

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(IN BANKRUPTCY AND INSOLVENCY)**  
**COMMERCIAL LIST**

**IN THE MATTER OF THE RECEIVERSHIP OF 2806401 ONTARIO INC.**  
**O/A ALLIED TRACK SERVICES INC., A CORPORATION**  
**INCORPORATED UNDER THE LAWS OF ONTARIO**

BETWEEN:

**PRICEWATERHOUSECOOPERS INC.**  
(solely in its capacity as Court-appointed receiver and manger of Bridging Finance Inc.  
and certain related entities and investment funds)

Applicant

- and -

**2806401 ONTARIO INC. o/a ALLIED TRACK SERVICES INC.**

Respondent

**FACTUM**  
**(Interim Distribution and Ancillary Matters)**  
**Returnable April 3, 2023**

March 30, 2022

**BLAKE, CASSELS & GRAYDON LLP**  
Barristers and Solicitors  
199 Bay Street  
Suite 4000, Commerce Court West  
Toronto, Ontario M5L 1A9

**Chris Burr**, LSO #55172H  
Tel: 416-863-3261  
Email: [chris.burr@blakes.com](mailto:chris.burr@blakes.com)

Lawyers for the Receiver

**TO: SERVICE LIST**

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**PART I - OVERVIEW**

1. KSV Restructuring Inc. (“**KSV**”) in its capacity as receiver (the “**Receiver**”) of 2806401 Ontario Inc. o/a/ Allied Track Services (“**Allied**”), brings this motion for an order:

- (a) approving distributions and interim distributions to the Canada Revenue Agency (the “**CRA**”), Employment and Social Development Canada (“**ESDC**”), certain former employees of Allied, HSBC Bank Canada (“**HSBC**”), Meridian OneCap

Credit Corp. (“**Meridian**”), Caisse Populaire (“**Caisse**”) and Bridging Finance Inc. (acting by its court appointed receiver, PricewaterhouseCoopers Inc.) (“**Bridging**”) in the amounts set out in the Receiver’s Second Report to Court dated March 21, 2023 (the “**Second Report**”);

- (b) declaring that each of Danella Rental Systems Ltd. (“**Danella**”) and LMS Rail Services Limited (“**LMS**”) do not have a valid and enforceable secured claim against the assets of Allied (or the proceeds thereof) in priority to the security interest of Bridging;
- (c) declaring that A Action Towing and Recovery Inc. (“**A Action**”) does not have a valid possessory lien claim under the *Repair and Storage Liens Act* (the “**RSLA**”) against the Mark 4 Track Machine formerly owned by Allied (the “**Mark 4**”), or the proceeds thereof;
- (d) approving the activities of the Receiver for the period of October 20, 2022 to March 21, 2023; and
- (e) approving the fees and disbursements of the Receiver and its counsel, Blake, Cassels & Graydon LLP (“**Blakes**”) for the period of September 23, 2022 to February 28, 2023.

Background

2. KSV was appointed as Receiver on September 23, 2022 by order of Mr. Justice Osborne. Prior to its appointment as Receiver, KSV was appointed as proposal trustee of Allied on August 25, 2022 (the “**Proposal Trustee**”), and interim receiver on September 6, 2022 (the “**Interim Receiver**”). Allied was deemed bankrupt on November 10, 2022, and KSV was appointed as trustee in bankruptcy.

3. As Interim Receiver and Receiver, KSV identified and located Allied's owned and leased equipment, which was disbursed across remote job sites in British Columbia, Manitoba, Alberta and Ontario.

4. Allied leased equipment from nine lessors. The Receiver and its counsel concluded that two of the lessors, Danella and LMS, had not properly perfected their security interests in the leased equipment (respectively, the "**Danella Units**" and the "**LMS Units**") and accordingly did not have priority interests in the equipment.

5. Pursuant to the terms of a Court-approved auction services agreement (the "**ASA**") among the Receiver and Corporate Assets Inc. (the "**Auctioneer**"), an auction was conducted via live webcast on November 16 and 17, 2022 (the "**Auction**"). Substantially all of Allied's equipment was sold at the Auction, resulting in total net proceeds in the amount of \$9,586,142.

6. With Court approval, the Danella Units and the LMS Units were sold at or prior to the Auction, and the Receiver is holding the proceeds of sale in trust. The Auctioneer also sold the Mark 4 that is subject to a possessory lien claim by A Action.

7. The Receiver is now seeking the Court's approval to make distributions of the proceeds of the Auction, including the proceeds of the Danella Units, the LMS Units and the Mark 4, together with certain other recoveries by the Receiver, in accordance with the relative priorities of Allied's creditors.

## **PART II – THE FACTS**

8. The facts relevant to the relief sought by the Receiver are set out in the Second Report and are summarized below.

## A. BACKGROUND

9. Allied was a railroad maintenance service provider offering various services, including track maintenance and repair, construction, bridging, civil engineering, signalling and related services. Prior to the termination of its real property leases by the Receiver, Allied leased its head office in Grimsby, Ontario and operated in Ontario, Alberta, Manitoba and British Columbia.<sup>1</sup>

10. Allied's largest secured creditor is Bridging, and its sole shareholder is a related party of Bridging, Bridging Income Fund LP. On April 30, 2021, this Court appointed PricewaterhouseCoopers Inc. as receiver and manager (in such capacity, the "**Bridging Receiver**") of Bridging upon application by the Ontario Securities Commission.<sup>2</sup>

11. On the morning of the day that the Bridging Receiver was appointed, Allied purchased all of the assets and undertakings of a company called "Allied Track Services Inc." out of a proposal proceeding. Despite successful implementation of the transaction, Allied continued to generate losses and never reached profitability. Allied was insolvent and did not have the liquidity to carry on its business. Accordingly, on August 25, 2022, Allied filed its notice of intention to make a proposal (the "**NOI**") and KSV was appointed as Proposal Trustee.<sup>3</sup>

12. As a result of personnel departures and stakeholder uncertainty triggered by the NOI, the Proposal Trustee brought an application under section 47.1 of the BIA seeking the appointment of KSV as Interim Receiver, and KSV was appointed as such on September 6, 2022.<sup>4</sup>

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<sup>1</sup> Second Report at para 2.0(1)-(2).

