Court File No.: CV-13-1 0280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

B E T W E E N:

DBDC SPADINA LTD.,
and THOSE CORPORATIONS LISTED ON SCHEDULE "A" HERETO

Applicants

- and -

NORMA WALTON, RONAULD WALTON, THE ROSE & THISTLE GROUP LTD. and EGLINTON CASTLE INC.

Respondents

- and -

THOSE CORPORATIONS LISTED IN SCHEDULE "B" HERETO, TO BE BOUND BY THE RESULT

Factum of Schonfeld Inc.

(Motions For Approval of Fee Allocation Methodology and Other Relief Returnable May 3, 2016)

Table of Contents

I. OVERVIEW

1. This is the factum of Schonfeld Inc., in its capacity as manager (the "**Manager**") of (i) certain companies listed in Schedule "B" to the Order of Justice Newbould dated November 5, 2013 (the "**November 5 Order**") (the "**Schedule "B" Companies**"), together with the real estate properties owned by the Schedule "B" Companies (the "**Schedule "B" Properties**"), as amended by Order of Justice Newbould dated January 16, 2014, and (ii) the properties listed at Schedule "C" to the Order of Justice Brown dated August 12, 2014 (the "**Schedule "C" Properties**", together with the Schedule "B" Properties, the "**Properties**").

2. The Manager has served two separate motions, both returnable May 3, 2016. The Manager's first motion (the "**Fee Allocation Motion**") seeks approval of a methodology for the allocation of fees incurred by the Manager and its counsel, Goodmans LLP ("**Goodmans**"), to the various Schedule "B" Companies and Schedule "C" Properties for the period from December 1, 2014 to January 1, 2016 (the "**Fee Allocation Methodology**"). In general terms, the Fee Allocation Methodology divides the time spent by the Manager and its counsel (and the related costs) based on the docket descriptions that show what work was done. Dockets that do not relate to a specific property are divided evenly, on a monthly basis, among the Properties on which the Manager or its counsel spent time during the month. With one exception, which is described below, the Manager's Fee Allocation Methodology is unopposed.

3. The Manager also seeks, among other things, an Order requiring the Respondents to disclose how they have been able to retain Cohen, Sabsay LLP ("**Cohen Sabsay**"). The Respondents have repeatedly represented to the Court that they are unable to fund their legal and living expenses without access to funds from the Schedule "C" Companies, despite the fact that

they do not claim any entitlement to these funds. Based on these representations, the Respondents received in excess of $400,000. Most recently, Mr. Walton swore that Cohen Sabsay was owed $40,000 that the Respondents could not pay. When funding for this payment was denied, Cohen Sabsay advised it would no longer represent the Respondents. Yet Cohen Sabsay was retained again in January 2016.

4. The Respondents have refused to explain how they have managed to fund Cohen Sabsay's work. The Manager respectfully submits that an explanation is required – particularly when the Respondents have failed to account for millions of dollars diverted from the Schedule "B" Companies. The Respondents have refused to provide the requested transparency and assert that their financial dealings with Cohen Sabsay are protected by solicitor-client privilege. But if privilege applies at all (which is not at all clear) that privilege was waived, repeatedly and without any reservation of rights, when the Respondents disclosed what they owed various law firms in an attempt to obtain funding. Having waived privilege and reaped significant benefits from that waiver, the Respondents cannot now re-assert privilege over the same subject. It follows that the Manager is entitled to the information sought.

5. In addition, the Manager motion seeks the following unopposed relief:

(a) requiring the Dupont Mortgagees (as defined below) to provide forthwith a copy of the GST/HST indemnity for self-assessment by the purchaser of the Property at 1485 Dupont Street (the "**Dupont Property**");

(b) approving the Manager's disallowance of costs claims made by certain lien claimants in connection with the property located at 140 Queen's Plate Drive (the "**Queen's Plate Property**") and approving the settlement reached between the

Manager and Peel Education & Tutorial Services Limited ("**Peel Education**") with respect to Norther Dancer Lands Ltd. ("**Northern Dancer**"); and

(c) authorizing the Manager to make an interim distribution of proceeds (the "**Interim Distribution**") as set out in Appendix "Q" to 42nd Report of the Manager dated April 21, 2016 (the "**42nd Report**") (the "**Interim Distribution Table**") in respect of certain Schedule "C" Companies for which a claims process (each, a "**Claims Process**") has been conducted pursuant to the Order of Justice Newbould dated September 8, 2014 (the "**September 8 Order**").

II. FACTS

A. Fee Allocation

6. A methodology for the allocation of fees incurred by the Manager and its counsel from the Manager's appointment on November 5, 2013 to November 30, 2014 (the "**First Period**") was approved by Order dated April 20, 2015 (the "**First Methodology**"). The 41st Report of the Manager dated March 29, 2016 (the "**41st Report**") relates to the allocation of fees relating to the period from December 1, 2014 to January 1, 2016 (the "**Second Period**").

> 41st Report of the Manager dated March 29, 2016 (the "**41st Report**") at para. 4, Manager's Motion Record ("**41 MR**"), Tab 2, p. 11

7. There are important differences in the Manager's mandate between the First Period and the Second Period. Among other things:

(a) the volume of work required on the part of the Manager and its counsel decreased substantially during the Second Period relative to the First period. Specifically, the total fees of approximately $4.2 million were allocated pursuant to the First Methodology. The total fees during the Second Period totalled $1,373,205.66;

(b) the number of Properties that the Manager was managing and marketing decreased substantially as Properties were either sold or turned over to mortgagees for enforcement. This decreased the number of issues and Properties dealt with on any given day; and

(c) the litigation between the Applicants and the Respondents was significantly less active during the Second Period relative to the First Period, resulting in the decrease (although not the elimination) of dockets that did not relate to any specific property.

41st Report at para. 6, 41 MR, Tab 2, p. 12

8. Furthermore, in response to the First Methodology, two groups of affected stakeholders asserted that the Manager should have attempted to allocate its time based on the docket descriptions entered by the various professionals that worked on the file. Although this complaint was found to be without merit, the Manager considered the concerns articulated in response to the First Fee Allocation Methodology in formulating the Second Allocation Methodology.

