

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

BETWEEN:

KSV KOFMAN INC. in its capacity as Trustee-in-Bankruptcy of 1033803  
ONTARIO INC. and 1087507 ONTARIO LIMITED

Applicant

- and -

JOHN AQUINO, MARCO CARUSO, GIUSEPPE ANASTASIO a.k.a.  
JOE ANA, THE ESTATE OF MICHAEL SOLANO, LUCIA COCCIA  
a.k.a. LUCIA CANDERLE, ~~DOMINIC DIPEDE~~, 2483251 ONTARIO  
CORP. a.k.a. CLEARWAY HAULAGE, MMC GENERAL  
CONTRACTING, MTEC CONSTRUCTION, STRADA HAULAGE,  
2104664 ONTARIO INC., and 2304288 ONTARIO INC.

Respondents

**FACTUM OF KSV KOFMAN INC. in its capacity as Trustee-in-Bankruptcy of 1033803  
ONTARIO INC. and 1087507 ONTARIO LTD.**

Date: September 8, 2020

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TO: **SERVICE LIST**

**TABLE OF CONTENTS**

**Page No.**

**PART I - OVERVIEW ..... 1**

**PART II - FACTS ..... 2**

**PART III - ARGUMENT ..... 10**

**SCHEDULE A**

**SCHEDULE B**

## **PART I - OVERVIEW**

1. During the five years before Forma-Con's bankruptcy, the Respondents worked together to perpetrate a false invoicing scheme and drain \$11.4 million from Forma-Con. The Trustee brings this transfer at undervalue application to set aside those transactions and recover the \$11.4 million for the benefit of Forma-Con's creditors.

2. The scheme was simple. An insider IT manager, Michael Solano (the now-deceased cousin of Forma-Con's president, John Aquino) would instruct one of the Respondents to submit an invoice for a given sum to Forma-Con, for non-existent work. The cooperating Respondent would then send a pro-forma invoice. Typically within hours, John Aquino or Michael Solano would sign a cheque on the same day and the cooperating Respondent would deposit it.

3. This is a classic transfer-at-undervalue: payment made by the bankrupt for no value received. What makes this case different is that, for the most part, the scheme is not contested. John Aquino, the directing mind of Forma-Con, admitted on cross examination that "the trustee's opinion as to the fair market value of goods and services provided by the suppliers of interest, not including 230 Ontario, to Forma-Con is correct." That value was nil. The other (living) individual Respondents made the same concession.

4. What the Respondents do contest is whether the false invoicing scheme was conducted with an intent to defraud, defeat or delay creditors. But, the surreptitious and fraudulent manner in which this scheme was undertaken leaves that intent as the only reasonable conclusion. Clandestinely taking the money from Forma-Con would, when the music stopped, unavoidably affect the corporation's stakeholders, including its creditors. Indeed, when the music did stop, Forma-Con's went bankrupt, and Forma-Con's creditors will recover \$11.4 million less than they otherwise would have.

5. One supplier Respondent, 2104664 Ontario Inc., does claim that it provided legitimate services. It did not. In the face of an admitted false invoicing scheme, the evidence provided by this Respondent does not actually establish Forma-Con received any value. Moreover, the extensive refusals of the company's principal on cross-examination has made its evidence impossible to test and adverse inferences should be drawn against it as a result.

## **PART II - FACTS**

6. On April 3, 2019, Bondfield Construction Company Limited ("BCCL") and several related entities (collectively "Bondfield") obtained protection under the *Companies' Creditors' Arrangement Act*, and Ernst & Young was appointed the Monitor of Bondfield (the "Monitor").

7. 1033803 Ontario Inc. ("Forma-Con") is an affiliate of BCCL (together with Bondfield, the "Group"). Forma-Con provided concrete and forming work on Bondfield and condominium projects.

8. On November 19, 2018, KSV Restructuring Inc.<sup>1</sup> ("KSV") was appointed as receiver and manager of, *inter alia*, all the assets, undertakings, and property of Forma-Con.<sup>2</sup> On December 19, 2019, KSV, on behalf of Forma-Con, filed an assignment in bankruptcy and was appointed as licensed insolvency trustee of Forma-Con (the "Trustee").<sup>3</sup>

9. At the time of Forma-Con's bankruptcy it had approximately \$215 million in outstanding liabilities, including, approximately: \$142 million owing to BCCL, \$40 million owing to Bridging Finance, \$8 million owing to Canada Revenue Agency, \$2 million owing to the Receiver General

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<sup>1</sup> On August 30, 2020, KSV Kofman Inc. changed its name to KSV Restructuring Inc.

<sup>2</sup> First Report of KSV Kofman Inc. as Trustee in Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited, dated February 21, 2020 ("February Report"), para 1.0(2).

<sup>3</sup> February Report, para. 1.2(1)

of Canada and \$2 million owed to the Workplace Safety & Insurance Board.<sup>4</sup> Further BCCL's surety, Zurich Insurance Company Ltd. is a secured creditor of Forma-Con.<sup>5</sup>

### **The Monitor's Investigation**

10. On October 30, 2019, the Monitor delivered an investigatory report (the "Monitor's Report"),<sup>6</sup> which detailed that BCCL and certain affiliates, including Forma-Con, had paid in excess of \$80 million to suppliers without good or services having been provided.<sup>7</sup>

### **The Trustee's Investigation**

11. On January 8, 2020, Forma-Con's inspectors authorized the Trustee to commence an investigation similar to the one carried out by the Monitor, as it related to Forma-Con.<sup>8</sup> The Trustee's investigation included reviewing Forma-Con's books and records, speaking to Forma-Con's current management, reviewing the Monitor's reports, and speaking to the Monitor.<sup>9</sup>

12. On February 21, 2020, the Trustee reported its preliminary conclusions (the "February Report"): between 2011 and 2017, Forma-Con had paid approximately \$34 million to certain suppliers (the "Suppliers of Interest") for no consideration. A chart summarizing the amounts paid to each of the Suppliers of Interest is attached as **Appendix A** to this factum.<sup>10</sup>

13. The Trustee's investigation further determined that, of this \$34 million, Forma-Con had made payments totaling \$11.4 million (the "Impugned Transactions") to six of the Suppliers of

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<sup>4</sup> Trustee's Responses to Questions posed by the Respondents, delivered September 30, 2020 ("Trustee's Responses"), Schedule B, Forma-Con's Statement of Affairs, Appendix C to the Third Supplement to the Report of KSV Kofman Inc. as Trustee in Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited (the "September Report").

<sup>5</sup> Second Report of KSV Kofman Inc. as Receiver and Manager of 1038303 Ontario Inc. and 1087507 Ontario Limited and Certain Related Other Property, dated December 10, 2018, para. 2.5.1(2)(b).

<sup>6</sup> Phase II Investigation Report of the Monitor, dated October 30, 2019 ("Monitor's Report").

<sup>7</sup> February Report, para. 1.1(4).

<sup>8</sup> February Report, para. 1.2(3).

<sup>9</sup> February Report, para. 1.4(1).

<sup>10</sup> February Report, para. 1.2(3).