<sup>2</sup> Second Report at paras 1.0(2)-(3).

<sup>3</sup> Second Report at paras 2.0(4), (5) and (6).

<sup>4</sup> Second Report at para 2.0(7).

13. The appointment of the Interim Receiver was intended to be a temporary solution to the operational issues at Allied. Accordingly, on September 23, 2022, Bridging brought an application to have KSV appointed as Receiver, which was granted on the same day.<sup>5</sup>

### ***Auction***

14. Shortly after the filing of the NOI by Allied, KSV (in its capacities as Proposal Trustee, and subsequently as Interim Receiver and Receiver), undertook a process to obtain proposals from auctioneers and liquidators to liquidate Allied's assets and equipment (the "**RFP Process**").<sup>6</sup>

15. Following the RFP Process, the Receiver determined that the Auctioneer was the best party to proceed with, and negotiated and entered into the ASA.<sup>7</sup> The ASA and the retention of the Auctioneer was approved by an order of Madam Justice Gilmore issued on October 28, 2022 (the "**Auction Services Approval Order**"), which also authorized the Receiver to sell the Danella Units and the LMS Units.<sup>8</sup>

16. Following the granting of the Auction Services Approval Order, the Auctioneer conducted an extensive conventional marketing and social media campaign targeting industries dealing with heavy equipment, railway equipment and services, as well as specific railway companies.<sup>9</sup> As a result of its extensive marketing campaign, the Auctioneer negotiated and completed a number of *en bloc* transactions for certain equipment prior to the Auction, for amounts that exceeded what it estimated would have been offered at the Auction.<sup>10</sup>

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<sup>5</sup> Second Report at para 2.0(8).

<sup>6</sup> First Report at para 3.2(1).

<sup>7</sup> First Report at para 3.2(9).

<sup>8</sup> Second Report at para 1.0(6).

<sup>9</sup> Second Report at para 3.2(3).

<sup>10</sup> Second Report at para 3.2(5).

17. The Auction was conducted on November 16 and 17, 2022 by live webcast online auction. The bidding process was highly competitive resulting in 262 registered bidders and 67 purchasers.<sup>11</sup>

18. The Auction resulted in net proceeds in the amount of \$9,586,142. Of these proceeds, \$200,510 was obtained for the Danella Units (the “**Danella Proceeds**”) and \$1,625,811 was obtained for the LMS Units (the “**LMS Proceeds**”), which the Receiver is holding pursuant to the terms of the Auction Services Approval Order.<sup>12</sup>

## **B. LEASED EQUIPMENT**

19. Allied leased equipment from a total of nine lessors. The Receiver and its counsel reviewed the lease documentation and personal property security act (“**PPSA**”) registrations of these nine lessors and has concluded that:<sup>13</sup>

- (a) six lessors were either properly registered to perfect their deemed security interest in the leased equipment, or not properly registered but in jurisdictions where there is no competing security registration, and accordingly had priority interests in the equipment they leased to Allied (collectively, the “**Perfected Lessors**”).<sup>14</sup>
- (b) one lessor, Setay Motors Inc. (“**Setay**”), was not properly registered in Ontario against any of the 17 trucks leased to Allied, but the provisions of the Ontario PPSA cured the defective registration in respect of 14 of the vehicles (the “**VIN Registered Setay Vehicles**”), and accordingly Setay had priority to the VIN

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<sup>11</sup> Second Report at para 3.2(6).

<sup>12</sup> Second Report at para 3.3(1).

<sup>13</sup> First Report at para 4.1(2) and (3).

<sup>14</sup> Second Report at para 3.1(3).

Registered Setay Vehicles, but not to an additional three vehicles leased to Allied against which Setay was unregistered (the “**Unregistered Setay Vehicles**”).<sup>15</sup>

- (c) two lessors, Danella and LMS, were not properly registered to perfect their deemed security interest in the equipment leased by them to Allied, or not registered in time, and therefore did not have priority to the vehicles they leased to Allied.<sup>16</sup>

20. The Receiver negotiated with the Perfected Lessors to determine if a buyout of their respective leases could be accomplished for an amount that the Auctioneer was willing to match or exceed by an increase to the net minimum guarantee under the ASA, which would result in a net gain for the Allied estate. The Receiver was able to negotiate and conclude sales with three of the Perfected Lessors, whose leased vehicles were subsequently sold in the Auction. The vehicles leased to Allied by two of the Perfected Lessors were returned to them, after no favourable buyout amount could be agreed upon.<sup>17</sup>

21. The remaining Perfected Lessor, Wheaton Chevrolet Buick Cadillac GMC Ltd. (“**Wheaton**”), repossessed the truck leased by it to Allied. Although Wheaton’s repossession was in violation of the stay of proceedings and done over the explicit objections of the Receiver, the Receiver ultimately concluded that Wheaton was entitled to the return of the vehicle and therefore did not pursue a claim against Wheaton.<sup>18</sup>

22. With the Court’s authorization in the Auction Services Approval Order, the VIN Registered Setay Units were returned to Setay, and the Unregistered Setay Units were sold at the Auction.<sup>19</sup>

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<sup>15</sup> Second Report at para 3.1(5).

<sup>16</sup> Second Report at paras 4.1(c)(6) and 4.1(i)(9).

<sup>17</sup> Second Report at para 3.1(4).

<sup>18</sup> Second Report at para 3.1(4)(f).

<sup>19</sup> Second Report at para 3.1(5).