41st Report at para. 7, 41 MR, Tab 2, p. 12

9. In light of all of the foregoing, the Manager and its counsel, Goodmans, each conducted a review of the docket descriptions entered in respect of fees incurred during the Second Period. Based on this review, the Manager determined that it was feasible to allocate a significant portion of the time spent based on docket descriptions. Based on this allocation, a total of 53% of the Manager's fees and 71% of Goodmans' fees were allocated to specific Properties. Overall, a total of 63% of fees were allocated to specific Properties. This allocation was performed in accordance with the following principles:

(a) As a general rule, where dockets referenced multiple Properties, the relevant time was divided evenly among the Properties unless either the docket itself or contemporaneous notes or correspondence indicated that time should be divided unevenly among the Properties.

(b) Time spent analyzing the numerous construction liens registered against the Properties was divided either based on the Property that the lien was registered against (if only one lien is referenced in the relevant docket) or divided equally among all construction liens analyzed (in respect of dockets referencing more than one construction lien).

(c) Where a docket did not relate to any particular Property, the relevant docket was categorized as "general" and divided evenly, on a monthly basis, between the Properties on which the Manager had incurred fees during the month.

41st Report at para. 8, 41 MR, Tab 2, p. 13

10. The allocation described above is summarized in Appendix "A" to the 41st Report.

Schedule "B" Companies and Schedule "C" Properties Fee Allocation and Funding Repayment Schedule from December 2, 2014 to December 31, 2015, being Appendix "A" to the 41st Report, 41 MR, Tab 2.A, p. 18

(i) Dupont Property and Cityview Property

11. As noted above, two groups of stakeholders opposed approval of the Manager's fees for the First Period and the First Methodology. These groups are:

(a) Certain individuals and entities (the "**Dupont Mortgagees**") with an interest in a first mortgage registered against the Dupont Property; and,

(b) Certain companies that have registered liens pursuant to the *Construction Lien Act*[1] against the Schedule "B" Property at 1 and 9-11 Cityview (the "**Cityview Lien Claimants**").

41st Report at para. 10, 41 MR, Tab 2, pp. 13-14

12. The Manager spent considerable time attempting to address the concerns raised by the Dupont Mortgagees and the Cityview Lien Claimants, including providing written answers to questions posed by both the Dupont Mortgagees and the Cityview Lien Claimants. The Cityview Lien Claimants, in particular, asked a total of 78 detailed questions relating to the First Methodology posed by the Manager and cross-examined both the Manager and its counsel on the fees addressed in the Supplemental Report. The Cityview Lien Claimants also sought and received an adjournment on the basis that they required certain e-mails to respond to the Manager's motion for approval of its fees. The Manager was ordered to provide these e-mails, which it did after reviewing them for privilege.

41st Report at para. 12, 41 MR, Tab 2, p. 14

13. In addition to the foregoing, the Dupont Mortgagees brought an unsuccessful challenge to the priority of the Manager's Charge and the Manager's Borrowing Charge (as both terms are defined in the November 5 Order). The Manager spent considerable time researching and responding to this motion and the subsequent (unsuccessful) appeal of it. The Manager was awarded costs of $2,500 with respect to the motion and $20,000 with respect to the appeal. These costs have been paid. None of these e-mails were used at the hearing of the Motion.

41st Report at para. 13, 41 MR, Tab 2, p. 14

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1 R.S.O. 1990, c. C.30 [*Construction Lien Act*]

14. The specific fees allocated to Cityview largely relate to the unsuccessful attempt by the Cityview Lien Claimants to oppose approval of the Manager's fees and the First Methodology. The fees also relate to the Manager's preparation of tax returns and related accounting work, which yielded returns of $178,726.50.

41st Report at para. 15, 41 MR, Tab 2, p. 14

15. The application of the Second Methodology resulted in the specific attribution of Goodmans' fees totalling $30,997.08 and Manager's fees totalling $20,341.84 in addition to a non-specific allocation of $16,152.71 to the Cityview Property.

41st Report at para. 14, 41 MR, Tab 2, p. 14

16. Similarly, the application of the Second Methodology resulted in the specific attribution of Goodmans' fees totalling $65,066.83 and Manager fees totalling $8,769.43 in addition to a non-specific allocation of $14,619.67 to the Dupont Property. These fees relate primarily to the Dupont Mortgagees' challenge to the priority of the Manager's charge (including the appeal thereof), the Manager's fees (including fees related to tax and accounting work) and the First Methodology. The fees also relate to the preparation of tax returns and related accounting work, which are expected to yield tax returns of approximately $110,000.

41st Report at para. 16, 41 MR, Tab 2, pp. 14-15

17. The time spent litigating against the Dupont Mortgagees and Cityview Lien Claimants resulted from decisions made by these stakeholders. These fees relate to the Dupont Property and the Cityview Property. No other Schedule "B" Properties were involved in the relevant motions.

41st Report at para. 17, 41 MR, Tab 2, p. 15

18. Each of the Dupont Mortgagees and the Cityview Lien Claimants rank behind the Manager's charge. Accordingly, allocating all of the costs spent responding to the Dupont Mortgagees and the Cityview Lien Claimants to the Dupont Property and the Cityview Property would effectively force the Cityview Lien Claimants and Dupont Mortgagees to bear all of the costs that the Manager incurred in responding to their objections. The Cityview Lien Claimants oppose such a result on the basis that no costs were sought or awarded when the motion was heard.

41st Report at para. 18, 41 MR, Tab 2, p. 15

19. The Applicants assert that all of the fees incurred by the Manager in responding to the Cityview Lien Claimants and the Dupont Mortgagees should be allocated to Cityview and Dupont and, moreover, that it should have been obvious to the Cityview Lien Claimants and the Dupont Mortgagees that their properties would bear these fees. They submit that it is not fair and reasonable to allocate any of these fees to other properties and thereby cause creditors of other properties to pay for the actions of the Cityview Lien Claimants and the Dupont Mortgagees.

Factum of the Applicants dated April 25, 2016 at paras. 4, 16, 18 and 19.

20. Having considered the competing positions taken by the Applicants and the Cityview Lien Claimants, the Manager is of the view that the dispute between them should be resolved by the Court.

(ii) Reallocation of Professional Fees

21. Certain Companies do not have sufficient capital to pay professional fees allocated to them in the First and Second Periods. The Manager recommends reallocating those fees, which total $1,413,207.64, to Liberty Village Properties Ltd. ("**Liberty Village**"). The sale of the property owned by Liberty Village generated a cash surplus of almost $4 million, and all creditors have now been paid.