Interest in the five years preceding Forma-Con filing its assignment in bankruptcy (the “Review Period”).<sup>11</sup> These six Suppliers of Interest are:

- (a) 2483251 Ontario Corp., a.k.a. Clearway Haulage (“Clearway”);
- (b) MMC General Contracting (“MMC”);
- (c) MTEC Construction (“MTEC”);
- (d) Strada Haulage (“Strada”);
- (e) 2104664 Ontario Inc. (“664”); and
- (f) 2304288 Ontario Ltd. (“230”, collectively the “Supplier Respondents”).<sup>12</sup>

14. Additionally, the Trustee’s investigation implicated several individuals (the “Individual Respondents”) connected to the Impugned Transactions including:

- (a) **John Aquino**, who was BCCL’s and Forma-Con’s President at the time the payments were made and signed the vast majority of the cheques associated with these payments;<sup>13</sup>
- (b) **Giuseppe Anastasio** a.k.a. Joe Ana (“Ana”) who sent invoices on behalf of MMC to Michael Solano;<sup>14</sup>
- (c) **Marco Caruso** (“Caruso”) who sent invoices on behalf of Clearway, MTEC and Strada to Michael Solano;<sup>15</sup>
- (d) **Lucia Coccia** aka Lucia Canderle (“Coccia”) who is listed as a director and officer of MTEC, MMC and Strada in those companies’ respective corporate profiles;<sup>16</sup> and
- (e) **Michael Solano** (“Solano”), John Aquino’s cousin, who e-mailed instructions to Ana and Caruso to include on the Supplier Respondents’ invoices to Forma-Con and signed certain cheques associated with the Impugned Transactions.<sup>17</sup>

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<sup>11</sup> February Report, para. 2.3(3).

<sup>12</sup> February Report, para. 2.3(3)

<sup>13</sup> February Report, paras. 3.1.5(1)(i), 3.1.5(2)(i)

<sup>14</sup> February Report, paras. 3.1.5(1)(iii), 3.1.5(2)(iv)

<sup>15</sup> February Report, paras. 3.1.5(1)(iii), 3.1.5(2)(iii)

<sup>16</sup> February Report, para. 3.1.5(1)(iv), cite to corporate profiles.

<sup>17</sup> February Report, para. 3.1.5(1)(ii), 3.1.5(2)(ii)

15. Forma-Con’s inspectors authorized the Trustee to commence an application under s. 96 of the *Bankruptcy and Insolvency Act* (“BIA”) to declare certain transactions uncovered by the Trustee’s investigation to be transfers at undervalue (“TUVs”).<sup>18</sup> In the course of this application, the Trustee released four further reports: (i) its second report of May 7, 2020,<sup>19</sup> which included supporting documentation, including copies of e-mails, cheques, and invoices;<sup>20</sup> (ii) its supplement to the February Report on July 10, 2020 to reply to responding materials provided by 664;<sup>21</sup> (iii) its second supplement to the February Report on August 18, 2020,<sup>22</sup> reply to the responding evidence of John Aquino, including an expert report authored by Ross Hamilton of Cohen Hamilton Steger & Co. Inc. (the “Hamilton Report”); and its third supplement to the February Report on September 8, 2020 to respond an evidentiary objection of John Aquino.<sup>23</sup>

### **The False Invoicing Scheme**

16. From 2014-2017, the Respondents were participants in a false invoicing scheme which illicitly removed at least \$11.4 million from Forma-Con while providing no value in return.

17. The scheme generally follows a similar pattern. First, Solano would send an e-mail to Caruso or Ana with instructions for a Supplier Respondent to invoice Forma Con, including the amount to be invoiced, the project to be invoiced, and the description of the work to be included.<sup>24</sup> Shortly thereafter, Caruso or Ana would send an invoice matching these instructions to Solano.<sup>25</sup>

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<sup>18</sup> February Report, para. 1.2(4)(a)

<sup>19</sup> Second Report of KSV Kofman Inc. as Trustee in Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited, dated May 7, 2020 (the “May Report”).

<sup>20</sup> May Report, para 1.3(1).

<sup>21</sup> Supplement to the First Report of KSV Kofman Inc. as Trustee in Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited, dated July 10, 2020, (the “July Report”) para 1.1(1)

<sup>22</sup> Second Supplement to the First Report of KSV Kofman Inc. as Trustee in Bankruptcy of 1033803 Ontario Inc. and 1087507 Limited., dated August 18, 2020 (the “August Report”)

<sup>23</sup> September Report, para. 1.1(1).

<sup>24</sup> February Report, para. 2.4(1), an example e-mail can be found at Appendix B.

<sup>25</sup> February Report, para. 2.4(1), an example invoice can be found at Appendix C.

Within hours of the invoice being sent a cheque signed by one of John Aquino or Solano would be issued to pay the invoice.<sup>26</sup>

18. In order to increase the appearance of the legitimacy, these invoices and their descriptions would purport to be for work performed on then ongoing Forma-Con projects. Further, some of the Supplier Respondents had names similar to legitimate suppliers of the Group.<sup>27</sup>

19. Forma-Con's controls and standard payment practices were not followed in relation to the Impugned Transactions.<sup>28</sup> As part of Forma-Con's usual accounting processes, invoices would be accompanied by timesheets, contracts and other supporting documentation.<sup>29</sup> This package would then typically be approved by a project manager, and only then Forma-Con would pay the invoice.<sup>30</sup> In the case of the Impugned Transactions, the only document supporting payment the Trustee could locate would be the invoice itself (if that).<sup>31</sup>

20. Payment of invoices in the Impugned Transactions was also unusually fast when compared to Forma-Con's typical accounting practices. Forma-Con typically paid its invoices within 30 to 90 days of receipt, consistent with other entities in the Group.<sup>32</sup> On average, the invoices associated with the Impugned Transaction were paid within 1.3 days.<sup>33</sup>

21. On cross-examination, John Aquino—who signed the vast majority of the cheques for the scheme—effectively conceded the falsity of the invoices scheme. He stated:

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<sup>26</sup> February Report, para. 2.4(1), an example cheque can be found at Appendix D.

<sup>27</sup> February Report, para. 3.1.4(1)(v); Trustee's Responses to the Questions, p. 25, q. 368.

<sup>28</sup> February Report, para. 2.5(1)

<sup>29</sup> May Report, para 2.0(6).

<sup>30</sup> May Report, para 2.0(6).

<sup>31</sup> May Report, para 2.0(6).

<sup>32</sup> February Report, para. 2.5(1)

<sup>33</sup> February Report, para. 2.5(1)

For purposes of these Applications, I am prepared to concede the following, the trustee's opinion as to the fair market value of goods and services provided by the suppliers of interest, not including 230 Ontario, to Forma-Con is correct.<sup>34</sup>

John Aquino clarified that he understood and agreed that this meant that the value of the goods and services was zero.<sup>35</sup> The next day, Ana, Coccia, and Caruso made similar concessions.<sup>36</sup>

### **The Individual Respondents' Lack of Evidence**

22. The Individual Respondents have all filed affidavits in this application. However, while John Aquino, Caruso, Ana, and Coccia deny that the Impugned Transactions were TUVs, these affidavits say little else which is relevant to the matters in this application. Notably:

- (a) None of the above Respondents provide any explanation for the Impugned Transactions or the false invoices;
- (b) None of the above Respondents deny their involvement in the Impugned Transactions;
- (c) None of the above Respondents deny that they personally benefited from the Impugned Transactions; and
- (d) None of the above Respondents have provided any evidence to rebut the presumptions drawn from the badges of fraud outlined in the Trustee's evidence.

