense en matière d'agression sexuelle.

L'intimé souligne que si le témoin n'est pas coopératif, la défense aura peu de moyens de vérifier, avant le début du procès, si les dossiers privés en question sont pertinents à sa cause. Cependant, la situation ne serait pas différente dans tout autre procès où un témoin refuse de collaborer avec la défense. De plus, peu importe le degré de collaboration du témoin avant le procès, la preuve dans tout procès n'est établie qu'une fois le témoin à la barre.

Par ailleurs, il ne faut pas perdre de vue que, dans la plupart des cas, de tels dossiers privés ne seront pas pertinents et constitueront une preuve par ouï-dire inadmissible. Comme nous l'avons vu précédemment, les notes relatives aux déclarations d'une plaignante prises dans un contexte thérapeutique ne sont pas nécessairement contemporaines à la consultation, n'ont pas été approuvées par elle et ne se veulent pas un compte rendu exact de ses propos. Au surplus, elles touchent une multitude de sujets non pertinents quant aux questions en litige au procès ou à l'habileté de la plaignante à témoigner. Étant donné leur manque de fiabilité et leur non-pertinence, ces documents seront dans la plupart des cas inadmissibles.

97 In addition, there are sound reasons for not introducing, in criminal matters, the concept of pre-trial discovery of records held by third parties. As well as inconveniencing witnesses, who would have to appear in court on more than one occasion, the procedure advocated by the respondent would invite fishing expeditions and entail unnecessary delays. Moreover, the trial judge would not be in a position, before the beginning of the trial, to determine the relevance, much less the admissibility, of the records sought, or to balance effectively the constitutional rights affected by an order for the production of the records (see *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, and *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3).

98 Consequently, I am not persuaded that counselling records held by third parties are of such a nature as to warrant a pre-trial discovery procedure not available in any other criminal proceeding. The proper time for the relevance of the documents to be ascertained and for the competing rights to be balanced is at trial upon an application by the accused for an order for production of the records.

99 It is against this background that we must now decide whether the trial judge properly disposed of the motions before him.

VIII. Application to the Case

100 In all fairness, it must be said at the outset that neither the trial judge nor the parties had the benefit of this Court's decision in *O'Connor*, *supra*, in dealing with the motions. However, the matter must be determined in accordance with *O'Connor*.

101 The record indicates that the respondent initiated the procedure by *subpoena duces tecum* coupled with a notice of motion requesting the judge to order the appellant counselling institutions to produce to the defence, before the scheduled trial date, all records relating to the appellant L.L.A. Although the motion came before a judge other than the trial judge, it was ultimately dealt with by Loukidelis J., the trial judge, as it ought to be. However, the trial judge ought not to have enter-

En outre, il existe de solides raisons de ne pas introduire, en matière criminelle, le concept de communication préalable de dossiers en la possession de tiers. En plus d'incommoder les témoins, qui devraient comparaître plus d'une fois en cour, la procédure défendue par l'intimé encouragerait les parties de pêche et occasionnerait des délais inutiles. Au reste, le juge du procès ne serait pas en mesure, avant le début de l'instance, de déterminer la pertinence, encore moins l'admissibilité, des dossiers demandés, ou de pondérer efficacement les droits constitutionnels touchés par une ordonnance de production des dossiers (voir *R. c. S. (R.J.)*, [1995] 1 R.C.S. 451, et *British Columbia Securities Commission c. Branch*, [1995] 2 R.C.S. 3).

En conséquence, je ne suis pas convaincue que les dossiers de consultation en la possession de tiers soient de telle nature qu'ils justifieraient une communication préalable qui n'existe dans aucune autre procédure criminelle. C'est au procès qu'il convient d'établir la pertinence des documents et de soupeser les droits en conflit, sur requête de l'accusé en vue d'obtenir une ordonnance de production des documents.

C'est dans ce contexte qu'il nous faut maintenant décider si le juge du procès a valablement disposé des requêtes dont il était saisi.

VIII. Application aux faits de la cause

En toute justice, il faut dire au départ que ni le juge du procès ni les parties n'ont eu l'avantage de prendre connaissance de la décision de notre Cour dans *O'Connor*, précité. La question doit, toutefois, se décider conformément à cet arrêt.

