

This is Affidavit #1 of Brian McMahon in this proceeding and was made on January 21, 2025

No. S-250304  
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 OR ARRANGEMENT OF  
KENSINGTON UNION BAY PROPERTIES GP LTD. and  
KENSINGTON UNION BAY PROPERTIES NOMINEE LTD.

PETITIONERS

**AFFIDAVIT #1 OF BRIAN MCMAHON**

I, Brian McMahon, Director, of 3329 Eagleview Cr., Courtenay, British Columbia, V9N 0B6,  
HEREBY SWEAR THAT:

1. I am a Director of 3003297 Nova Scotia Company (the "VTB Lender"), a secured creditor of the Petitioners in this proceeding. I have worked in the real estate development business for over 40 years, and have experience completing at least 12 separate real estate projects in British Columbia and abroad. As such, I have personal knowledge of the facts deposed to in this Affidavit, except where stated to be based upon information and belief, in which case I believe both the information and the resulting statements to be true and accurate.

2. All capitalized terms used herein but not otherwise defined have the meaning set out in the Petition to the Court filed on January 14, 2025 (the "Petition") in this proceeding.

3. I am authorized to make this Affidavit on behalf of the VTB Lender. I make this Affidavit in support of a Response to Petition to be filed by counsel to the VTB Lender in these proceedings, opposing all relief sought in the Petition.

### Sale Transaction and Deferred Purchase Price

4. In or about December 2017, Kensington Union Bay Properties Limited Partnership (“**Kensington LP**”), by its general partner Kensington Union Bay Properties GP Ltd. (“**Kensington GP**”, and together with Kensington LP, “**Kensington**”), concluded a transaction (the “**Sale Transaction**”) to acquire the Lands by way of purchasing all issued and outstanding shares in the capital of 34083 Yukon Inc. (now operating as Kensington Union Bay Properties Nominee Ltd., the “**Mortgagor**”).

5. The Sale Transaction concluded pursuant to the terms and conditions of a Purchase and Sale Agreement dated October 17, 2017 (the “**Original Purchase and Sale Agreement**”), originally among the VTB Lender and 34072 Yukon Inc., as vendors, and UB Holdings Ltd., as purchaser (the “**Original Purchaser**”), as amended by a Condition Waiver and Amending Agreement dated December 7, 2017 (the “**First Amendment**”), as assigned by the Original Purchaser to Kensington pursuant to an Assignment of Contract of Purchase and Sale Agreement dated December 14, 2017 (the “**Assignment Agreement**”). The Original Purchase and Sale Agreement contemplated, among other things, partial payment of the purchase price on closing, with the remaining balance of \$24,000,000 paid post-closing over time by way of vendor take-back financing (the “**Deferred Purchase Price**”) with interest accruing thereon at the rate of five percent (5%) per annum.

### VTB Mortgage

6. As security for payment of the Deferred Purchase Price, the Mortgagor, as mortgagor, and Kensington, as covenantor (the Mortgagor and Kensington are together referred to as the “**Obligors**”), granted in favour of the VTB Lender a mortgage with assignment of rents dated December 15, 2017, in the principal amount of \$24,000,000 and with interest accruing thereon at the rate of five (5%) percent per annum (as modified, the “**VTB Mortgage**”), encumbering that portion of the Lands comprised of CDA1, CDA3, CDA4 and CDA5. The VTB Mortgage was registered in the Victoria Land Title Office on December 15, 2017, under Registration Nos. CA6518044 (as a mortgage) and CA6518045 (as an assignment of rents).

7. Pursuant to the terms of the Original Purchase and Sale Agreement, as Kensington paid instalments of the Deferred Purchase Price over time, the VTB Lender agreed to discharge the VTB Mortgage from certain parcels comprising the Lands. Presently, the VTB Mortgage only encumbers CDA1, and is the first-priority mortgage on title to that property.

8. CDA1 is comprised entirely of unsubdivided bare land. To the best of my knowledge, Kensington does not have any going concern business relating directly to CDA1.

### Prolonged History of Liquidity Issues

#### *Reductions to Deferred Purchase Price and Payment Extensions*

9. Shortly before the execution of the First Amending Agreement, Michael Ching indicated to me that the financial circumstances of Kensington required the Deferred Purchase Price to be paid over a longer period of time. This culminated in Kensington and the VTB Lender entering into the First Amendment, which extended the deadline for payment of certain instalments of the Deferred Purchase Price.