23. Further, the Individual Respondents were connected to Forma Con, the Supplier Respondents, and/or each other and were parties to or privy to the Impugned Transactions:

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<sup>34</sup> Transcript of the Cross-Examination of John Aquino, dated September 3, 2020 ("John Aquino Cross Transcript"), Q. 220 (emphasis added). He disputed that the transfers were intended to delay, defeat or defraud Forma-Con's creditors.

<sup>35</sup> John Aquino Cross Transcript, Q. 225.

<sup>36</sup> Transcript of the Cross-Examination of Giuseppe Anastasio, dated September 4, 2020, Q. 73.; Transcript of the Cross-Examination of Lucia Coccia-Canderle, dated September 4, 2020 ("Coccia Cross Transcript"), QQ. 4-5; Transcript of the Cross-Examination of Marco Caruso, dated September, 2, 2020, Q. 28.

- (a) *John Aquino* was at all material times an officer and shareholder of Forma Con,<sup>37</sup> signed the majority of the cheques associated with the Impugned Transactions<sup>38</sup> and personally received payments from 230.<sup>39</sup>
- (b) *Solano* was John Aquino's cousin and provided instructions to Caruso and Ana on how to effect the Impugned Transactions.<sup>40</sup> Solano received payments from 230.<sup>41</sup>
- (c) *Caruso* and *Ana* provided invoices on behalf of the Supplier Respondents to Forma-Con.<sup>42</sup> Caruso and Ana received cheques from the Supplier Respondents.<sup>43</sup>
- (d) *Coccia* is listed as a director and officer of three of the Supplier Respondents' corporate profiles and is a signing authority on those Supplier Respondents' bank accounts.<sup>44</sup> Further, cheques were made out to Coccia from the Supplier Respondents.<sup>45</sup>

### **The Hamilton Report is flawed and irrelevant to the Trustee's Allegations**

24. John Aquino has commissioned an expert report from Ross Hamilton of Cohen Hamilton Steger. The Hamilton Report's conclusions, as they relate to Forma-Con, are limited to the conclusion that Forma-Con paid its liabilities on a timely basis from 2014 to at least until December 31, 2017.<sup>46</sup> Despite this conclusion, Mr. Hamilton agreed on cross-examination that he did not conduct a solvency analysis or consider Forma-Con's liabilities on a "balance-sheet test" and could not opine on Forma-Con's solvency during the review period.<sup>47</sup>

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<sup>37</sup> February Report, 3.1.5(1)(i)

<sup>38</sup> February Report, 3.1.5(2)(i)

<sup>39</sup> Monitor's Report, para. 57(a).

<sup>40</sup> February Report, 3.1.5(1)(ii)

<sup>41</sup> Monitor's Report, para. 57(d).

<sup>42</sup> February Report, 3.1.5(2)(iii-iv)

<sup>43</sup> Monitor's Report, paras. 57(b)-(c).

<sup>44</sup> February Report, 3.1.5(1)(iv); Corporate Profiles, Appendix D to the September Report.

<sup>45</sup> Coccia Cross Transcript, QQ. 111-159.

<sup>46</sup> Cohen, Hamilton, Steger & Co. Inc. Accounting Report, dated July 27, 2020, Exhibit "L" to the Affidavit of John Aquino sworn July 27, 2020 ("John Aquino July 27 Affidavit"), para. 20.

<sup>47</sup> Transcript of the Cross Examination of Ross Hamilton, dated September 1, 2020 ("Hamilton Cross Transcript") QQ 453-458.

25. Mr. Hamilton also agreed that his analysis was limited to Forma-Con's short-term liabilities. He did not consider any of the long-term, contingent, or off-balance sheet liabilities of Forma-Con.<sup>48</sup> Mr. Hamilton conceded that he was not even aware that Forma-Con was a guarantor of BCCL's credit facilities with National Bank.<sup>49</sup> Nor did he consider Forma-Con's ability to pay its related-party liabilities.<sup>50</sup>

26. Finally, the Hamilton Report is limited by the reliability of the information it is based on. As explained by the Monitor, there are several reasons to doubt the accuracy of the Group's financial records.<sup>51</sup> For example, the financial records frequently overstate revenues and understate liabilities and BCCL had a practice of holding cheques to suppliers that were issued but not yet delivered allowing for extended use of those funds and further obscuring actual BCCL's financial position.<sup>52</sup> The same would apply to Forma-Con.

### **230's lack of evidence**

27. John Aquino has identified that 230 is his company.<sup>53</sup> As it relates to the Trustee's application, John Aquino has not provided any explanation or evidence to support his assertion that the payment made by Forma-Con to 230 was for valuable consideration.

### **664's Impugned Transaction**

28. Antonio Caranci ("Caranci") is the principal of two numbered companies identified as Suppliers of Interest: 664 and 2104661 Ontario Inc. ("661") The Trustee has identified approximately \$1.5 million of payments to 661 and \$260,000 of payments to 664, of which only

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<sup>48</sup> Hamilton Cross Transcript, QQ 563-567, 599.

<sup>49</sup> Hamilton Cross Transcript, QQ 585.

<sup>50</sup> Hamilton Cross Transcript, Q 558.

<sup>51</sup> Seventh Supplement to the Phase II Investigation Report of the Monitor, dated August 18, 2020 ("Seventh Supplement"), para. 44.

<sup>52</sup> Seventh Supplement, para 48.

<sup>53</sup> Affidavit of John Aquino, sworn June 14, 2020, ("John Aquino June 14 Affidavit") para. 30.

\$90,400 to 664 is in the review period. The only evidence of this transaction in Forma-Con's records is a suspect invoice with the work allegedly provided described only as: "Consultation."<sup>54</sup>

29. The Trustee's investigation showed that no services were provided in connection with this invoice. John Aquino has conceded as much on cross-examination. Nonetheless, despite its similarities with the false invoicing scheme and the lack of documentation in Forma-Con's records, 664 insists that the transaction was legitimate.

### **The Other Supplier Respondents**

30. The other Supplier Respondents (Clearway, MMC, MTEC, and Strada) have not responded to this application.

### **PART III - ARGUMENT**

31. The issue on this application is whether the Respondents are liable for transfers at undervalue. The Trustee is seeking to recover the entirety of the value of the Impugned Transactions from the Respondents, totalling **\$11,366,890**.

#### **Section 96 of the *BIA***

32. For the benefit of creditors, the *BIA* provides the Trustee with a powerful remedy to recovery money taken from the debtor in a transaction at undervalue. A transfer at undervalue is defined to include "a disposition of property or provision of services for which no consideration is received by the debtor."<sup>55</sup>

33. The Trustee proceeds under s. 96(1)(b)(ii)(B) of the *BIA*. Under this section, the Trustee may seek to avoid the TUV (i) if the party was not dealing at arm's length with a debtor, (ii) the transfer occurred during the five-year Review Period, *and* (iii) the debtor intended to defraud,

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<sup>54</sup> July Report, para. 2.0(8)(b).