41st Report at para. 22, 41 MR, Tab 2, p. 16

22. In accordance with the November 5 Order, Liberty Village paid approximately $2.5 million in professional fees in 2014 on behalf of Companies that then lacked sufficient capital to pay professional fees allocated to them. The Manager recommends reimbursing Liberty Village for the difference between the amount previously paid by Liberty Village (approximately $2.5 million) and the professional fees to be reallocated to Liberty Village (approximately $1.413 million) from fees reimbursed to the Manager from various Companies in 2015, which are currently being held by the Manager. The amounts proposed to be reallocated to Liberty Village are set out in the chart attached as Appendix "B" to the 41st Report.

41st Report at para. 23, 41 MR, Tab 2, p. 16

Professional Fee Allocation Analysis, being Appendix "B" to the 41st Report, Tab 2.B, p. 22

23. The proposed re-allocation is unopposed.

B. Disclosure Regarding Payment of the Respondents' Legal Fees

(i) The Respondents' Legal Fees have been paid largely by Schedule "C" Properties

24. The Manager has served a motion to compel disclosure from the Waltons with respect to the quantum and source of funds paid to Cohen Sabsay. The Waltons have repeatedly represented that they are unable to pay their legal counsel, including substantial amounts claimed to have been owing to Cohen Sabsay. Based on these representations, they have received a total of $406,150 from the sale and refinancing of certain Schedule "C" Properties in order to pay litigation and living expenses, thereby reducing the funds available to other stakeholders.

25. Despite their alleged inability to pay for counsel, on January 25, 2016, Ms. Walton advised that the Respondents had again retained Cohen Sabsay to respond to the Applicants' application now returnable June 3, 2016. Cohen Sabsay has been active since being retained: it served a motion seeking Justice Newbould's recusal, had two lawyers attend a full day of argument relating to that motion (which was denied), served a "counter-application" seeking various relief and attended various 9:30 chambers attendances.

42nd Report at para. 16, 42 MR, Tab 2, pp. 18-19

26. The Waltons have no known source of funds sufficient to pay their legal costs and have failed to account for money invested by Dr. Bernstein. The Manager is, in its capacity as Inspector, empowered to investigate how these funds were used. Given the Waltons' oft-repeated assertion that they have no source of funds, which is described below, it is appropriate to investigate the source of funds used by the Waltons to pay counsel.

(ii) The Respondents' representations and funds paid as a result of them

27. Shortly after these proceedings were commenced, the Respondents (other than Norma Walton) retained Cohen Sabsay. As described below, Cohen Sabsay has been paid primarily from Schedule "C" Properties in accordance with orders of this Court.

42nd Report at para. 9, 42 MR, Tab 2, p. 16

28. In her affidavit dated March 31, 2014 Ms. Walton deposed that she owed Fasken Martineau DuMoulin LLP ("**Fasken**") $365,690.48 and owed Schible Law ("**Schible**") $285,256.12. Ms. Walton further deposed that she needed access to her properties and the proceeds from the sale of her properties to pay those debts and "to have any ability to pay counsel moving forward" as she could not in good faith continue to keep her lawyers employed until she had the ability to pay them. It is not clear whether, when or how these debts were paid. Neither Fasken nor Schible has sought to recover any of the outstanding fees in these proceedings.

Affidavit of Norma Walton dated March 31, 2014 at para. 58, Motion Record of Norma Walton dated March 31, 2014, Tab 2, p. 58

29. On the basis of further representations that she lacked the funds to pay for lawyers and consultants, by Reasons for Decision dated May 20, 2014, which are attached as Appendix "E" to the 42nd Report, this court approved Ms. Walton's proposal that Cohen Sabsay be paid $67,800 from the proceeds of the proposed sale of a Schedule "C" Property at 66 Gerrard Street (the "**Gerrard Property**"). Ultimately, the proposed sale did not close and the Waltons refinanced the Gerrard Property. As approved by order of this Court dated June 16, 2014, a total of $288,150 was paid from the refinancing of the Gerrard Property to fund the Respondents'

legal and professional fees and living expenses. These payments substantially reduced the amount available for other stakeholders.

> 42nd Report at para. 10, 42 MR, Tab 2, p. 16
>
> Reasons for Decision dated May 20, 2014, being Appendix "E" to the 42nd Report, 42 MR, Tab 2.E, pp. 188-217

30. On February 24, 2015, Mr. Walton swore an affidavit representing that Cohen Sabsay was owed $42,695 and required substantial further funds to complete a mediation of this matter. Mr. Walton represented that his wife earned approximately $6,100 per month and he earned no income. In her affidavit sworn February 18, 2015, Ms. Walton swore that the Waltons had no ability to pay their legal fees or living expenses without access to funds from either the Schedule "B" Companies or Schedule "C" Properties.

> 42nd Report at para. 15, 42 MR, Tab 2, p. 18
>
> Affidavit of Norma Walton dated February 18, 2015, being Appendix "H" to the 42nd Report, 42 MR, Tab 2.H, pp. 240-248

31. On the basis of these representations, this Court ordered further payments to the Waltons by Order of Justice Newbould dated March 5, 2015 (the "**March 5 Order**"). The March 5 Order required the Manager to pay $6,000 per month to the Waltons for living expenses until the end of the mediation or for six months, whichever time period was shorter, as well as $80,000 for fees and disbursements incurred by Lax O'Sullivan Lisus Gottlieb LLP, which was then acting for Ms. Walton.

> 42nd Report at para. 11, 42 MR, Tab 2, p. 17
>
> March 5 Order, being Appendix "F" to the 42nd Report, 42 MR, Tab 2.F, pp. 218-230

32. Justice Newbould declined to order that any amount be paid to Cohen Sabsay for representation of Mr. Walton. In response, Cohen Sabsay advised that it would no longer act for the Respondents.

42nd Report at para. 12, 42 MR, Tab 2, p. 17

33. On June 24, 2015, Ms. Walton swore again that the Respondents had no funds or ability to pay legal fees and asked this Court to Order the Manager to supply these funds.

Affidavit of Norma Walton dated June 24, 2015, being Appendix "I" to the 42nd Report, 42 MR, Tab 2.I, pp. 249-250

34. By Order dated June 26, 2015, which is attached as Appendix "G" to the 42nd Report, Justice Newbould ordered that $20,000 be paid to Corbett Law Professional Corporation for legal fees and disbursements relating to representing the Respondents on the motions then scheduled to be argued in September 2015.