10. Following conclusion of the Sale Transaction, Kensington was often late in paying the principal or interest payments of the Deferred Purchase Price. Michael Ching expressed to me that Kensington required additional working capital for project development purposes, which culminated in the VTB Lender agreeing to amend the Original Purchase and Sale Agreement further pursuant to: (i) a Second Amending Agreement dated November 20, 2019 (the “**Second Amendment**”), and (ii) a Third Amending Agreement dated August 16, 2022 (the “**Third Amendment**”, and together with the Original Purchase and Sale Agreement, the First Amendment, the Assignment Agreement, and the Second Amendment, the “**Purchase and Sale Agreement**”). These amendments benefited Kensington by, among other things, permitting Kensington to pay the remaining instalments of the Deferred Purchase Price in smaller increments and over a longer period of time, thus freeing available funds for working capital purposes.

11. Due to frequent late payments of the Deferred Purchase Price and interest described in paragraph 10 above, I was hesitant to enter into the Second Amendment or Third Amendment. Despite that hesitation, I ultimately (and reluctantly) agreed each time. In so agreeing, my motivation was to provide Kensington with greater working capital to develop the Lands, and give Kensington every possible chance to succeed in developing the Lands.

#### *Prolonged Complaints from Service Providers*

12. Prior to conclusion of the Sale Transaction, I was responsible for the management of the project to develop the Lands (including CDA1). During my time in such role, I ensured that all accounts payable regarding consulting, engineering, professional or other service providers were consistently paid in normal course, in full and on a timely basis.

13. Following conclusion of the Sale Transaction, many of the same consultants, engineers and other professionals (collectively, the “**Service Providers**”) that I initially engaged on the project to develop the Lands continued to provide services to Kensington, despite the change in project ownership. Shortly after the Sale Transaction, I began receiving complaints from various Service Providers, indicating to me that Kensington had substantial and prolonged outstanding accounts payable, sometimes left unpaid for over 120 days after invoice issuance. Though I do not recall each instance of such complaints, I confirm that I received such complaints from Bob Hudson, Vice President Vancouver Island of McElhanney Ltd. (a construction engineering firm) and from Michael Sloan, Principal Environmental Engineer of SLR Consulting (an environmental/sustainability consultancy) on numerous occasions between 2018 to the present.

14. In my experience in the real estate industry, punctually paying accounts payable to Service Providers is essential to the overall viability of any real estate development project. The complaints that I received from the Service Providers, described in paragraph 13 above, indicate to me that Kensington and Michael Ching have consistently failed to stay current with accounts payable to Service Providers since 2018. This is despite the vast sums of money raised by Kensington (including loans advanced by creditors), ostensibly to finance development of the Lands.

#### **Defaults and Demand**

15. As a result of the Second Amendment and the Third Amendment, a final instalment of the Deferred Purchase Price in the amount of \$9,000,000 (plus interest) was due and payable on or before August 16, 2024 (the “**Final Instalment**”). Kensington failed to pay the Final Instalment as and when due, and the amount remains outstanding. As a result, Kensington has been in default of the VTB Mortgage and Purchase and Sale Agreement since August 16, 2024 (the “**Default**”).

16. As a result of the Default, I considered making immediate demand and initiating foreclosure proceedings to enforce on the VTB Mortgage. However, as I understood that Beem Credit Union (“**Beem**”) (a subordinate mortgagee over CDA1) had already initiated its own foreclosure proceeding, and proposed to imminently seek an order for conduct of sale over the Lands encumbered by its mortgage (including CDA1), I refrained from immediately enforcing to minimize cost and avoid a multiplicity of proceedings. Beem’s proposed course of action did not materialize in the coming weeks, and so on December 30, 2024,

the VTB Lender formally made demand on the Obligors for payment of the Final Instalment, all accrued interest thereon, and all recoverable costs.

17. Despite this demand, the Obligors have failed, refused or neglected to pay the Final Instalment to the VTB Lender.

### **Opposition to CCAA Initial Order**

18. I have read and considered in detail the Petition and the supporting Affidavit #1 of Michael Ching filed therewith, and considered the viability of the Petitioners' overall proposed restructuring plan described in those materials (the "**Restructuring Plan**"). Based on my experience in the real estate development industry, the Restructuring Plan is in my view extremely speculative and premised on conditions that are unlikely to materialize.