<sup>55</sup> *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("*BIA*") s. 2.

defeat, or delay a creditor.<sup>56</sup> If a court determines that a TUV occurred it may order a party to the transfer or any other person who is privy to the transfer,<sup>57</sup> to pay to the estate the difference between the value given by the debtor and the value received by the debtor—here the entire consideration of the transfers.<sup>58</sup> The Impugned Transactions meet all of the above criteria.

34. In light of this, the Trustee’s submissions focus on three points:

- (a) The Supplier Respondents were not dealing with Forma-Con at arm’s length;
- (b) The Impugned Transactions were designed to defraud, defeat or delay Forma-Con’s creditors; and
- (c) The Respondents are party to or otherwise privy to the Impugned Transactions.

35. For simplicity of analysis, the entirety of the claim against 664 is addressed in the final section of this factum.

### **The Impugned Transactions were transfers at undervalue**

36. The Trustee has discovered a false invoicing scheme at Forma-Con. Invoices were created for services never delivered. Cheques were cut for these non-existent services. Forma-Con received zero consideration, but money flowed to the Respondents and their privies.

37. In its February and May Reports, the Trustee stated its opinion that there was nil value for any of the Impugned Transactions.<sup>59</sup> Under s. 96(2), in the absence of evidence to the contrary, the value of the Impugned Transactions is as provided by the Trustee.

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<sup>56</sup> *BIA*, s. 96(1)(b)(ii)(B).

<sup>57</sup> Section 96(3) of the *BIA* explains that a person who is privy means a person who is not dealing at arm’s length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.”

<sup>58</sup> *BIA*, s. 96(1).

<sup>59</sup> February Report, para. 3.1.1(1); May Report, para. 2.0(3).

38. Four of the individual respondents have conceded that—with the exception of 230—no value was provided by the Supplier Respondents for the Impugned Transactions. This is also clear from the lack of evidence uncovered by the Trustee’s investigation.

39. The Trustee has not been able to locate any evidence that 230 provided any valuable consideration to Forma-Con in the Review Period. Despite carving out 230 from the Individual Respondents’ concession, none of them have adduced any evidence to show valuable goods or services 230 delivered. As a result, the presumption in s. 96(2) applies and the value of the consideration received by Forma-Con from 230 is the value stated by the Trustee: zero.

**The Supplier Respondents were not dealing at arm’s length with Forma-Con**

40. With respect to the Impugned Transactions, none of the Supplier Respondents, the parties billing for the Impugned Transactions, were dealing with Forma-Con at arm’s length.

41. First, 230 was not dealing at arm’s length because it is a related person under s. 4 of the *BIA*. 230 has been identified by John Aquino as his company, and it is clear that, in all material respects, Mr. Aquino controlled 230. It is the Trustee’s evidence that John Aquino was the directing mind of Forma-Con during the relevant period.<sup>60</sup> John Aquino’s evidence is that control was shared between him, Steven Aquino, and Ralph Aquino.<sup>61</sup> Either way, for the purposes of s. 4 of the *BIA*, John Aquino controlled both 230 and Forma-Con; therefore, 230 and Forma-Con are deemed not to deal with each other at arm’s length.<sup>62</sup>

42. Second, with respect to Clearway, MMC, MTEC, and Strada, the concession that Forma-Con received zero value is conclusive of the non-arm’s length nature of the transactions. In

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<sup>60</sup> Trustee’s Responses, p. 23, q. 360., Appendix C to the September Report.

<sup>61</sup> John Aquino July 27 Affidavit, para. 8.

<sup>62</sup> *BIA*, ss. 4(2)(c), 4(5).

essence, the parties did not deal with each other in an arm's length relationship because everyone was involved in the false invoicing scheme.

43. Justice Pattillo addressed a question on arm's length dealing in a similar situation in *National Telecommunications v. Stalt*.<sup>63</sup> According to Justice Pattillo, s. 4(4) of the *BIA* requires a determination, based on the totality of the evidence, of whether the transaction involves "generally-accepted commercial incentives such as bargaining and negotiation in an adversarial format and maximizing of a party's economic interest" and "in the absence of any such indicia, the inference that arises is that the parties were not dealing at arm's length."<sup>64</sup>

44. It is uncontested that Forma-Con received no value for the payments it made to Clearway, MMC, MTEC, and Strada. Since Forma-Con was paying these respondents for nothing in return, tautologically there was no bargaining, negotiation or any incentive for Forma-Con to maximize its economic interest. A company that agrees to pay respondents some \$11 million for doing nothing is not dealing with that person at arm's length.<sup>65</sup>

**The Impugned Transactions were designed to defraud, defeat, or delay Forma-Con's creditors.**

45. Under s. 96(1)(b)(ii)(B) of the *BIA*, the Trustee must show that the "debtor intended to defraud, defeat or delay a creditor." This is contested for all of the Impugned Transactions.

46. In establishing the intent to defraud, defeat or delay a creditor, the Trustee need only demonstrate that one of the debtor's motives or intentions was to defraud, defeat, or delay a creditor.<sup>66</sup> The common law has recognized that it is nearly impossible to prove another person's

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<sup>63</sup> *National Telecommunications v. Stalt*, [2018 ONSC 1101](#).

<sup>64</sup> *National Telecommunications v. Stalt*, [2018 ONSC 1101](#), para. 41; see also *Juhasz (Trustee of) v. Cordiero*, [2015 ONSC 1781](#), para. 41.

<sup>65</sup> *National Telecommunications Inc. Re.*, [2017 ONSC 1475](#), para. 48.

<sup>66</sup> *Juhasz Estate v. Cordiero*, [2015 ONSC 1871](#), para. 54.

subjective intention.<sup>67</sup> As such, in order to establish the requisite intent under s. 96 of the *BIA* an applicant is permitted to rely upon “badges of fraud” to establish a presumption of intention.<sup>68</sup>

47. The Ontario Court of Appeal has identified non-exhaustive list of “badges of fraud” including but not limited to:

- (a) the consideration for the transaction was grossly inadequate;
- (b) the transfer was made to a non-arm's length person;
- (c) the transfer was secret;
- (d) the transfer was effected with unusual haste; and
- (e) the transferor was facing actual or potential liabilities, was insolvent, or about to enter a risky undertaking.<sup>69</sup>

All of the above badges of fraud are present in the Impugned Transactions.

48. Once the Trustee has raised evidence of one or more badges of fraud “the evidential burden” shifts and “then falls on those defending the transaction to adduce evidence showing the absence of fraudulent intent.”<sup>70</sup>

49. This is a false invoicing scheme. John Aquino and Solano, insiders at Forma-Con, knowingly cut cheques for fake invoices in relation to which no services that were delivered. This is not a case where an innocent explanation has been or could be provided. There is no innocent explanation for a false invoicing scheme. In a similar case, it has been held that a false invoicing scheme that had the effect of falsifying the debtor’s receivables and payables established an intent to “defeat, defraud or delay” creditors.<sup>71</sup>

50. The badges of fraud in this case are clear on their face:

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<sup>67</sup> *National Telecommunications Inc. Re.*, [2017 ONSC 1475](#), para. 53.

<sup>68</sup> *National Telecommunications Inc. Re.*, [2017 ONSC 1475](#), para. 53.

<sup>69</sup> *Montor Business Corp. (Trustee of) v. Goldfinger*, [2016 ONCA 406](#), para. 73.