42nd Report at para. 13, 42 MR, Tab 2, p. 17

Order dated June 26, 2015, being Appendix "G" to the 42nd Report, 42 MR, Tab 2.G, pp. 231-239

35. In all, the Waltons have received funding totalling $406,150 to fund their legal, professional and living expenses from the proceeds and refinancing of the Schedule "C" Properties. Each of these amounts were authorized based on representations that, without funding, the Waltons would be unable to fund the relevant expenses. The payments to the Waltons are summarized below:

Order Date	Payment
June 16, 2014[2]	$67,800 to Cohen Sabsay
	$101,700 to Froese Forensics
	$101,700 to BTY Group
	$16,950 to Intrepid QS
March 5, 2015[3]	$80,000 to Lax O'Sullivan Lisus Gottlieb
	$18,000 for living expenses
June 26, 2015[4]	$20,000 to Corbett Law Professional Corporation

42nd Report at para. 14, 42 MR, Tab 2, pp. 17-18

C. Unopposed Matters

(i) Disclosure by the Dupont Mortgagees

36. The property located at 1485 Dupont Street, Toronto (the "**Dupont Property**") was formerly owned by Dupont Developments Ltd. ("**Dupont Developments**") and has now been sold by Millwood Management Limited in its capacity as agent for the mortgagees of the Dupont Property, being Florence Leaseholds Limited, Beatrice Leaseholds Limited and Ada Leaseholds Limited (collectively, the "**Dupont Mortgagees**").

42nd Report at para. 21, 42 MR, Tab 2, p. 20

37. As previously described, the Manager is in the process of filing tax returns for each of the Schedule "B" Properties. The Manager has filed tax returns for Dupont Developments and has received a tax refund of $60,112.23. In connection with this tax refund, the CRA has requested

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2 These amounts were paid from the refinancing of the Gerrard Property. The funds were paid by the mortgagee directly to the Waltons.

3 These amounts were paid from the proceeds of the sale of 24 Cecil Street, Toronto.

4 *Ibid.*

certain documents in the possession of the Dupont Mortgagees, but the Dupont Mortgagees have refused to cooperate. Similar documentation has been requested of, and received from, several other mortgagees who sold Schedule "B" Properties pursuant to enforcement proceedings.

42nd Report at para. 22, 42 MR, Tab 2, p. 20

(ii) Settlement of the Peel Education Claim

38. Prior to the Manager's appointment, the Walton Group and Peel Education agreed that the Walton Group would build a school on the lands located at 140 Queens Plate Drive to be leased by Peel Education. Peel Education paid a deposit in the amount of $58,333 to secure this lease. When it became apparent that the new school building could not be completed when Peel Education required it, Ms. Walton and Peel Education entered into a second lease agreement whereby Peel Education would lease the property located at 1 Cityview Drive (the "**Cityview Property**").

42nd Report at para. 26, 42 MR, Tab 2, p. 21

39. Peel Education occupied the Cityview Property throughout the time the Manager was responsible for the Cityview Property. When the Cityview Property was sold, Peel Education owed $58,878 for taxes and utilities that it was responsible for under the terms of its lease. Ultimately, Peel Education submitted a claim against Northern Dancer in the amount of $900,000. The Manager partially accepted Peel Education's claim in the amount of $58,333, which represents the amount of the deposit paid by Peel Education in connection with the lease of the school that was to be built at 140 Queen's Plate Drive.

42nd Report at para. 27, 42 MR, Tab 2, p. 22

40. The Manager and Peel Education have now reached a settlement agreement whereby the Manager would accept Peel Education's claim in the amount of $87,440 as against Northern Dancer. Of those funds, Peel Education would direct the Manager to direct Northern Dancer to pay $58,878 to Cityview Industrial Ltd. in satisfaction of a tax and utility liability owing by Peel Education. However, the Manager cannot effect the settlement until disputed costs claims of certain lien claimants against Northern Dancer are finally resolved. As described below, the Manager is of the view that it has properly disallowed the disputed costs claims and seeks the Court's approval of such disallowance.

42nd Report at para. 28, 42 MR, Tab 2, p. 22

(iii) The Manager has properly disallowed costs claims by lien claimants

41. As set out in the Manager's 22nd and 35th Reports, the Manager partially disallowed claims for costs relating to construction lien actions commenced after the appointment of the Manager. Each of the underlying lien actions was stayed and did not progress past the filing of the statement of claim, but two of the claimants, Spectra Engineering Ltd. ("**Spectra**") and Melillo Architects Incorporated ("**Melillo**"), still assert an entitlement to costs equal to 25% of the value of the lien or equal to their full indemnity costs (the "**Disputed Costs Claims**"). The liens of Spectra and Melillo have been vacated by the Orders of Master C. A. Albert dated December 15, 2014, which are attached as Appendix "N" and "O" respectively to the 42nd Report.

42nd Report at para. 29, 42 MR, Tab 2, pp. 22-23

Order of Master C.A. Albert dated December 15, 2014, vacating the lien of Spectra, being Appendix "N" to the 42nd Report, 42 MR, Tab 2.N, pp. 276-279

Order of Master C.A. Albert dated December 15, 2014, vacating the lien of Milello, being Appendix "O" to the 42nd Report, 42 MR, Tab 2.O, pp. 280-283

42. The Manager disallowed these claims on the basis that the lien claimants are not owed any debt by the relevant Companies and the costs claims appear to be premised on what is, in the Manager's view, an incorrect interpretation of the *Construction Lien Act*. The context underlying these Disputed Costs Claims, and the Manager's rationale for the partial disallowances in issue, are described below at paragraphs 68 to 76.

42nd Report at para. 30, 42 MR, Tab 2, p. 23

D. Interim Distributions in respect of Schedule "C" Companies

43. As noted above, the Manager was appointed as Manager of the Schedule "C" Properties pursuant to the August 12 Order. Where the sale of a Schedule "C" Property has resulted in net proceeds being realized by a Schedule "C" Company, the Manager is holding such proceeds in trust pending completion of an orderly and transparent process for the identification and evaluation of claims asserted by creditors of the applicable Schedule "C" Company.

42nd Report at para. 40, 42 MR, Tab 2, pp. 25-26

44. The Manager has completed Claims Processes in respect of the following Schedule "C" Companies: 30A Hazelton Inc., Atala Investments Inc., 1780355 Ontario Inc., Bible Hill Holdings Ltd., United Empire Lands Ltd., St. Clarens Holdings Ltd., Emerson Developments Ltd. and 6195 Cedar Street Ltd. The Manager is of the view that it is appropriate to make Interim Distributions in respect of such Schedule "C" Companies in accordance with the Interim Distribution Table, which is attached as Appendix "Q" to the 42nd Report.