23. As a result of Danella's and LMS's failure to perfect their deemed security interests, the Receiver sought and obtained the Court's authorization to sell the Danella Units and the LMS Units in the Auction Services Approval Order, and these vehicles have been sold.<sup>20</sup>

24. Fifteen of the vehicles leased by LMS to Allied are subject to PPSA registrations by vehicle identification number against LMS in favour of LMS's creditors, being HSBC, Meridian and Caisse (collectively, the "**LMS Secured Creditors**"). Like the other LMS Units, the Receiver was authorized by the Auction Services Approval Order to sell these LMS vehicles subject to the registrations of the LMS Secured Creditors, and the vehicles have been sold.<sup>21</sup>

### **C. A ACTION LIEN CLAIM**

25. A Action is a towing and recovery company that was historically retained by Allied to move its equipment. On September 1, 2022, A Action picked up the Mark 4 at Allied's request and was in the process of transporting it to Allied's site in North Bay when it learned of the NOI proceedings, whereupon A Action held the Mark 4, issued a "owner/lien holder notification" to Allied on September 14, 2022, and refused to release the Mark 4 until it was paid.<sup>22</sup>

26. A Action's claim was for a possessory lien against the Mark 4 under the RSLA in the aggregate amount of approximately \$116,000. This lien claim included pre-filing invoices totaling approximately \$77,000 in respect of the Mark 4 and other Allied equipment, which were incurred between March 25, 2022 and August 24, 2022.<sup>23</sup>

27. The Receiver disputed the validity and the quantum of A Action's possessory lien on the Mark 4, but agreed that if A Action delivered the Mark 4 to the North Bay property, the Receiver

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<sup>20</sup> Second Report at para 3.1(6).

<sup>21</sup> Second Report at para 6.3.2.4(2).

<sup>22</sup> Second Report at para 6.4(3).

<sup>23</sup> Second Report at paras 6.4(3)-(4).

would pay for the transport costs for that delivery, without prejudice to A Action's rights, if any, as a possessory lien claimant pursuant to the RSLA. A Action agreed, and delivered the Mark 4 on September 17, 2022.<sup>24</sup>

28. Upon receipt of the vehicle, the Receiver paid A Action (a) \$12,751, on account of A Action's costs associated with delivering the Mark 4 to North Bay at the Receiver's request, and (b) \$8,208, on account of storage and other charges incurred in relation to the Mark 4 between August 25, 2022 and September 30, 2022, being charges for services rendered at Allied's request in respect of the Mark 4 after Allied filed its NOI.<sup>25</sup>

#### **D. ALLIED SECURED CREDITORS AND PRIORITY CLAIMS**

29. The Receiver has reviewed the books and records of Allied, including certain priority claims made by CRA, calculated employee priority entitlements in consultation with Allied's union's counsel, and vetted the Bridging security.<sup>26</sup> The Receiver's counsel has issued an opinion that Bridging's security is valid, enforceable and properly perfected, subject to standard assumptions and qualifications.<sup>27</sup>

30. The Receiver has also worked with each of the LMS Secured Creditors, with LMS's consent, to assess the security interest of each of them against certain LMS Units and to determine the amount of the indebtedness of LMS secured by such registrations.<sup>28</sup>

31. Based on this analysis, the Receiver has determined the relative priorities of each creditor and calculated the amounts to which these priority and secured creditors are entitled. After

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<sup>24</sup> Second Report at paras 6.4(5)-(6).

<sup>25</sup> Second Report at para 6.4(6).

<sup>26</sup> Second Report at para 6.1(1).

<sup>27</sup> Second Report at para 6.0(1).

<sup>28</sup> Second Report at para 6.3.2.5(5).

accounting for a \$750,000 costs reserve to fund the costs of the remaining administration of the receivership and a \$100,000 contingency reserve for any unknown or unexpected priority claims, and assuming that the Court grants the Receiver's requests for a declaration that A Action, Danella and LMS have no priority interests, the Receiver has determined that the following parties are entitled to distributions or, in the case of Bridging, interim distributions, in the following amounts:<sup>29</sup>

	(\$)
CRA Payroll Claim	673,594
Employee Secured Claims	153,841
WEPP Secured Claim	52,106
HSBC	347,629
Meridian	144,240
Caisse	123,086
Bridging (interim distribution)	7,911,504
	<u>9,406,000</u>

32. Upon the payment of these foregoing distributions and interim distributions, Bridging will have a remaining claim in the approximate amount of \$7.1 million, in respect of which interest will continue to accrue.

#### **E. FEES AND ACTIVITIES**

33. The Auction Services Approval Order approved the activities of the Receiver for the period beginning on its appointment, September 23, 2022, and ending on the date of the First Report, October 20, 2022. The activities of the Receiver for the period beginning on October 21, 2022 and ending on March 21, 2023 are described in part 8.0 of the Second Report, and are subject to a request for approval by this Court.<sup>30</sup> The Receiver is also seeking approval of its fees and

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<sup>29</sup> Second Report at para 7.0(5).

<sup>30</sup> Second Report at para 8.0(1).

disbursements, and the fees and disbursements of its counsel, for the period of September 23, 2022 to February 28, 2023, which fees and disbursements are described in part 9.0 of the Second Report, and the fee affidavits attached thereto.<sup>31</sup>

### **PART III – ISSUES AND THE LAW**

34. There are four issues to be determined by the Court in this motion:
- (a) Should the Court declare that Danella and LMS do not have valid and enforceable secured claims against the proceeds of the sale of the Danella Units and LMS Units, respectively, in priority to Bridging?
  - (b) Should the Court declare that A Action does not have a valid possessory lien against the Mark 4, securing amounts in excess of what has already been paid to A Action?
  - (c) Should the final and interim distributions recommended by the Receiver be authorized?
  - (d) Should the activities of the Receiver, and the fees and activities of the Receiver and its counsel, be approved?
35. In the Receiver’s respectful view, the answer to each of these foregoing questions is “yes”.

#### **A. DANELLA AND LMS INTERESTS**

36. As a result of their failure to perfect deemed security interests in priority to Bridging, the interests of Danella and LMS in the Danella Proceeds and LMS Proceeds, respectively, are subordinate to those of Bridging. The Receiver is seeking a declaration accordingly, so that it can make a distribution of the Danella Proceeds and LMS Proceeds.

37. The Receiver has been advised by counsel to Danella and LMS that neither intends to take a position on this request.

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<sup>31</sup> Second Report at para 9.0

### **Deemed Security Interests & Leases for a Term of More than One Year**

38. The Receiver's analysis with respect to the interest of Danella and LMS in the Danella Proceeds and LMS Proceeds, respectively, is based on the provisions of the Ontario PPSA (the "OPPSA") that deem security interests to exist in respect of leases of a term of more than one year. This analysis is based on a number of different provisions of the OPPSA, read together.

39. The OPPSA provides at section 2 that it applies to:

2(a)(ii) every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest, including, without limiting the foregoing,... an assignment, lease or consignment that secures payment or performance of an obligation

and

2(c) a lease of goods under a lease for a term of more than one year even though the lease may not secure payment or performance of an obligation.