<sup>70</sup> *Purcaru v. Seliverstova*, [2016 ONCA 610](#), para. 5.

<sup>71</sup> *National Telecommunications v. Stalt*, [2018 ONSC 1101](#), para. 57.

- (a) **Absence of consideration.** As discussed above, inherent in the false invoicing scheme is the complete absence of value provided to Forma-Con. With the exception of 230 (where there is no evidence otherwise), all of the living Individual Respondents have conceded the lack of value.
- (b) **Non-arm's length.** As discussed above, the transactions were made with non-arm's length parties; all were in on the scheme together.
- (c) **Secrecy.** The Respondents developed and perpetrated a scheme to conceal the true nature of the Impugned Transactions. The invoices purport to describe services that were in fact not delivered. The only purpose could be hiding the improper dispersion of funds.
- (d) **Unusual haste.** The Impugned Transactions were carried out with unusual haste. While Forma-Con's typical payment cycle was 30-90 days, payments made in association with the Impugned Transactions were on average paid in 1.3 days.<sup>72</sup> Further these transactions were largely effected by Solano, whose role has been understood by the Trustee to have worked in the Group's IT and accounting departments but was not engaged in vendor or procurement matters.<sup>73</sup>
- (e) **Liabilities.** Forma-Con had significant long-term and off-balance sheet liabilities during the Review Period. Forma-Con owed related parties approximately \$9 million in 2014; approximately \$96 million in 2015; and approximately \$119 million in 2016.<sup>74</sup> Further, Forma-Con was a guarantor of BCCL's credit facility with National Bank ("NBC"), with contingent obligations of \$48 million, \$55 million, and \$56 million at the end of fiscal 2014, 2015, and 2016 respectively. Further, Forma-Con became a guarantor of BCCL's \$80 million credit facility with Bridging Finance Inc. when the facility was entered into in July 2017.<sup>75</sup>

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<sup>72</sup> February Report, para. 2.5(1)

<sup>73</sup> Monitor's Phase II Investigation Report, para. 32; Trustee's Responses, p. 14, q. 329, Appendix C to the September Report. Transcript of the Cross-Examination of Steven Aquino, dated August 31, 2020, ("Steven Aquino Cross Transcript") Q. 178.

<sup>74</sup> August Report, para. 3.1(4)(c)

<sup>75</sup> August Report, para. 3.1(5)(d)

51. After the clear pattern of largely conceded badges of fraud, the evidentiary burden shifts. None of the Respondents have provided evidence which could reasonably be interpreted to rebut the presumption of fraudulent intent.

52. Indeed, to the extent that evidence of the debtor's actual intent is available, it supports an intent to defraud. John Aquino was a directing mind of Forma-Con<sup>76</sup> and signed a significant portion of the cheques associated with the Impugned Transactions.<sup>77</sup> John Aquino stated on cross-examination that he would have been familiar with 100% of the suppliers and subtrades.<sup>78</sup> Put together with his concession regarding the non-value of the Impugned Transactions (except 230), the only available inference is that Forma-Con, acting through John Aquino, knowingly made payment for the receipt of no consideration in return.<sup>79</sup> There is no reason to do so except to avoid its obligations. Nor have the Respondents given evidence of an alternative explanation.

53. In light of the concession of the existence of a false invoicing scheme, the Trustee is not aware of the Respondents' defence to the question of intent. However, to the extent that the Respondents argue that there is no intent to defraud, delay or evade creditors because Forma-Con was paying its current liabilities, this defence is misplaced, for three reasons.

54. First, the Trustee is not relying on the branch of s. 96 that requires a showing of insolvency. Moreover, the Hamilton report does not actually opine on solvency.

55. Second, the fact that a debtor is meeting its short-term liabilities, such as accounts payable to trades, is not evidence that it has not defrauded, evaded or delayed its creditors. A company's short-term liabilities are only one part of the equation. Despite still meeting current obligations, if

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<sup>76</sup> John Aquino Affidavit, sworn July 27, 2020, para. 123.

<sup>77</sup> February Report, para. 3.1.5(2)(i)

<sup>78</sup> John Aquino Cross Transcript. Q. 50.

<sup>79</sup> The carve-out of 230 to this concession is, here, irrelevant. Once the broader pattern of the intent is found, it can easily be inferred to apply to the Impugned Transaction involving 230.

money is taken from a company that makes it less able to meet long-term or contingent liabilities, those long-term or contingent creditors are nonetheless affected. Forma-Con had substantial other liabilities including long-term related party liabilities,<sup>80</sup> a guarantee of the Bondfield Group's lending facilities given by NBC<sup>81</sup> and then Bridging.<sup>82</sup> Every dollar taken in the false invoicing scheme is one less dollar available to these creditors if and when their liabilities came due.

56. The intent to defraud Forma Con's creditors can be seen clearly in the effect of the false invoicing scheme. When Forma-Con filed for bankruptcy, it had \$215 million in outstanding liabilities, including: approximately \$142 million owed to BCCL, \$40 million owed to Bridging Finance, approximately \$8 million owed to Canada Revenue Agency, approximately \$2 million owed to the Receiver General of Canada, and approximately \$2 million owed to the Workplace Safety & Insurance Board. These creditors, and others are receiving substantially lower recoveries because the false invoicing scheme during the Review Period drained more than \$11 million from Forma-Con's coffers (more than \$34 million, if transactions pre-Review Period are included).

### **The Respondents are party to or otherwise privy to the Impugned Transactions**

57. To be liable, a respondent must be a party to the Impugned Transactions or privy to it.

58. The Supplier Respondents were all parties to the Impugned Transactions because they issued the invoices and received payments.

59. The Individual Respondents are all privy to the Impugned Transactions. Under s. 96(3) of the *BIA*, "a 'person who is privy' means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person."<sup>83</sup> This test is met for each Individual Respondent:

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<sup>80</sup> August Report, para. 3.1(4)(c).

<sup>81</sup> August Report, para. 3.1(4)(d).

<sup>82</sup> August Report, para. 3.1.5(d).

<sup>83</sup> *BIA*, s. 96(3)

(a) **John Aquino** was a directing mind and officer of Forma-Con, as a result John was a “related person” to Forma-Con meaning that he is deemed not to deal at arm’s length with Forma-Con.<sup>84</sup> Further, John Aquino authorized payments from Forma-Con to the Supplier Respondents by signing cheques, causing, by reason of the Impugned Transactions, the Supplier Respondents to receive benefits. He also indirectly received benefits by virtue of his control and ownership of 230.

(b) **Michael Solano**. Solano was a signing authority at Forma-Con<sup>85</sup> and was John Aquino’s cousin. As a result, Solano was connected by blood to John Aquino who controlled Forma-Con (or, in the alternative was a member of a related group that controlled Forma-Con). Therefore, under s. 4(5) of the *BIA*, Solano is presumed not to deal at arm’s length with Forma-Con. Solano played a central role in the scheme by organizing and facilitating the creation of false invoices and Forma-Con’s acceptance of these invoices. In his capacity as a signing authority of Forma-Con, Solano authorized payments from Forma-Con to the Supplier Respondents by signing cheques, therefore causing the Supplier Respondents to receive benefits.