42nd Report at para. 41, 42 MR, Tab 2, p. 26

Interim Distribution Table, being Appendix "Q" to the 42nd Report, 42 MR, p. 291

III. LAW AND ARGUMENT

A. Fee Allocation Methodology

(i) The Fee Allocation Methodology is fair and equitable

45. Canadian courts recognize that the allocation of professional fees in insolvency proceedings is a flexible, discretionary exercise. A receiver or manager is not required to undertake a strict accounting that attributes fees to each party with absolute accuracy, as doing so is impractical, cost-inefficient, and economically self-defeating. Furthermore, a manager is not required to allocate fees equally, on a *pro rata* basis, or in any other particular manner. Rather, fees are to be allocated on a case-by-case basis at the receiver or manager's discretion.

Royal Bank of Canada v. Atlas Block Co., 2014 ONSC 1531 at para. 43, 238 A.C.W.S. (3d) 373 (Sup. Ct. [Commercial List]), Manager's Book of Authorities ("**BOA**"), Tab A.

Hunjan International Inc., Re, 2006 CarswellOnt 2718 at paras. 4-5, 55 and 57, 21 C.B.R. (5th) 276 (Sup. Ct.), BOA, Tab B.

Winnipeg Motor Express Inc., Re, 2009 MBQB 204 at paras. 41 and 52, 56 C.B.R. (5th) 265, BOA, Tab C.

46. Canadian courts also recognize that it is unlikely that any particular allocation method will result in absolute fairness to all parties. Each creditor will have a view, from its own perspective, of what is or is not fair in terms of allocation. In light of the receiver or manager's role in preserving and realizing on assets for the benefit of all stakeholders, the allocation methodology must only be fair and equitable; it need not be perfect.

Hunjan International Inc., *supra* at paras. 4-5, 55, 57, 71-72, BOA, Tab B.

Royal Bank of Canada, *supra* at para. 43, BOA, Tab A.

47. Justice D.M. Brown (as he then was) recently summarized the principles governing the allocation of fees in insolvency proceedings as follows:

> (i) The allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee;
>
> (ii) Costs should be allocated in a fair and equitable manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;
>
> (iii) A strict accounting to allocate such costs is neither necessary nor desirable in all cases. To require a receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-à-vis another likely would not be cost effective and would drive up the overall cost of the receivership;
>
> (iv) A creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery;
>
> (v) An allocation does not require a strict cost/benefit analysis or that the costs be borne equally or on a *pro rata* basis;
>
> (vi) Where an allocation appears *prima facie* as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial.
>
> *Royal Bank of Canada*, supra, BOA, Tab A.

48. The Manager respectfully submits that the Fee Allocation Methodology is fair and equitable, and accords with the general principles set out by Justice Brown in *Royal Bank of Canada*.

49. As noted above, the Manager and its counsel were able to allocate 63% of fees incurred during the Second Period to specific properties based on docket descriptions. The remainder of the Manager's time, and that of its counsel, did not relate to a specific Property. Such fees were allocated evenly between the Properties.

B. Disclosure Regarding Payment of the Respondents' Legal Fees

(i) The Manager is entitled to the disclosure to fulfill its tracing mandate

50. There is no dispute that the information sought by the Manager must be disclosed, unless it is protected by solicitor-client privilege.

51. Pursuant to the Orders of Justice Newbould dated October 4, 2013 (the "**October 4 Order**") and October 25, 2013, the Manager has an ongoing mandate in its capacity as Inspector to trace how funds invested in the Schedule "B" Properties were used. The October 4 Order provides:

> 4. THIS COURT ORDERS that the Inspector shall investigate and report to this Court no earlier than October 18, 2013 upon the financial position of the Schedule B Corporations, the Projects and Properties, including but not limited to:
>
> ...
>
> (e) Tracing of any amounts to and from the bank accounts of the Schedule B Corporations and those of Rose & Thistle or other accounts under the control of the Respondents.
>
> ...
>
> 10. THIS COURT ORDERS that in the event that any claim of solicitor client privilege is raised in relation to any inquiry made by the Inspector, further directions may be sought from the Court regarding the appropriate validity and scope of any alleged privilege.

The October 4 Order at paras. 4 and 10, being Appendix "J" to the 42nd Report, 42 MR, Tab 2.J, pp. 251-259

52. As has previously been reported, $78 million invested by Dr. Bernstein in the Schedule "B" Companies was diverted from these companies to Rose & Thistle Group Ltd. ("**Rose & Thistle**"). The Waltons and the Schedule "C" Companies retained approximately $23 million of this amount, after accounting for transfers from Rose & Thistle to the Schedule "B" Companies. This Court has found on numerous occasions that these diverted funds have never been accounted for.

42nd Report at para. 17, 42 MR, Tab 2, p. 19

53. In addition, this Court awarded funds to the Waltons on an interim basis so they could fund necessary living, legal and professional expenses pending a final determination of the matters at issue in this proceeding. There was no final determination that the Waltons were the proper recipients of these funds. If the Waltons' circumstances have changed and they are now able to fund their living and legal expenses, then it may be appropriate for them to repay some or all of these amounts.

42nd Report at para. 18, 42 MR, Tab 2, p. 19

54. In light of the foregoing, upon learning that the Respondents had retained Cohen Sabsay, counsel for the Manager wrote to Ms. Walton on January 26, 2016 to ask how Cohen Sabsay had been paid for its past and future services. Ms. Walton replied that "how we retained Mr. Cohen is fully covered by solicitor and client privilege." The Manager's counsel subsequently wrote to Mr. Cohen asking him to identify any authority that supported the Respondents' privilege assertion. Mr. Cohen did not respond to this e-mail.

42nd Report at para. 19, 42 MR, Tab 2, pp. 19-20

Email exchange dated January 26-27, 2015, being Appendix "L" to the 42nd Report, 42 MR, Tab 2.L, pp. 266-270

(ii) The Respondents' waiver

55. The law of waiver of privilege was summarized by Justice McLachlin (as she then was) in *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*:

> Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost *Rogers v. Hunter*, [1982] 2 W.W.R. 189, 34 B.C.L.R. 206 (S.C.).

S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd., [1983] B.C.J. No. 1499, 1983 CarswellBC 147 (Sup. Ct.) at para. 6, BOA, Tab D

56. If the Respondents had the right to keep their financial relationship with Cohen Sabsay confidential, they waived that right. The Respondents have – repeatedly and without any reservation of rights – relied on their ability (or lack of ability) to pay for counsel and on the fact that they had received funds from Ms. Walton's parents and from Mr. Walton's mother. They obtained more than $400,000 by disclosing this information. Fairness and consistency dictate that when they disclosed their financial relationship with counsel to this Court, the Respondents waived any privilege that might otherwise attach to such information. Having taken the benefits of their waiver, the Respondents must accept the associated burden.