40. The OPPSA further provides at section 1(1) that a "security interest" includes "an interest in personal property that secures payment or performance of an obligation", and "the interest of a lessor of goods under a lease for a term of more than one year."

41. Section 1(1) of the OPPSA defines "lease for a term of more than one year" in relevant part as follows:

(a) a lease for an indefinite term, even if the lease is determinable by one of the parties or by agreement of two or more of the parties within one year from the date of its execution,

(b) a lease for a term of one year or less if the lessee, with the consent of the lessor, retains uninterrupted or substantially uninterrupted possession of the leased goods for a continuous period of more than one year, but a lease described in this clause is not a lease for a term of more than one year during the period before the day the lessee's possession of the leased goods exceeds one year,

(c) a lease for a term of one year or less if,

(i) the lease provides that it is renewable for one or more terms at the option of one of the parties or by agreement of all of the parties, and

(ii) it is possible for the total of the original term and the renewed terms to exceed one year,

but does not include,

(d) a lease by a lessor who is not regularly engaged in the business of leasing goods.

42. Section 20(1)(a)(i) of the OPPSA provides that “until perfected, a security interest in collateral is subordinate to the interest of a person who has a perfected security interest in the same collateral”.

43. Accordingly, by operation of the foregoing provisions of the OPPSA, a lessor that is regularly engaged in the business of leasing goods, who leases equipment to a lessee under a lease of a term of more than one year, is deemed to have a security interest in the leased goods, and if that security interest is not perfected, the lessor’s interest is subordinate to the interests of secured creditors with a perfected security interest in the same goods.

44. The Courts have routinely upheld this conclusion. For example, in the leading case of *Giffen (Re)*, the Supreme Court of Canada held that the interest of a lessee’s trustee in bankruptcy had priority over the interests of a vehicle lessor under a lease of a term of more than one year, where that lessor was unperfected. Justice Iacobucci stated in that case:

Provincial legislatures, faced with a policy choice involving the competing interests of the true owner and those of third parties dealing with the ostensible owner, have decided that the true owner must forfeit title, when faced with a competing interest, if she failed to register her interest as required.<sup>32</sup>

45. More recently, in *Wells Fargo Foothill Canada ULC v. Big Eagle Hydro-Vac Inc.* (“**Big Eagle**”), the Alberta Court of Queens Bench considered facts very similar to those in the present case, and concluded that the interests of an unperfected lessor of equipment under a lease of a term

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<sup>32</sup> [Giffen \(Re\)](#), 1998 CanLII 844 (SCC), [1998] 1 SCR 91 at para 50

of more than one year was subordinate to the interests of the lessee's lender, which held a perfected general security interest.<sup>33</sup>

46. In *Big Eagle*, Justice Yamauchi was unpersuaded that the resulting loss of the lessor's interest in the equipment was unfair, finding "[the lessor] could have protected its position by taking a purchase-money security interest in the Units. It could, in the alternative, have entered into a priority and postponement agreement with [the lender]. It did neither." He concluded, "As a result of the foregoing, this Court orders that the Receiver is entitled to dispose of the Units in accordance with the Receivership Order and distribute the proceeds of sale..."<sup>34</sup>

### *Danella*

47. The Danella Lease has a term of 36 months, and has a \$1 purchase option, making it a "financing" lease (ie: a lease that secures the payment of an obligation). In the alternative, if it is not a "financing lease", it would be a "true" lease, being a lease that does not secure the performance of an obligation. Regardless of the characterization, because it has a term of more than one year, the Danella Lease creates a security interest for the purposes of the OPPSA.

48. Danella has not registered a financing statement, and it was not in possession of the Danella Units as of the date of the Receiver's appointment. It is therefore unperfected.

49. Pursuant to PPSA s. 20(1)(a)(i), Danella's interests in the Danella Units are subordinate to the interests of Allied's secured creditors with a perfected interest in the same collateral, which includes Bridging.

50. As a result of Danella's non-perfection and resulting subordinate position, it is not entitled to the Danella Proceeds in priority to Bridging. The Receiver is seeking a distribution order

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<sup>33</sup> [Wells Fargo Foothill Canada ULC v Big Eagle Hydro-Vac Inc, 2015 ABQB 546 \(CanLII\)](#) [*Big Eagle*] at para 62

<sup>34</sup> [Big Eagle, supra](#) at 62 and 63

accordingly. Danella's counsel has advised the Receiver that it does not intend to take a position on the Receiver's distribution motion.

### *LMS*

51. As detailed in the Second Report, the documentation around the LMS Units is unclear. Despite the poor documentation, the Receiver has concluded that the lease or leases for the LMS Units (other than 2 LMS Units that have been returned to LMS) are for a term of more than one year, and accordingly create a security interest for the purposes of the OPPSA.

52. LMS registered against the LMS Units and "2806401 Ontario Inc. o/a Allied Track Services Inc." on October 19, 2022 (following the August 24, 2022 filing by Allied of its NOI), and amended that registration on October 21, 2022. The Receiver has not taken a position on whether this registration is valid, but even if it is valid, it was made over 18 months after Bridging filed its registration against Allied, in April 2021.

53. If LMS's registration is invalid because it was stayed by Allied's proposal, then LMS is unperfected and, pursuant to OPPSA s. 20(1)(a)(i), its interests in the LMS Units are subordinate to the interests of Bridging. If LMS's registration is valid, then it has perfected, but because it registered late, it is subordinate to the interests of Bridging, pursuant to OPPSA s. 30(1)1.

54. As a result of LMS's subordinate position with respect to the LMS Units, it is not entitled to the LMS Proceeds in priority to Bridging.