(c) **Joe Ana and Marco Caruso** Ana and Caruso are privy to the Impugned Transactions as they were key participants in the false invoicing scheme and both worked with Solano to effect the Impugned Transactions. Ana and Caruso received e-mailed instructions from Solano on how to prepare the false invoices and would provide the invoices on behalf of certain Supplier Respondents to Forma-Con. As described above, this collective participation in the false invoicing scheme qualifies all parties as non-arm’s length.<sup>86</sup> Caruso and Ana’s participation in the scheme resulted in benefits being received by Clearway, MMC, MTEC, and Strada. Further, Caruso and Ana received \$782,000 and \$1,853,789 respectively from the Supplier Respondents.

(d) **Lucia Coccia** Coccia is listed as a director and officer of MMC, MTEC, and Strada on those entities’ respective corporate profiles. Despite Coccia’s denial of serving in these roles, or otherwise being employed by these companies, there is evidence showing that she received payment from these entities. Further, there is no evidence that these entities had

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<sup>84</sup> *BIA*, ss. 4(2), 4(5).

<sup>85</sup> Steven Aquino Cross Transcript, Q. 985.

<sup>86</sup> *Juhasz (Trustee of) v. Cordiero*, [2015 ONSC 1781](#), para. 41.

any source of funds other than the false invoicing scheme; therefore, it is clear that Coccia was not at arm's-length to the Supplier Respondents and received benefits from the scheme.<sup>87</sup>

**The Impugned Transaction with 664 is a transfer at undervalue**

60. As demonstrated above by the concessions of John Aquino and the other living Individual Respondents, there was a false invoicing scheme at Bondfield and Forma-Con. A series of payments made to 664, and another Supplier of Interest— a company with the same principal, 2104661 Ontario Inc.—showed the same pattern. One \$90,400 payment to 664 is captured in the Review Period.

61. 664 contests that this invoice was part of the false invoicing scheme and claims it was for legitimate work. It was not.

62. *Transfer at undervalue.* The payment to 664 largely follows the same pattern as the balance of the Impugned Transactions: it was issued at the request of Solano,<sup>88</sup> contained minimal description of the service (here one word: “Consulting”) and was paid by a cheque on the same day. The Trustee has not been able to find any supporting accounting records or correspondence at Forma-Con to show that the work was conducted. The Trustee’s investigations, including conversations with Steve Aquino, show no evidence that any work was performed.<sup>89</sup> John Aquino first disagreed with 664’s explanation provided for the alleged transaction<sup>90</sup> and the, on cross-examination, that there was no value delivered by 664.

63. In its affidavit evidence, 664 has provided an explanation for the work that was allegedly performed in consideration of the \$90,400 it received from Forma-Con. According to 664, this

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<sup>87</sup> *Juhasz (Trustee of) v. Cordiero*, [2015 ONSC 1781](#), para. 51.

<sup>88</sup> Transcript of the Cross-Examination of Antonio Caranci, dated September 4, 2020, (“Caranci Cross Transcript”), Q. 234.

<sup>89</sup> February Report, para. 2.3(4); July Report, para. 2.0(7).

<sup>90</sup> John Aquino July 27 Affidavit, para. 18.

payment was for consulting work performed for Forma-Con on the Hawkesbury Hospital project.<sup>91</sup> In its affidavit evidence, 664 attached documents ostensibly evidencing that 664 was paid by Forma-Con and that 664 paid taxes on this payment, but attached no documentation to support its assertion that 664 actually provided any services to Forma-Con.

64. On July 9, 2020, the Trustee made an express request to 664 for it to provide any relevant documents or correspondence regarding the consulting work allegedly performed by 664 for Forma-Con.<sup>92</sup> After receiving no response to this letter for almost two months, at the cross-examination of 664's representative, Caranci, the Trustee was provided with scans of certain e-mail correspondence between Caranci and Rich Ramos ("Ramos") a principal of Canarch Consulting Services Inc. ("Canarch"), and an invoice from Canarch purportedly for work performed on the Hawkesbury Hospital project.<sup>93</sup> The Trustee has been unable to properly test these documents as the Trustee's request for 664 to provide the original electronic versions of these documents was refused.<sup>94</sup>

65. To date, 664 has presented no direct evidence of the work done for Forma-Con and the circumstantial evidence it has provided has been shielded by so many refusals as to prevent the Trustee from being able to test it. An adverse inference should be drawn against 664 as a result.

66. The evidence of 664 is that it entered into an oral agreement with Solano to perform consulting work.<sup>95</sup> With respect, that lacks any indicia of reliability. The Trustee has not been able to find, and 664 has not provided, any internal records corroborating the work or the agreement, despite broad searches through Solano's inbox. Despite 664's evidence that it effectively saved

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<sup>91</sup> Affidavit of Antonio Caranci, sworn June 26, 2020, ("Caranci Affidavit") paras. 4-11.

<sup>92</sup> July Report, para. 2.0(6).

<sup>93</sup> Caranci Cross Transcript, QQ. 185, 190-196.

<sup>94</sup> Caranci Cross Transcript QQ 186-189.

<sup>95</sup> Caranci Cross Transcript, Q. 153.

Forma-Con \$8 million, Solano—664’s contact on this project—does not appear to have any relevant e-mail correspondence on the subject.

67. 664’s evidence is that it was hired to solve a problem which required “a high degree of structural engineering expertise”.<sup>96</sup> However, 664 had no expertise in structural engineering and its principal, Caranci, was not qualified to even read the report which allegedly addressed the issues.<sup>97</sup> Instead, according to Caranci, the structural engineer, Ramos, who was already known to Solano, largely interacted directly with Forma-Con.<sup>98</sup> Even on 664’s own evidence, it is not clear why 664 was needed or what they did to earn their \$80,000 fee (plus HST).

68. Instead, the pattern of the invoice is consistent with the false invoicing scheme with respect to the balance of the other Supplier Respondents. Solano was at the centre of the false invoicing scheme. His position was in IT and he dealt with accounting for expenditures of the Aquino family.<sup>99</sup> Aside from Caranci, no one has suggested that Solano had any role in managing or troubleshooting construction projects, or—with the exception of the false invoices for the Supplier Respondents—hiring subcontractors or instructing structural engineers.

69. While the above evidence gives rise to serious doubts about 664’s assertions, what is more troubling is that the fact that the Trustee was largely prevented from testing the evidence of 664. Over the course of Caranci’s cross-examination, Caranci’s counsel inappropriately and repeatedly interrupted the Trustee’s questioning resulting in 44 refusals being noted in the draft transcript of the examination. In reality, the number of refused questions is significantly higher than 44, but this

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<sup>96</sup> Caranci Affidavit, para. 9.

<sup>97</sup> Caranci Cross Transcript, Q. 204.