19. The VTB Lender has lost all confidence in the competence and ability of the Petitioners to complete development of the Lands or repay the Final Instalment and other obligations secured by the VTB Mortgage. In the circumstances based on materials filed in this proceeding, there is no plan of compromise or arrangement that could be proposed by the Petitioners which the VTB Lender would support.

20. I understand that concurrent with the Petitioners' application for creditor-protection under the CCAA, Cameron Stephens Mortgage Capital Ltd. ("**Cameron Stephens**") will be making an application to appoint a receiver over CDA2, and Beem will be making an application to appoint a receiver over CDA1, CDA3, CDA4 and CDA5. In considering these alternatives, the VTB Lender opposes in the strongest terms the granting of any relief under the CCAA in favour of the Petitioners, and favours instead an order appointing a receiver over the Lands (including CDA1) with a mandate to market such Lands for sale following a court-supervised sale process.

### ***Subdivision of CDA2 and Completion of Presale Contracts***

21. The Petitioners propose to complete subdivision of CDA2, complete the existing presales regarding that property, and use the sale proceeds to pay out Cameron Stephens or other creditors, all prior to the end of April 25, 2025. I note that Michael Ching has communicated to me since on or about June 2023 that the subdivision of CDA2 would be completed "imminently". Thus far, nothing has materialized.

22. The subdivision of CDA2 depends on formal approval from both the Comox Valley Regional District and Ministry of Transportation and Infrastructure. In reviewing the materials filed by the Petitioner

in this proceeding, I see no credible strategy or timeline confirming how the Petitioners realistically plan to accomplish these critical milestones.

23. Assuming the Petitioners are able to subdivide CDA2, the materials filed by the Petitioners state that they expect substantially all of the CDA2 presale contracts to close, regardless of the fact the termination dates listed in such contracts have already passed. The Petitioners have provided no fact or other tangible basis to support the expectation that the presale contracts will close and based on my experience in the real estate development industry, it is not realistic for the Petitioners to expect such a result.

***Restructuring Plan Prejudices the VTB Lender***

24. The Restructuring Plan does not outline any path or timeline for the Petitioners to repay the obligations secured by the VTB Mortgage. The materials filed in this proceeding by the Petitioner describe the completion and development of CDA1 as part of “Phase 4” – chronologically last in the order-of-operations with respect to development of the Lands. From this, it is not clear to me whether the VTB Mortgage is expected to be repaid in the course of the CCAA proceedings, or at all.

25. The Restructuring Plan presents significant risk to the VTB Lender’s prospects for recovery, with very limited potential benefit. In particular, the Charges described in the Petition are proposed to encumber all assets, property and undertaking of the Petitioner with a super-priority charge. As a consequence, the Charges would subordinate the VTB Mortgage with respect to CDA1. This subordination would effectively allow the Petitioners to leverage value from the VTB Lender’s sole source of collateral for purposes of facilitating a potential sale of CDA2 and CDA3, the net proceeds of which would ultimately benefit other creditors and not the VTB Lender. These other creditors are, with respect to encumbrances on CDA1, subordinate to the VTB Lender in all respects.

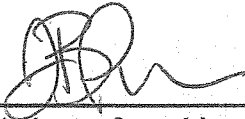
26. The VTB Mortgage over CDA1 represents the only security available to the VTB Lender. It would be unfair to involuntarily subordinate the VTB Mortgage in favour of the Charges for purposes of facilitating the sales of CDA2 and CDA3 and otherwise funding the Petitioners’ speculative Restructuring Plan.

**Virtual Commissioning**


27. I was not physically present before the lawyer commissioning this affidavit, but was in the lawyer’s electronic presence linked with the lawyer using video technology and the process described in the Law Society of British Columbia Code of Professional Conduct for remote commissioning of affidavits was

used. I acknowledge the solemnity of making this affidavit and acknowledge that I am aware of the consequences of making an untrue statement in this affidavit.

SWORN BEFORE ME at the City of )  
Vancouver, in the Province of British )  
Columbia, on this 21<sup>st</sup> day of January, 2025 )  
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A Commissioner for taking Affidavits for  
British Columbia



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