### *The LMS Secured Creditors & The "Double Debtor" Problem*

55. The fact that fifteen of the LMS Units are subject to PPSA registrations by VIN, against LMS, in favour of the LMS Secured Creditors gives rise to what is referred to in the case law as a "double debtor" problem: Bridging has a secured claim against the LMS Units to secure the indebtedness of Allied owing to Bridging, and the LMS Secured Creditors have a security interest



against the LMS Units to secure the indebtedness of LMS to the LMS Secured Creditors. The question becomes who, as between Bridging and the LMS Secured Creditors, has priority to the proceeds of sale of the specified LMS Units.<sup>35</sup>

56. This “double debtor” problem is rare, however it has been considered by the British Columbia Court of Appeal in the *Perimeter Transportation Ltd. (Re)* decision (“**Perimeter**”).<sup>36</sup>

57. The *Perimeter* case involved a priority contest between (a) a trustee of a bankrupt debtor; and (b) a secured creditor of a lessor of busses to the bankrupt, which lessor did not register a PPSA financing statement to perfect its deemed security interest.

58. To relate the *Perimeter* facts to the present Allied facts: the bankrupt is analogous to Allied, the trustee in bankruptcy is analogous to Bridging, the lessor is analogous to LMS, and the secured creditor is analogous to the LMS Secured Creditors.

59. The applicable section of the BC PPSA in the *Perimeter* case was s. 30(2):

30(2) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest in the goods given by the seller or lessor or arising under section 28 or 29, whether or not the buyer or lessee knows of it, unless the buyer or lessee also knows that the sale or lease constitutes a breach of the security agreement under which the security interest was created.

60. The analogous section in the Ontario PPSA is 28(2), which is substantively the same:

28(2) A lessee of goods from a lessor who leases the goods in the ordinary course of business holds the goods, to the extent of the lessee’s rights under the lease, free from any security interest therein given by the lessor even though it is perfected and the lessee knows of it, unless the lessee also knew that the lease constituted a breach of the security agreement.

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<sup>35</sup> As discussed in the Second Report, because there are sufficient proceeds from the Auction to pay all other secured and priority creditors other than Bridging, without accounting for the proceeds of the sale of the LMS Units against which the LMS Secured Creditors have a VIN registration, it is not necessary to analyze the relative priorities of these other secured and priority creditors and the LMS Secured Creditors. The priority dispute is, as a result of the amount of Auction proceeds, between Bridging and the LMS Secured Creditors.

<sup>36</sup> [\*Perimeter Transport Ltd. \(Re\)\*, 2010 BCCA 509 \(BCCA\)](#).

61. In *Perimeter*, the BC Court of Appeal upheld a chambers decision which found that the secured creditor of the bus lessor (analogous to the LMS Secured Creditors) had priority to the secured creditor of the bus lessee (analogous to Bridging).

62. The Court of Appeal's rationale, which differed from the rationale of the motions judge, was that although s. 30(2) prohibits a secured creditor of a lessor (ie: the LMS Secured Creditors) from taking enforcement steps against leased property in the hands of the lessee (ie: Allied), it does not have the effect of wholly negating the security interest of that secured creditor. The security interest of the secured creditor continues to exist with respect to the reversionary rights of the lessor (ie: LMS).<sup>37</sup>

63. Applying the rationale in the *Perimeter* case to the present Allied facts, the LMS Secured Creditors have priority over Bridging to the LMS Units in respect of which they are VIN registered.

64. While there is conflicting academic commentary on the appropriateness of the *Perimeter* decision,<sup>38</sup> the Receiver is satisfied that (a) the facts of the *Perimeter* case and the present Allied facts are sufficiently similar, and (b) the language in the BC PPSA and Ontario PPSA is sufficiently similar, that the result in the *Perimeter* case ought to apply equally to the Allied facts.

65. Accordingly, the Receiver has concluded that the LMS Secured Creditors have priority to Bridging with respect to the specific LMS Units that they are registered against by VIN, to the extent of the indebtedness secured thereby.

66. The Bridging Receiver has advised the Receiver that it does not object to the Receiver's conclusion with respect to the priority of, and proposed distribution to, the LMS Secured Creditors.

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<sup>37</sup> [Perimeter](#), at para 33.

<sup>38</sup> For example, see [Security Interests in Goods Held for Lease: The Double Perfection Requirement](#), by Professor Tony Duggan [51 CAN Bus. L.J. 85 (2011)].

67. LMS has advised the Receiver that it does not oppose the Receiver's proposed distribution of the LMS Proceeds in accordance with the Receiver's recommendations.

**B. A ACTION POSSESSORY LIEN CLAIM**

68. A Action has asserted that it has a valid possessory lien claim in respect of the Mark 4 under the RSLA, in the amount of \$116,000. The Receiver has paid A Action a total of \$8,208 on account of this claim, which reflects towing, storage and other charges incurred in relation to the Mark 4 between August 25, 2022 (the date the NOI was filed) and September 17, 2022 (the date the Mark 4 was delivered to the Receiver).

69. A Action was in possession of the Mark 4 from September 1 until September 17, 2022. Prior to that time, the Receiver understands that it had historically provided services in connection with the Mark 4, but Allied was in possession of the unit on August 31, 2022.

70. A Action delivered the Mark 4 to the Receiver on September 17, 2022 without prejudice to its possessory lien rights, meaning that if A Action had a valid possessory lien claim against the Mark 4 for amounts in excess of \$8,208.19 as of September 17, 2022, that valid possessory lien claim would attach to the proceeds of the vehicle, notwithstanding that A Action turned over possession to the Receiver.

71. The RSLA provides, in relevant part, that a possessory lien arises in favour of repairers and storers against the article repaired or stored for an amount equal to the amount that the person who requested the repair or storage agreed to pay.<sup>39</sup>

72. Pursuant to Section 5 of the RSLA, the possessory lien is permanently discharged and cannot be revived if the lien claimant surrenders possession of the article to prescribed persons, including the owner of the article:

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<sup>39</sup> RSLA s. 3(1) and 4(1)

5 A lien under this Part is discharged and cannot be revived as an interest in the article if possession of the article that is subject to the lien is surrendered to, or lawfully comes into the possession of, the owner or any other person who is entitled to receive a notice under subsection 15 (2).

73. Possessory lien rights that are discharged by the lien claimant giving up possession of the article are not revived if the lien claimant subsequently re-acquires possession. The costs of any new work done after repossession may be subject to a new possessory lien, but no lien exists to secure the costs of work done prior to the giving up of possession.<sup>40</sup>

74. Lien rights can be preserved under the RSLA after an article is released from the claimant's possession, if (a) the owner of the article acknowledges the indebtedness owing to the lien claimant, and (b) a PPSA financing statement is filed.<sup>41</sup> A Action has not registered a PPSA financing statement against Allied.