<sup>98</sup> Caranci Cross Transcript, QQ. 184, 337

<sup>99</sup> Steven Aquino Cross Transcript, Q 178.

fact was obscured in part by 664's counsel's evasiveness on confirming whether an interruption was actually a refusal or not.<sup>100</sup>

70. First, the pattern of 664 being a legitimately operating business could not be examined. Mr. Caranci refused to answer questions about the invoices that 664 and its affiliate 661 billed Forma-Con in previous years.<sup>101</sup> Caranci also refused to disclose the income of 664 in the prior year to test whether it indeed had a legitimate going concern business.<sup>102</sup>

71. Second, despite the Trustee requesting documents from 664 almost two months earlier, the Canarch emails and invoices were only provided at the cross-examination itself. No sworn evidence was provided by Canarch or its principal Ramos. Questions to further elucidate the evidence were refused. For example, in Caranci's affidavit he provided income and HST tax forms as evidence that he had reported the \$80,000 income, but redacted the balance of the form (without a legal basis to do so).<sup>103</sup> When asked for the unredacted forms, which would have allowed the Trustee to determine whether the Canarch expense was reported, Caranci refused.<sup>104</sup>

72. Third, when asked about Ramos's credentials (which appeared from the internet to be those of an architect not a structural engineer), Caranci's counsel refused the question.<sup>105</sup> If Caranci is not even aware of Ramos's professional qualifications, it calls into question his role in charging \$80,000, apparently for the sole benefit of subcontracted to Ramos.

73. Mr. Caranci's evidence is that Canarch produced a report for the Hawkesbury project, which he read.<sup>106</sup> But 664 has not produced Canarch's report, Canarch apparently cannot find it

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<sup>100</sup> See for example, Caranci Cross Transcript, QQ 122-136.

<sup>101</sup> Caranci Cross Transcript QQ. 397-402.

<sup>102</sup> Caranci Cross Transcript QQ. 286-287.

<sup>103</sup> Exhibits A & B to the Caranci Affidavit.

<sup>104</sup> Caranci Cross Transcript, QQ. 291-295.

<sup>105</sup> Caranci Cross Transcript, Q. 459.

<sup>106</sup> Caranci Cross Transcript, Q. 207.

but was sure that Solano would have received it.<sup>107</sup> But a search of Solano's inbox has turned up nothing to connect 664 with the Hawkesbury project.<sup>108</sup> The Trustee has been unable to confirm the report's existence or assess the value it purportedly provided.

74. Mr. Caranci's refusals stretch beyond these limited examples and include his refusal to even particularize details in his own affidavit.<sup>109</sup> When a deponent refuses to answer a proper question on cross-examination the court may draw an adverse inference with respect to the deponent such as inferring that the answers, had they been given, would have exposed facts unfavourable to the deponent's position.<sup>110</sup> The Trustee asks the Court to draw such adverse inferences against 664, leading to the conclusion that the purportedly exculpatory evidence adduced is unreliable or irrelevant.

75. Given the conceded existence of a false-invoicing scheme at Forma-Con, the dearth of records of 664 performing work for Forma-Con, 664's refusal to provide any further records related to 664's alleged work and 664's dubious explanation related to Solano's role at Forma-Con, there are serious questions about the legitimacy of 664's explanation for the payment. Further, the pattern of the false invoicing scheme permits this Court to draw an inference that, in the absence of convincing evidence to the contrary, 664's invoice, like the balance of the Impugned Transactions, evidenced no value given.

76. In the alternative, even if one were to accept 664's explanation for the \$90,400 payment from Forma-Con (which, to be clear, the Trustee does not), 664 did not provide any value to Forma-Con in connection to the Hawkesbury Hospital project. Caranci conceded on cross-

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<sup>107</sup> Caranci Cross Transcript, Q. 210

<sup>108</sup> July Report, para. 2.0(4).

<sup>109</sup> *See for example*, Caranci Cross Transcript, QQ 413-417.

<sup>110</sup> *1705371 Ontario Ltd. v. Leeds Contracting Restoration Inc.*, [2018 ONSC 7423](#), paras. 31-32; *see also*, *Indcondo Building Corp. v. Steele- Jane Properties Inc.*, [2001 CarswellOnt 2904](#), (Sup. Ct. J.) para. 7.

examination that he was compensated for subcontracting to Ramos, despite the fact that Solano already knew Ramos.<sup>111</sup> Further, Caranci conceded he was not an engineer, that he was not qualified to comment on structural issues, that he did not know or understand the details of the work which are discussed within his affidavit.<sup>112</sup> When expressly asked what the “value-add” 664 provided to Forma-Con for the payment Caranci stated he couldn’t answer.<sup>113</sup>

77. ***The Impugned Transaction with 664 was not at arm’s length*** As is the case with the other Impugned Transactions, 664 provided no value Forma-Con for the Impugned Transactions, which in and of itself is conclusive that 664 was not dealing at arm’s length with Forma-Con. Further, the Impugned Transaction involving 664 bears no indicia of generally accepted commercial incentives, giving rise to an inference that the parties were not dealing at arm’s length.<sup>114</sup> 664’s own evidence describes the fact that Caranci arrived at the amount of 664’s compensation without any negotiation or bargaining.<sup>115</sup>

78. ***The transaction with 664 was designed to defraud, defeat, or delay Forma-Con’s creditors*** The payment to 664 bears identical badges of fraud to the Impugned Transactions involving the other Supplier Respondents, as described above at paras. 45 - 56. Given the broader false invoicing scheme, there is not sufficient evidence to show that the invoice from 664 was anything but a false invoice with the purpose of defrauding Forma-Con’s creditors.

## **ORDER REQUESTED**

79. In light of the foregoing, the Trustee requests:

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<sup>111</sup> Caranci Cross Transcript, Q. 422.

<sup>112</sup> Caranci Cross Transcript, QQ. 204, 231.

<sup>113</sup> Caranci Cross Transcript, QQ. 424-425.

<sup>114</sup> *National Telecommunications v. Stalt*, [2018 ONSC 1101](#), para. 41.

<sup>115</sup> Caranci Affidavit, para. 12. Caranci Cross Transcript, Q 226.

- (a) a declaration that the Impugned Transactions, were transfers at undervalue for the purposes of section 96 of the BIA; and are void as against the Trustee;
- (b) an order that the Respondents, either as parties to the Impugned Transactions or as privies thereto, or both, shall jointly and severally pay to Forma-Con the value of the payments received by the Supplier Respondents through the Impugned Transactions, collectively; and
- (c) costs of this application.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 8th day of September, 2020.

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Scott Bomhof / Jeremy Opolsky / Craig Gilchrist

Date: September 8, 2020

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Trustee-in-Bankruptcy of 1033803 ONTARIO INC.  
and 1087507 ONTARIO LTD

## SCHEDULE “A”

### LIST OF AUTHORITIES

#### Case Law

1. *1705371 Ontario Ltd. v. Leeds Contracting Restoration Inc.*, [2018 ONSC 7423](#)
2. *Indcondo Building Corp. v. Steele- Jane Properties Inc.*, [2001 CarswellOnt 2904](#), (Sup. Ct. J.)
3. *Juhasz Estate v. Cordiero*, [2015 ONSC 1871](#)
4. *Montor Business Corp. (Trustee of) v. Goldfinger*, [2016 ONCA 406](#)
5. *National Telecommunications Inc. Re.*, [2017 ONSC 1475](#)
6. *National Telecommunications v. Stalt*, [2018 ONSC 1101](#).
7. *Purcaru v. Seliverstova*, [2016 ONCA 610](#)

## SCHEDULE “B”

### TEXT OF STATUTES, REGULATIONS & BY-LAWS

*Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3*

#### Definitions

2 In this Act,

...

**transfer at undervalue** means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor; (*opération sous-évaluée*)

...