57. Once privilege is waived for a particular subject, all related facts and circumstances must also be disclosed. A party cannot waive privilege over only those facts that serve its purpose while keeping related facts confidential:

> When a party elects to waive a privilege to withhold specific evidence he must also intend to waive the privilege to withhold facts and circumstances surrounding that evidence. In deciding to take advantage of the evidence for his own purposes he must be prepared to accept the side effects of that decision, and if, as in the case at bar, some declarations against his interest may be revealed, he must take that chance.
>
> *T. Eaton Co. v. Neil J. Buchanan*, [1979] NSJ No. 197. (C.A.) [*T. Eaton*] at para. 61, BOA, Tab F. See also *Smith v. Smith*, [1957] O.J. No. 700 (H. Ct. J.) at para. 6, BOA, Tab E
>
> Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *Sopinka, Lederman & Bryant, The Law of Evidence in Canada*, 3d ed (Markham: LexisNexis Canada, 2014) at para. 14.138, BOA, Tab G. See Also *T. Eaton, supra*, BOA, Tab F and *George Doland Ltd. v. Blackburn & Co.*, [1972] 1 W.L.R. 1338, [1972] 3 All ER 959, BOA, Tab H

58. In this case, the Respondents have specifically waived privilege relating to their financial dealings with Cohen Sabsay. As noted above, Ms. Walton swore on March 31, 2015 that Cohen Sabsay was owed $67,800 and received funding to pay these fees. The Respondents again disclosed that they owed $42,695 to Cohen Sabsay on February 24, 2015. In other words, they have willingly disclosed the *very information* that they now seek to withhold.

(iii) In any event, the information sought is not privileged

59. The Manager's primary position, as described above, is that any privilege that may attach to the Respondents' source of funding has been waived. Accordingly, the Manager respectfully submits that whether privilege attaches in the first place need not be determined. In the alternative, the Manager submits that the information sought is not protected by privilege.

60. The law relating to when administrative aspects of the solicitor-client relationship, such as the amount a lawyer charges their client or the source of funds used to pay such fees, has been the subject of significant recent appellate jurisprudence, including decisions by the Supreme Court of Canada.[5] The present state of the law was summarized by Blair, J.A. in *Kaiser (Re)* as follows:

> From these developments in the jurisprudence I take the law to be that administrative information relating to the solicitor-client relationship — including the identity of the person paying the lawyer's bills — is presumptively privileged. The presumption may be rebutted by evidence showing: (a) that there is no reasonable possibility that disclosure of the requested information will lead, directly or indirectly, to the revelation of confidential solicitor-client communications (*Maranda*, at para. 34 and *Ontario (Assistant Information and Privacy Commissioner)*, at para. 9); or (b) that the requested information is not linked to the merits of the case and its disclosure would not prejudice the client (*Cunningham*, at paras. 30-31).
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> *Kaiser, Re*, 2012 ONCA 838, 2012 CarswellOnt 16539 [*Kaiser*] at para. 30, BOA, Tab I

61. The Manager submits that, in this case, the presumption of privilege is rebutted. First, the Respondents are not entitled to be shielded from the sort of prejudice that could potentially be alleged to flow in this case. Second, the Order can be tailored to ensure that there is no risk that information about the solicitor-client relationship will be disclosed.

62. If the Waltons have assets that were hidden from this Court and its officers (including their personal receiver, who is now discharged), and if these assets were used to pay Cohen Sabsay, then the disclosure sought could uncover these assets and make them available to the

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[5] See *Descoteaux c. Mierwinski*, [1982] 1 S.C.R. 860, BOA, Tab J, *Maranda c. Quebec (Juge de la Cour du Quebec)*, 2003 SCC 67, BOA, Tab K and *Cunningham v. Lilles*, 2010 SCC 10, BOA, Tab L

Waltons' many creditors. This would prejudice the Waltons, in a literal sense. However, the Manager respectfully submits that this is not the sort of prejudice that the Waltons should be protected from.

63. Brown, J. reached a similar conclusion in *Katz, Re*. In that case, a trustee sought to compel disclosure of information about a bankrupt's assets in a lawyer's file. The bankrupt was not allowed to use solicitor-client privilege to shield from disclosure information about his assets (as distinct from legal advice relating to those assets) that he was otherwise obliged to disclose:

> [S]olicitor-client privilege may not be invoked for the purpose of assisting in the commission of a crime, suppressing real evidence of a crime or perpetrating tortious conduct…To permit a solicitor to refuse to answer questions about the existence and location of the bankrupt's property would, in its effect, enable solicitor-client privilege to be invoked to assist the bankrupt in committing an offence — i.e. failing to comply with the duties imposed by section 158 of the *BIA*.
>
> *Katz, Re*, 2013 ONSC 4543, 2013 CarswellOnt 9050 at para. 18 (Comm. List) [*Katz*], BOA, Tab M

64. Like the bankrupt in *Katz*, the Respondents have an obligation to account for funds and disclose their assets. Whether the obligation arises by operation of the *BIA* (as it did in *Katz*) or the Order of this Court (as it does in this case) solicitor-client privilege cannot be invoked to avoid complying with the obligation.

65. In the further alternative, the Manager submits that, even if privilege applies to the information sought in this case and was not waived, any concerns about privilege can be addressed by appropriately limiting the Order to information that will not disclose, directly or indirectly, potentially privileged information. The Waltons should be ordered to disclose all of

their assets, all amounts received from any source and all payments made to any party. If this Court determines that payments to Cohen Sabsay are privileged then the identity of payees can, at this stage, be redacted so that payments to Cohen Sabsay cannot be identified.

C. The Dupont Mortgagees ought to disclose the HST indemnity

66. As described above, the Dupont Mortgagees did not collect HST on the sale of the Dupont Property. Accordingly, in connection with a tax refund to Dupont Developments, the CRA has requested a copy of the GST/HST indemnity by the purchaser of the Dupont Property. The Dupont Mortgagees have refused to provide a copy of this document to the Manager but they do not oppose the Manager's motion.

67. While title to the Dupont Property remained in Dupont Developments, the Dupont Mortgagees sold the Dupont Property under power of sale. When this sale was completed, the Dupont Mortgagees had an obligation to collect HST on the sale of the Dupont Property, unless the purchaser provided a GST/HST indemnity for self-assessment. As the Dupont Mortgagees did not collect HST on the sale of the Dupont Property, the CRA has requested a copy of the purchaser's GST/HST indemnity for self-assessment in connection with paying the tax refund to which Dupont Developments is entitled.