75. Moreover, the possessory liens rights under the RSLA apply as against a particular article only for the costs of repairing or storing that article. Lien rights do not apply against one article for the costs of repair or storage of a different article owned by the same party.

76. A Action's lien claim of \$116,000 breaks down into three categories:

- (a) Non-Mark 4 Services: A Action is claiming a lien for amounts invoiced for services in respect of Allied equipment other than the Mark 4;
- (b) Pre-Possession Services: A Action is claiming a lien for amounts invoiced for services in respect of the Mark 4 that were done prior to September 1, 2022, which is the date that A Action took possession of the Mark 4; and
- (c) Post-Filing Services: A Action is claiming a lien for amounts invoiced for services in respect of the Mark 4 for work done after August 25, 2022, including amounts

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<sup>40</sup> [\*Nikore v. Sciannella\*](#), 1999 CarswellOnt 2863 (Ont. S.C.J.), at para. 9.

<sup>41</sup> RSLA s. 7 and 9.

for towing requested by Allied and storage and other changes associated with A Action improperly diverting the Mark 4 to its yard.

77. The Receiver rejects A Action's claim for a possessory lien in any amount greater than what it has already been paid because:

- (a) Non-Mark 4 Services: No lien claim arises against one piece of equipment for services performed on other pieces of equipment owned by the same debtor. Accordingly, there is no valid lien claim for any of the Non-Mark 4 Services.
- (b) Pre-Possession Services: A Action provided services in respect of the Mark 4 prior to September 1, 2022, but released possession of it to Allied. A Action then picked up the Mark 4 from Allied on or about September 1, 2022 for the purposes of transporting it from Welland to North Bay; prior to September 1, the Mark 4 was in the possession of Allied. There is no valid lien claim against the Mark 4 for services provided in respect of the Mark 4 that were done prior to September 1, when Allied was in possession of the vehicle. Such lien claims were irrevocably discharged by Section 5 of the RSLA when A Action released possession to Allied.
- (c) Post-Filing Services: Notwithstanding that claims for services provided in respect of the Mark 4 prior to September 1 are not lienable, claims for eligible services provided after the filing of the NOI (ie: after August 25) are post-filing claims that Allied is required to pay. The Receiver has paid A Action \$8,208.19 on account of services requested by Allied after August 25, as well as \$12,750.92 in consideration for A Action towing the Mark 4 to North Bay, at the Receiver's request. The balance of A Action's claim for services provided after August 25, 2022 is on account of charges incurred in connection with A Action improperly diverting the

Mark 4 and storing it without Allied's request or authorization (and in breach of the stay). These improper charges are not eligible for a valid lien claim under the RSLA because they relate to services that were not authorized or requested by Allied.

78. Accordingly, the Receiver is seeking an order that A Action has no possessory lien claim against the proceeds of the Mark 4, so that it can distribute those proceeds to Bridging, whose security has priority to the claims of A Action.

79. The Receiver communicated its position to A Action's counsel on March 6, 2023, after sending a letter summarizing this position to A Action on February 28, 2023. A Action was served with the Receiver's motion record seeking the declaration regarding A Action's rights, and the Receiver's counsel requested on March 22, 2023 that A Action's counsel advise if A Action would be taking a position. As of the date of this factum, no response has been received.

**C. PROPOSED DISTRIBUTION**

80. As set out above, the Receiver is seeking authorization to make the following distributions:

	(\$)
CRA Payroll Claim	673,594
Employee Secured Claims	153,841
WEPP Secured Claim	52,106
HSBC	347,629
Meridian	144,240
Caisse	123,086
Bridging (interim distribution)	7,911,504
	<u><b>9,406,000</b></u>

81. In the Receiver's view, these distributions are appropriate, and in accordance with the relative priorities of the proposed recipients, for the reasons set out below.

CRA Claim

82. The CRA has examined Allied's payroll records, and made a priority claim in the amount of \$673,594 for unremitted source deductions secured by the deemed trust created by section 227(4) of the *Income Tax Act* (the "**ITA**"). The Receiver has reviewed this claim, and agrees with the quantum, and with the CRA's position that the amount has a super-priority as a result of the statutory deemed trust. Pursuant to section 67(3) of the BIA and 227(4.1) of the ITA, this deemed trust survives the bankruptcy of Allied, and the CRA's claim properly has priority over the claims of other secured creditors.

Employee Claim

83. The Receiver has determined that Allied's former employees have priority claims (collectively, the "**Priority Employee Claims**"):

- (a) under section 81.4 of the BIA in the amount of \$94,407, on account of pre-filing unpaid wages up to \$2,000 per employee, and
- (b) under section 81.6 of the BIA in the amount of \$111,540, on account of unpaid contributions to Allied's employee pension plan.

84. Pursuant to sections 81.4(4) and 81.6(2) of the BIA, these Priority Employee Claims rank above every other claim against Allied's assets.<sup>42</sup> Accordingly, these claims have priority over Bridging's secured claim.

85. The Receiver has consulted with counsel to Allied's union, LIUNA, in coming to the foregoing conclusion, and understands that the union agrees with the calculations.

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<sup>42</sup> Except for claims under BIA sections 81.1 (claims of unpaid suppliers) and 81.2 (special rights for farmers, fishermen and aquaculturists), of which the Receiver has identified none.

ESDC Subrogated Claim

86. All or substantially all of Allied's former employees have applied for payments under the Wage Earner Protection Program, and ESDC has paid these individuals. As a result, ESDC is subrogated to the former employees for \$52,106 of the Priority Employment Claims. The remainder of the Priority Employment Claims, being \$153,841, are claims by certain former employees directly.

LMS Secured Creditor Claims

87. The Receiver has reviewed the financing documents between LMS and each of the LMS Secured Creditors and determined that they create a valid security interest over the applicable LMS Units, and the Receiver has worked with each of the LMS Secured Creditors to determine the indebtedness owing by LMS to each of the LMS Secured Creditors, that is secured by the applicable LMS Units. The Receiver's considerations regarding the priority of the LMS Secured Creditors are set out in paragraphs 55-67, above, and the Receiver has concluded that the LMS Secured Creditors have priority over Bridging to the extent of the indebtedness secured by the applicable LMS Units.