Selon le dossier, l'intimé a initié la procédure par voie de *subpoena duces tecum* accompagné d'un avis de requête demandant au juge d'ordonner aux établissements de consultation appelants de produire à la défense, avant la date prévue pour le procès, tous les dossiers relatifs à l'appelante L.L.A. Bien que la requête ait été présentée à un juge autre que le juge du procès, elle a été finalement traitée, comme il se devait, par le juge Loukidelis, le juge du procès. Toutefois, ce dernier

tained this motion at the pre-trial stage. As discussed previously, it is only at the trial that the relevance of such records can be assessed. The procedure followed by the respondent in the present case was consequently not appropriate.

Moreover, notice of the application for production of the private records was not given to all those with an interest in the confidentiality of the records. This encompasses not only the counselling institutions and the Crown, as was done, but it includes also the subject of the records, i.e., the sexual assault complainant L.L.A., who was not notified. The notification of all interested parties is not merely elective; failure to make the required notifications is fatal to an application for production.

As well, the trial judge did not apply the correct evidentiary threshold on the issue of relevance, i.e., likely relevance either to an issue in the proceedings or to the competence of the witness to testify (see *O'Connor*, *supra*). The Crown's application to quash the subpoenas was dismissed on the ground that "there may be information at hand that is relevant to the issue" without more. There is nothing in the record to indicate that the trial judge informed himself as to the likely relevance of these records either to an issue in the proceedings or to the competence of the witness to testify.

Moreover, as set out in *O'Connor*, in determining the likely relevance of the private records, the trial judge cannot rely upon illegitimate purposes or discriminatory and stereotypical reasoning. For instance, an application based on credibility "at large", based on unsupported assertions of "recent complaint" or of "allegations of sexual abuse by other people", or based on the mere fact that a witness has a past psychiatric history or that he or she received counselling after a sexual assault are all insufficient grounds to meet the threshold of likely relevance. In the case at hand, the respondent argued that "the records have to be reviewed to determine if there is any information in there which would be relevant to the trial, credibility of the complainant, [and] how the information was

n'aurait pas dû entendre cette requête au stade préliminaire du procès. Comme nous l'avons vu, ce n'est qu'au procès que peut être établie la pertinence de ces dossiers. La procédure qu'a suivie l'intimé en l'espèce n'était donc pas appropriée.

De plus, l'avis de demande de production des dossiers privés n'a pas été donné à toutes les personnes intéressées à la confidentialité des dossiers. Celles-ci comprennent en effet non seulement les établissements de consultation et le ministère public, qui ont été avisés, mais aussi la personne faisant l'objet des dossiers, c.-à-d. L.L.A., la plaignante victime de l'agression sexuelle, laquelle n'a pas été avisée. Or, la notification de toutes les parties intéressées n'est pas simplement facultative; le défaut de donner l'avis requis est fatal à une requête pour production.

Par ailleurs, sur la question de la pertinence, le juge du procès n'a pas appliqué le test préliminaire approprié, savoir la pertinence vraisemblable soit quant à une question en litige soit quant à l'habilité à témoigner (voir l'arrêt *O'Connor*, précité). La requête du ministère public en cassation des subpoenae a été rejetée au motif qu'[TRADUCTION] «il peut y avoir des renseignements pertinents quant à la question en litige», sans plus. Or, rien au dossier n'indique que le juge du procès se soit enquis de la pertinence vraisemblable de ces dossiers soit quant à une question en litige soit quant à l'habilité à témoigner.

Qui plus est, comme l'arrêt *O'Connor* le souligne, le juge du procès ne peut, pour décider de la pertinence vraisemblable de dossiers privés, invoquer des fins illégitimes ou un raisonnement discriminatoire ou stéréotypé. Ainsi, une requête fondée sur la crédibilité «en général», sur des déclarations non étayées de «plainte récente» ou des «allégations d'abus sexuels commis par d'autres personnes», ou encore sur le simple fait qu'un témoin ait des antécédents psychiatriques ou qu'il ou elle a reçu des conseils suite à une agression sexuelle sont tous des motifs insuffisants pour rencontrer le test préliminaire de la pertinence vraisemblable. Dans le cas qui nous occupe, l'intimé a prétendu que [TRADUCTION] «les dossiers doivent être examinés afin de déterminer s'ils contiennent des ren-