42nd Report at para. 23, 42 MR, Tab 2, pp. 20-21

68. The Manager has requested a copy of the GST/HST indemnity from the Dupont Mortgagees, but the Dupont Mortgagees have refused to provide it. Accordingly, the Manager determined that the assistance of the Court is required in order to secure a copy of the GST/HST

indemnity for self-assessment by the purchaser of the Dupont Property so that the Manager may comply with CRA's request and perform its mandate.

42nd Report at para. 25, 42 MR, Tab 2, p. 21

D. The Disputed Costs Claims have been properly disallowed

69. In the period that preceded the appointment of the Manager on November 5, 2013, a number of contractors working on the Properties were not paid for some or all of their work. Many of these contractors registered liens pursuant to the *Construction Lien Act*. The *Construction Lien Act* requires that a lien claimant register a lien on title to preserve their claim and then commence an action and (in some cases) register a certificate of action on title in order to perfect its lien. If a lien is not perfected within the prescribed period then the relevant lien expires.

42nd Report at para. 31, 42 MR, Tab 2, p. 23

70. The November 5 Order included a stay of proceedings against the Companies but provided that its terms did not operate to "prevent the filing of any registration to preserve or perfect a security interest" or "prevent the registration of a claim for lien." The Manager has, from the inception of these proceedings, taken the position that lien claimants were entitled to commence actions to perfect their security interests but that the stay of proceedings imposed by the November 5 Order precluded further steps in any of the construction lien actions. This position was clarified in the Order of Justice Newbould dated January 16, 2014 (the "**January 16 Order**") and attached as Appendix "P" to the 42nd Report, which provided that:

> 4. THIS COURT ORDERS that persons claiming to be entitled to liens under the *Construction Lien Act*, R.S.O. 1990, c. C.30 are hereby granted relief from the stay provisions of the November 5 Order solely to allow them to register claims for liens against the Properties and to issue and serve statements of claim to perfect and protect their alleged security interests.

42nd Report at para. 32, 42 MR, Tab 2, p. 23

January 16, 2016 Order, being Appendix "P" to the 42nd Report, 42 MR, Tab 2.P, p. 285

71. The practical effect of the November 5 Order and January 16 Order was that many companies registered liens against the Properties and commenced actions to perfect these liens, but none of these actions proceeded any further.

42nd Report at para. 33, 42 MR, Tab 2, p. 24

72. Many of the Properties that the Manager and mortgagees sold have had construction liens registered against them. If these Properties were to be sold outside of a court supervised process, then the liens would have to be vacated either: (i) with the consent of the lien claimant; or (ii) by paying money into Court pursuant to section 44(1) of the *Construction Lien Act*. Section 44(1) of the *Construction Lien Act* allows any person to seek an order vacating a claim for lien from title upon paying into court an amount comprised of two components: (i) the full amount of the claim for lien (the "**Claim Component**"); and (ii) an additional 25% as security for costs to a maximum of $50,000 (the "**Costs Component**").

42nd Report at para. 34, 42 MR, Tab 2, p. 24

Construction Lien Act at s. 44(1)

73. Each time the Manager sold a Property, it obtained an order approving each sale and vesting any liens (and other encumbrances) off of the title to that Property. Rather than pay

money into Court pursuant to Section 44(1) of the *Construction Lien Act*, the Manager or its counsel held an amount in trust equal to the Claim Component and the Costs Component (the "**Lien Holdback**"). In each case, the Lien Holdback was to be held pending further order of the Court.

42nd Report at para. 35, 42 MR, Tab 2, p. 24

74. The Disputed Costs Claims appear to be based on the premise that section 44(1) of the *Construction Lien Act* entitles a lien claimant to a costs award equal to 25% of its claim and that the lien claimants are entitled to the Costs Component as of the Lien Holdback as a matter of right. Respectfully, this is an incorrect reading of the *Construction Lien Act.* The *Construction Lien Act* provides that a lien claimant is entitled to *security* for a potential future costs award. Unless and until costs are awarded, a defendant to a lien claim does not owe costs pursuant to the *Construction Lien Act*, or otherwise.

Construction Lien Act, at s. 44(1)

75. More specifically, section 44(1) outlines the purpose of both the Claim Component and the Cost Component. It explicitly states that the Costs Component is paid as security for costs:

> Without notice
>
> 44. (1) Upon the motion of any person, without notice to any other person, the court shall make an order vacating,
>
> (a) where the lien attaches to the premises, the registration of a claim for lien and any certificate of action in respect of that lien; or
>
> (b) where the lien does not attach to the premises, the claim for lien,

where the person bringing the motion pays into court, or posts security in an amount equal to, the total of,

(c) the full amount claimed as owing in the claim for lien; and

(d) the lesser of $50,000 or 25 per cent of the amount described in clause (c), as security for costs. [Emphasis added].

Construction Lien Act at s. 44(1)

76. The *Construction Lien Act* provides that the purpose of the Claim Component of the payment is to satisfy "the amount claimed as owing." In other words, it serves as security for the debt the defendant allegedly owes the lien claimant. In contrast, the second amount is paid "as security for costs;" it is not paid to satisfy any part of the debt allegedly owing to the lien claimant. In the Manager's view, the costs provisions of the *Construction Lien Act* does not create a new debt that should be paid in the claims process.

Construction Lien Act at s. 44(1)

77. Neither Spectra nor Melillo have provided any basis upon which the Manager's disallowance of the Disputed Costs Claims should be overturned. Accordingly, the Manager respectfully requests that this Court approve its disallowance of the Disputed Costs Claims.

42nd Report at para. 39, 42 MR, Tab 2, p. 25

E. Interim distributions

78. Pursuant to the terms of the November 5 Order, the Manager is authorized to manage and control any and all proceeds arising out of or from the Schedule C Properties.

November 5 Order at para. 5, being Appendix "B" to the 42nd Report, 42 MR Tab 2.B, pp. 52-69

79. The Manager, having determined the legal entitlements to certain proceeds (as described above), seeks this Court's approval to distribute such proceeds in accordance with the Interim Distribution Table, as defined above.

IV. CONCLUSION

80. For the foregoing reasons, the Manager respectfully requests the relief set out in its Notices of Motion.

All of which is respectfully submitted this 2nd day of May, 2016.