Bridging

88. The Receiver's counsel has provided a legal opinion concluding that Bridging's security interest over all of Allied's assets is valid, enforceable and properly perfected. The Receiver has concluded that only the CRA, the Employee Priority Claims (including the ESDC subrogated claim) and the claims of the LMS Secured Creditors have priority to Bridging's claim.

89. Accordingly, provided the Court accepts the Receiver's position that none of A Action, Danella nor LMS have claims that rank senior to Bridging's security interest, Bridging is entitled



to all of the proceeds of Allied's estate, once the CRA, the Employee Priority Claims (including the ESDC subrogated claim) and the claims of the LMS Secured Creditors have been paid.

#### **D. APPROVAL OF FEES AND ACTIVITIES**

90. In *Target Canada*, the Court noted that there are good policy and practical reasons to grant the approval of Monitor's reports and activities, including (a) allowing the Monitor to bring its activities before the Court; (b) allowing an opportunity for stakeholders' concerns to be addressed; (c) enabling the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners; (d) providing protection for the Monitor not otherwise provided by the Companies' Creditors Arrangement Act; and (e) protecting creditors from delay that may be caused by re-litigation of steps or potential indemnity claims by the Monitor.<sup>43</sup>

91. Recently, the principles set out in *Target Canada* were reaffirmed by Chief Justice Morawetz in *Laurentian University*.<sup>44</sup>

92. These comments and the policy considerations identified by the Court apply with equal force to receivership proceedings, and motions seeking approval of a receiver's report and activities described therein.<sup>45</sup>

93. This court has jurisdiction to review and approve the activities of a receiver. If the receiver has met the objective test of demonstrating that it has acted reasonably, prudently and not arbitrarily, the court may approve the activities set out in its report.<sup>46</sup>

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<sup>43</sup> [Re Target Canada Co., 2015 ONSC 7574 \[Target Canada\]](#) at paras 2, 22-23.

<sup>44</sup> [Re Laurentian University of Sudbury, 2022 ONSC 2927 \[Laurentian University\]](#) at paras 13-14; [Target Canada Co.](#) at paras 2, 22-23.

<sup>45</sup> [Re Hanfeng Evergreen Inc., 2017 ONSC 7161](#) at para 15.

<sup>46</sup> [Bank of America Canada v Willann Investments Ltd., \[1993\] OJ No. 1647 \(Gen Div\)](#) at paras 2-5, [aff'd \[1996\] OJ No. 2806 \(CA\)](#); [Lang Michener v American Bullion Minerals Ltd., 2005 BCSC 684](#) at para 21.

94. The activities of the Receiver were carried out in accordance with the order appointing it, were consistent with its mandate, and were done in furtherance of the objective of securing Allied's assets, stabilizing its business in the short term and maximizing recoveries for stakeholders. The fees incurred by the Receiver and its counsel were incurred in connection therewith are commercially reasonable, consistent with applicable market standards and incurred in good faith. The Receiver therefore respectfully submits that the order approving its activities, and the fees and activities of Receiver and its counsel, should be granted.

**PART IV – ORDER REQUESTED**

95. For the reasons set out herein, the Receiver respectfully requests that this Court grant the relief requested in paragraph 1, above, in the form of the order included in the Receiver's motion record dated March 21, 2023.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 30th day of March, 2023.



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Chris Burr  
Lawyers for the Receiver

## SCHEDULE "A"

### LIST OF AUTHORITIES

<u>Cases</u>	
1.	<a href="#"><i>Giffen (Re)</i>, 1998 CanLII 844 (SCC), [1998] 1 SCR 91</a>
2.	<a href="#"><i>Wells Fargo Foothill Canada ULC v Big Eagle Hydro-Vac Inc</i>, 2015 ABQB 546 (CanLII)</a>
3.	<a href="#"><i>Perimeter Transport Ltd. (Re)</i>, 2010 BCCA 509 (BCCA)</a>
4.	<a href="#"><i>Nikore v. Sciannella</i>, 1999 CarswellOnt 2863 (Ont. S.C.J.)</a>
5.	<a href="#"><i>Re Target Canada Co.</i>, 2015 ONSC 7574</a>
6.	<a href="#"><i>Re Laurentian University of Sudbury</i>, 2022 ONSC 2927</a>
7.	<a href="#"><i>Re Hanfeng Evergreen Inc.</i>, 2017 ONSC 7161</a>
8.	<a href="#"><i>Bank of America Canada v Willann Investments Ltd.</i>, [1993] OJ No. 1647 (Gen Div), aff'd [1996] OJ No. 2806 (CA)</a>
9.	<a href="#"><i>Lang Michener v American Bullion Minerals Ltd.</i>, 2005 BCSC 684</a>

## **SCHEDULE “B”**

### **TEXT OF RELEVANT STATUTES AND REGULATIONS**

#### **Personal Property Security Act**

#### **R.S.O. 1990, CHAPTER P.10**

#### **Definitions and interpretation**

**1** (1) In this Act,

“lease for a term of more than one year” includes,

- (a) a lease for an indefinite term, even if the lease is determinable by one of the parties or by agreement of two or more of the parties within one year from the date of its execution,
- (b) a lease for a term of one year or less if the lessee, with the consent of the lessor, retains uninterrupted or substantially uninterrupted possession of the leased goods for a continuous period of more than one year, but a lease described in this clause is not a lease for a term of more than one year during the period before the day the lessee’s possession of the leased goods exceeds one year,
- (c) a lease for a term of one year or less if,
  - (i) the lease provides that it is renewable for one or more terms at the option of one of the parties or by agreement of all of the parties, and
  - (ii) it is possible for the total of the original term and the renewed terms to exceed one year,

but does not include,

- (d) a lease by a lessor who is not regularly engaged in the business of leasing goods, or
- (e) a lease of household furnishings or appliances as part of a lease of land, if the use and enjoyment of the household furnishings or appliances is incidental to the use and enjoyment of the land; (“bail de plus d’un an”)

#### **Application of Act, general**

**2** Subject to subsection 4 (1), this Act applies to,

- (a) every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest including, without limiting the foregoing,
  - (i) a chattel mortgage, conditional sale, equipment trust, debenture, floating charge, pledge, trust indenture or trust receipt, and
  - (ii) an assignment, lease or consignment that secures payment or performance of an obligation;

- (b) a transfer of an account or chattel paper even though the transfer may not secure payment or performance of an obligation; and
- (c) a lease of goods under a lease for a term of more than one year even though the lease may not secure payment or performance of an obligation.