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extracted prior to them going to the police". These grounds do not meet the test for an application for production of private records held by third parties (see *O'Connor*). This should have been amply sufficient either to dismiss the respondent's application for production or to allow the Crown's application to quash the *subpoena duces tecum*.

seignements susceptibles de se rapporter au procès, à la crédibilité de la plaignante [et] la façon dont les renseignements ont été obtenus avant qu'ils ne parviennent à la police». Or, ces motifs ne satisfont pas au test applicable à la requête pour production de dossiers privés en la possession de tiers (voir l'arrêt *O'Connor*). Cela aurait dû amplement suffire soit à rejeter la requête de l'intimé pour production soit à accueillir la requête du ministère public en cassation des *subpoenae duces tecum*.

105 Having decided to order production, however, the trial judge, without even reviewing the records to ensure that only relevant information would be produced, went on to discuss the appellants' arguments as to privileged communications. He held that the confidentiality of the records had to give way to the right of the accused and, consequently, that the records in question were not privileged and had to be produced to the defence. There was no discussion of, on the one side, the complainant's *Charter* rights to privacy and to equality without discrimination and, on the other, the accused's *Charter* right to make full answer and defence. This was also in error.

Ayant décidé d'ordonner la production, toutefois, le juge du procès, sans même examiner les dossiers pour s'assurer que seuls les renseignements pertinents seraient produits, a ensuite disposé des arguments des appelants en ce qui a trait aux communications privilégiées. Il a conclu que la confidentialité des dossiers devait céder le pas au droit de l'accusé et qu'en conséquence, les dossiers en cause n'étaient pas privilégiés et devaient être produits à la défense. Il n'y a pas eu d'analyse des droits de la plaignante à la vie privée et à l'égalité indépendamment de toute discrimination garantis par la *Charte*, d'une part, et du droit de l'accusé, également garanti par la *Charte*, de présenter une défense pleine et entière, d'autre part. C'était là aussi une erreur.

106 Given that the respondent has not established the first element of the test for production, namely the likely relevance of the private records held by the appellant third parties either to the issues at trial or to the competence of the witness, and that his request constituted nothing more than a fishing expedition, the trial judge's order directing the production of those records by the appellants must be quashed.

Étant donné que l'intimé n'a pas établi le premier élément du test applicable à la production, soit la pertinence vraisemblable des dossiers privés en la possession des tiers appelants soit quant aux questions en litige dans l'instance soit quant à l'habilité à témoigner, et que sa requête ne constituait rien de plus qu'une partie de pêche, l'ordonnance du juge du procès enjoignant aux appelants de produire ces documents doit être cassée.

IX. Disposition

IX. Dispositif

107 In the result, I would allow the appeal, quash the order of the trial judge for the production of the private records relating to the appellant L.L.A. and held by the other appellants and remit the matter to the trial judge for the trial to continue.

En définitive, j'accueillerais le pourvoi, j'infirmes la décision du juge du procès d'ordonner la production des dossiers privés relatifs à l'appelante L.L.A. en la possession des autres appelants, et je renverrais l'affaire au juge du procès pour la poursuite de l'instance.

Appeal allowed.

Solicitor for the appellants: Diane Oleskiw, Toronto.

Solicitors for the respondent: Ruby & Edwardh, Toronto.

Solicitor for the intervener Her Majesty the Queen: The Attorney General for Ontario, Toronto.

Solicitor for the intervener the Attorney General of Canada: The Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Manitoba: The Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Canadian Foundation for Children, Youth and the Law: The Canadian Foundation for Children, Youth and the Law, Toronto.

Solicitors for the intervener the Aboriginal Women's Council: Buchan, Derrick & Ring, Halifax.

Solicitor for the interveners the Canadian Association of Sexual Assault Centres, DAWN Ontario: DisAbled Women's Network Ontario and Women's Legal Education and Action Fund: The Women's Legal Education and Action Fund, Toronto.

Solicitors for the intervener the Criminal Lawyers Association: Gold & Fuerst, Toronto.

Pourvoi accueilli.

Procureur des appelants: Diane Oleskiw, Toronto.

Procureurs de l'intimé: Ruby & Edwardh, Toronto.

Procureur de l'intervenante Sa Majesté la Reine: Le procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Canada: Le procureur général du Canada, Ottawa.

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