Goodmans LLP

6564044

SCHEDULE "A"

COMPANIES

1. Dr. Bernstein Diet Clinics Ltd.
2. 2272551 Ontario Limited
3. DBDC Investments Atlantic Ltd.
4. DBDC Investments Pape Ltd.
5. DBDC Investments Highway 7 Ltd.
6. DBDC Investments Trent Ltd.
7. DBDC Investments St. Clair Ltd.
8. DBDC Investments Luttrell Ltd.
9. DBDC Investments Leslie Ltd.
10. DBDC Investments Lesliebrook Ltd.
11. DBDC Fraser Properties Ltd.
12. DBDC Fraser Lands Ltd.
13. DBDC Queen's Corner Ltd.
14. DBDC Queen's Plate Holdings Inc.
15. DBDC Dupont Developments Ltd.
16. DBDC Red Door Developments Inc.
17. DBDC Red Door Lands Inc.
18. DBDC Global Mills Ltd.
19. DBDC Donalda Developments Ltd.
20. DBDC Salmon River Properties Ltd.
21. DBDC Cityview Lands Ltd.
22. DBDC Weston Lands Ltd.
23. DBDC Double Rose Developments Ltd.
24. DBDC Skyway Holdings Ltd.
25. DBDC West Mall Holdings Ltd.
26. DBDC Royal Gate Holdings Ltd.
27. DBDC Dewhurst Developments Ltd.
28. DBDC Eddystone Place Ltd.
29. DBDC Richmond Row Holdings Ltd.

SCHEDULE "B"

COMPANIES

1. Twin Dragons Corporation
2. Bannockburn Lands Inc. / Skyline – 1185 Eglinton Avenue Inc.
3. Wynford Professional Centre Ltd.
4. Liberty Village Properties Ltd.
5. Liberty Village Lands Inc.
6. Riverdale Mansion Ltd.
7. Royal Agincourt Corp.
8. Hidden Gem Development Inc.
9. Ascalon Lands Ltd.
10. Luttrell Mews Inc.
11. Lesliebrook Holdings Ltd.
12. Lesliebrook Lands Ltd.
13. Fraser Properties Corp.
14. Fraser Lands Ltd.
15. Queen's Corner Corp.
16. Northern Dancer Lands Ltd.
17. Dupont Developments Ltd.
18. Red Door Developments Inc. and Red Door Lands Ltd.
19. Global Mills Inc.
20. Donalda Developments Ltd.
21. Salmon River Properties Ltd.
22. Cityview Industrial Ltd.
23. Weston Lands Ltd.
24. Double Rose Developments Ltd.
25. Skyway Holdings Ltd.
26. West Mall Holdings Ltd.
27. Royal Gate Holdings Ltd.
28. Royal Gate Nominee Inc.
29. Royal Gate (Land) Nominee Inc.
30. Dewhurst Development Ltd.
31. Eddystone Place Inc.

32. Richmond Row Holdings Ltd.
33. El-Ad (1500 Don Mills) Limited
34. 165 Bathurst Inc.

SCHEDULE "C"

PROPERTIES

1. 3270 American Drive, Mississauga, Ontario
2. 0 Luttrell Ave., Toronto, Ontario
3. 2 Kelvin Avenue, Toronto, Ontario
4. 346 Jarvis Street, Suites A, B, C, E and F, Toronto, Ontario
5. 1 William Morgan Drive, Toronto, Ontario
6. 324 Prince Edward Drive, Toronto, Ontario
7. 24 Cecil Street, Toronto, Ontario
8. 30 and 30A Hazelton Avenue, Toronto, Ontario
9. 777 St. Clarens Avenue, Toronto, Ontario
10. 252 Carlton Street and 478 Parliament Street, Toronto, Ontario
11. 66 Gerrard Street East, Toronto, Ontario
12. 2454 Bayview Avenue, Toronto, Ontario
13. 319-321 Carlaw, Toronto, Ontario
14. 260 Emerson Ave., Toronto, Ontario
15. 44 Park Lane Circle, Toronto, Ontario
16. 19 Tennis Crescent, Toronto, Ontario
17. 646 Broadview, Toronto, Ontario

SCHEDULE "D"

AUTHORITIES

1. *Royal Bank of Canada v. Atlas Block Co.*, 2014 ONSC 1531 at para. 43, 238 A.C.W.S. (3d) 373 (Sup. Ct. [Commercial List])
2. *Hunjan International Inc., Re, 2006 CarswellOnt 2718*, C.B.R. (5th) 276 (Sup. Ct.)
3. *Winnipeg Motor Express Inc., Re, 2009 MBQB 204*, C.B.R. (5th) 265
4. *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, [1983] B.C.J. No. 1499, 1983 CarswellBC 147 (Sup. Ct.)
5. *Smith v. Smith*, [1957] O.J. No. 700 (H. Ct. J.)
6. *T. Eaton Co. v. Neil J. Buchanan*, [1979] NSJ No. 197. (C.A.)
7. *Phipson on Evidence*, 13th Ed.
8. *George Doland Ltd. v. Blackburn & Co.*, [1972] 1 W.L.R. 1338
9. *Kaiser, Re*, 2012 ONCA 838, 2012 CarswellOnt 16539
10. *Descoteaux c. Mierwinski*, [1982] 1 S.C.R. 860, 1982 CarswellQue 291
11. *Maranda c. Quebec (Juge de la Cour du Quebec)*, 2003 SCC 67, 2003 CarswellQue 2477
12. *Cunningham v. Lilles*, 2010 SCC 10
13. *Katz, Re*, 2013 ONSC 4543, 2013 CarswellOnt 9050

SCHEDULE "E"

TEXT OF RELEVANT STATUTES

Construction Lien Act, R.S.O. 1990, c. C.30

Vacating lien by payment into court
Without notice

44. (1) Upon the motion of any person, without notice to any other person, the court shall make an order vacating,

(a) where the lien attaches to the premises, the registration of a claim for lien and any certificate of action in respect of that lien; or

(b) where the lien does not attach to the premises, the claim for lien,

where the person bringing the motion pays into court, or posts security in an amount equal to, the total of,

(c) the full amount claimed as owing in the claim for lien; and

(d) the lesser of $50,000 or 25 per cent of the amount described in clause (c), as security for costs. R.S.O. 1990, c. C.30, s. 44 (1).

DBDC SPADINA LTD., et al
Applicants

NORMA WALTON, et al
Respondents

Court File No. CV-13-10280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List

Proceeding commenced at Toronto

Factum of Schonfeld Inc.

(Motions For Approval of Fee Allocation Methodology and Other Relief Returnable May 3, 2016)

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