#### Definitions

4 (1) In this section,

**entity** means a person other than an individual; (*entité*)

**related group** means a group of persons each member of which is related to every other member of the group; (*groupe lié*)

**unrelated group** means a group of persons that is not a related group. (*groupe non lié*)

#### Definition of related persons

(2) For the purposes of this Act, persons are related to each other and are **related persons** if they are

(a) individuals connected by blood relationship, marriage, common-law partnership or adoption;

(b) an entity and

(i) a person who controls the entity, if it is controlled by one person,

(ii) a person who is a member of a related group that controls the entity, or

(iii) any person connected in the manner set out in paragraph (a) to a person described in subparagraph (i) or (ii); or

(c) two entities

- (i) both controlled by the same person or group of persons,
- (ii) each of which is controlled by one person and the person who controls one of the entities is related to the person who controls the other entity,
- (iii) one of which is controlled by one person and that person is related to any member of a related group that controls the other entity,
- (iv) one of which is controlled by one person and that person is related to each member of an unrelated group that controls the other entity,
- (v) one of which is controlled by a related group a member of which is related to each member of an unrelated group that controls the other entity, or
- (vi) one of which is controlled by an unrelated group each member of which is related to at least one member of an unrelated group that controls the other entity.

### **Relationships**

**(3)** For the purposes of this section,

- (a) if two entities are related to the same entity within the meaning of subsection (2), they are deemed to be related to each other;
- (b) if a related group is in a position to control an entity, it is deemed to be a related group that controls the entity whether or not it is part of a larger group by whom the entity is in fact controlled;
- (c) a person who has a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently, to, or to acquire, ownership interests, however designated, in an entity, or to control the voting rights in an entity, is, except when the contract provides that the right is not exercisable until the death of an individual designated in the contract, deemed to have the same position in relation to the control of the entity as if the person owned the ownership interests;
- (d) if a person has ownership interests in two or more entities, the person is, as holder of any ownership interest in one of the entities, deemed to be related to himself or herself as holder of any ownership interest in each of the other entities;
- (e) persons are connected by blood relationship if one is the child or other descendant of the other or one is the brother or sister of the other;
- (f) persons are connected by marriage if one is married to the other or to a person who is connected by blood relationship or adoption to the other;

**(f.1)** persons are connected by common-law partnership if one is in a common-law partnership with the other or with a person who is connected by blood relationship or adoption to the other; and

**(g)** persons are connected by adoption if one has been adopted, either legally or in fact, as the child of the other or as the child of a person who is connected by blood relationship, otherwise than as a brother or sister, to the other.

### **Question of fact**

**(4)** It is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length.

### **Presumptions**

**(5)** Persons who are related to each other are deemed not to deal with each other at arm's length while so related. For the purpose of **paragraph 95(1)(b)** or **96(1)(b)**, the persons are, in the absence of evidence to the contrary, deemed not to deal with each other at arm's length.

...

### **Transfer at undervalue**

**96 (1)** On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

**(a)** the party was dealing at arm's length with the debtor and

**(i)** the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

**(ii)** the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

**(iii)** the debtor intended to defraud, defeat or delay a creditor; or

**(b)** the party was not dealing at arm's length with the debtor and

**(i)** the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

**(ii)** the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the

day before the day on which the period referred to in subparagraph (i) begins and

**(A)** the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

**(B)** the debtor intended to defraud, defeat or delay a creditor.

## Appendix A

## Chart of Impugned Transactions

\$000s, unaudited	Payments Before 12/19/2014	Payments After 12/19/2014	Total Payments
<b>Supplier Respondents</b>			
Clearway Haulage	-	968	968
MMC General Contracting	-	2,795	2,795
MTEC Construction	3,859	5,260	9,119
Strada Haulage	109	1,711	1,820
2104664 Ontario Inc.	170	90	260
2304288 Ontario Inc.	565	543	1,108
	4,703	11,367	16,070
<b>Other Suppliers of Interest</b>			
2299726 Ontario Inc.	14,134	-	14,134
2104661 Ontario Inc.	1,516	-	1,516
B.I.C. Haulage	37	-	37
Terra Haulage	832	-	832
TP Inc	229	-	229
Vaughan Haulage	639	-	639
GGC Gem General Contracting	362	-	362
GH Gem Haulage	91	-	91
Gem Stone	249	-	249
ABC Masonry	58	-	58
	18,147	-	18,147
<b>Total</b>	<b>22,850</b>	<b>11,367</b>	<b>34,217</b>

## Appendix B

### Example E-mail from Solano



Michael Solano  
To: Marco Caruso

Reply   Reply All   Forward   ...  
Mon 2015-04-06 2:25 PM

# Company to Bondfield  
Re: Hawkesbury Hospital  
To cut and remove existing slab on grade. Excavate and prepare existing base for new rebar and slab.  
\$223,000

Haulage Company to Bondfield  
Re: Cambridge Hospital  
To excavate and provide labour to underpin existing walls.  
\$126,000

# Company to Forma-Con  
Re: Sheridan College  
To supply, install and weld bolts to piles to fasten forms against shoring. Fabricate exterior wall forms and install on site.  
\$281,000

Michael Solano  
IT Manager

<b>Date of Instructions</b> April 6, 2015, 14:25
<b>Construction Project</b> Sheridan College
<b>Description of work performed</b>
<b>Invoice Amount</b> This amount is before a 10% markup.
\$281,000 x 110% = <b>\$309,100</b>



### Appendix D Example Cheque

**FORMA-CON CONSTRUCTION**  
(A Division of 1428508 Ontario Limited)  
407 BASALTIC ROAD  
CONCORD, ON L4K 4W8

**NATIONAL BANK OF CANADA**  
130 KING STREET WEST, SUITE 800  
TORONTO, ONTARIO M5X 1E3

CHEQUE NUMBER  
**128659**

DATE **0 6 0 4 2 0 1 5**  
D O M M Y Y Y Y

PAY \*\*\*349,283 DOLLARS & 00 CENTS \$ **349,283.00**

ORDER OF  
MTEC CONSTRUCTION  
B3-9600 ISLINGTON AVENUE  
VAUGHAN, ONTARIO L4L 1A7

PER [Signature] **FORMA-CON CONSTRUCTION**

⑆ 128659⑆ ⑆0593⑆ ⑆006⑆ 0⑆ ⑆938⑆ 27⑆ ⑆0034928300⑆

Payment Date  
April 6, 2015  
(same day as  
instruction email  
and invoice date)

Amount Paid  
After tax balance  
of the invoice  
amount including  
a 10% markup.

John Aquino's  
Signature  
John Aquino  
signed the cheque  
payable to the  
Supplier of  
Interest

ERNST & YOUNG INC., in its capacity as v. JOHN AQUINO et al.  
Court-Appointed Monitor of Bondfield  
Construction Company Limited  
Applicant Respondents

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at TORONTO

**FACTUM OF KSV KOFMAN INC.**

**Torys LLP**  
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Box 270, TD South Tower  
Toronto, ON M5K 1N2  
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Email: jopolsky@torys.com  
  
R. Craig Gilchrist (LSO#: 77315B)  
Tel: 416.865.7629  
Email: cgilchrist@torys.com

Lawyers for KSV Kofman Inc.