### **Perfection**

**19** A security interest is perfected when,

- (a) it has attached; and
- (b) all steps required for perfection under any provision of this Act have been completed,

regardless of the order of occurrence.

### **Unperfected security interests**

**20** (1) Except as provided in subsection (3), until perfected, a security interest,

- (a) in collateral is subordinate to the interest of,
  - (i) a person who has a perfected security interest in the same collateral or who has a lien given under any other Act or by a rule of law or who has a priority under any other Act, or
  - (ii) a person who causes the collateral to be seized through execution, attachment, garnishment, charging order, equitable execution or other legal process, or
  - (iii) all persons entitled by the *Creditors' Relief Act, 2010* or otherwise to participate in the distribution of the property over which a person described in subclause (ii) has caused seizure of the collateral, or the proceeds of such property;
- (b) in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy;
- (c) in chattel paper, documents of title, instruments or goods is not effective against a transferee thereof who takes under a transaction that does not secure payment or performance of an obligation and who gives value and receives delivery thereof without knowledge of the security interest;
- (d) in intangibles other than accounts is not effective against a transferee thereof who takes under a transaction that does not secure payment or performance of an obligation and who gives value without knowledge of the security interest.

### **Perfection by registration**

**23** Registration perfects a security interest in any type of collateral.

### **Priorities**

**30** (1) If no other provision of this Act is applicable, the following priority rules apply to security interests in the same collateral:

1. Where priority is to be determined between security interests perfected by registration, priority shall be determined by the order of registration regardless of the order of perfection.

### **Registration requirements**

**46** (1) A financing statement or financing change statement that is to be registered shall contain the required information presented in a required format.

### **Electronic transmission**

(2) A financing statement or financing change statement in a required format may be tendered for registration by direct electronic transmission to the registration system's database.

### **Classification of collateral**

(2.1) Except with respect to rights to proceeds, where a financing statement or financing change statement sets out a classification of collateral and also contains words that appear to limit the scope of the classification, then, unless otherwise indicated in the financing statement or financing change statement, the secured party may claim a security interest perfected by registration only in the class as limited.

### **Authorized person**

(3) A financing statement or financing change statement in a required format may be tendered for registration by direct electronic transmission only by a person who is, or is a member of a class of persons that is, authorized by the registrar to do so.

### **Errors, etc.**

(4) A financing statement or financing change statement is not invalidated nor is its effect impaired by reason only of an error or omission therein or in its execution or registration unless a reasonable person is likely to be misled materially by the error or omission.

### **Effect of registration**

(5) Registration of a financing statement or financing change statement,

- (a) does not constitute constructive notice or knowledge to or by third parties of the existence of the financing statement or financing change statement or of the contents thereof; and
- (b) does not create a presumption that this Act applies to the transaction to which the registration relates.

### **Deemed not likely to be misled by errors or omissions**

**46.1** (1) For the purposes of subsection 46 (4), in the case of a financing statement or financing change statement in respect of collateral that is or includes a motor vehicle, as defined in the regulations, a reasonable person shall be deemed not likely to be misled materially, insofar as the security interest in the motor vehicle is concerned, by the fact that the statement has one or more errors or omissions described in subsection (2) of this section, if,

- (a) the motor vehicle's vehicle identification number is set out correctly in the designated place on the statement;
- (b) the statement sets out at least the name of one debtor and, if the debtor is a natural person, his or her date of birth; and
- (c) the statement otherwise substantially complies with the requirements that apply for the purposes of subsection 46 (1).

### **Errors or omissions to which subs. (1) applies**

(2) The following are the errors or omissions to which subsection (1) applies:

1. Regarding any debtor named in the statement, the debtor's name is set out incorrectly or in a way that does not comply with the requirements that apply for the purposes of subsection 46 (1).
2. Regarding any debtor named in the statement who is a natural person, the date of birth of the debtor is set out incorrectly or in a way that does not comply with the requirements that apply for the purposes of subsection 46 (1).

### **Deemed likely to be misled by error or omission**

**46.2** For the purposes of subsection 46 (4), in the case of a financing statement or financing change statement in respect of collateral that is or includes a motor vehicle, as defined in the regulations, a reasonable person shall be deemed likely to be misled materially, insofar as the security interest in the motor vehicle is concerned, by any one or more of the following errors or omissions in the statement:

1. In the case where the motor vehicle is classified as consumer goods on the statement,
  - i. a vehicle identification number for the motor vehicle is not set out on the statement,
  - ii. a vehicle identification number for the motor vehicle is set out on the statement but not in the designated place, or
  - iii. a vehicle identification number for the motor vehicle is set out on the statement but is incorrect.
2. In the case where the motor vehicle is classified as equipment or inventory on the statement and the statement sets out a vehicle identification number for the motor vehicle even though that information is not required,
  - i. the vehicle identification number is not set out in the designated place on the statement, or
  - ii. the vehicle identification number that is set out is incorrect.

**No limitation**

**46.3** Nothing in sections 46.1 and 46.2 affects the application of subsection 46 (4) in circumstances not described in sections 46.1 and 46.2.



## **Repair and Storage Liens Act**

### **R.S.O. 1990, CHAPTER R.25**

#### **Repairer's lien**

3 (1) In the absence of a written agreement to the contrary, a repairer has a lien against an article that the repairer has repaired for an amount equal to one of the following, and the repairer may retain possession of the article until the amount is paid:

1. The amount that the person who requested the repair agreed to pay.
2. Where no such amount has been agreed upon, the fair value of the repair, determined in accordance with any applicable regulations.
3. Where only part of a repair is completed, the fair value of the part completed, determined in accordance with any applicable regulations.

#### **When lien arises**

(2) A repairer's lien arises and takes effect when the repair is commenced, except that no repairer's lien arises if the repairer was required to comply with sections 56 and 57, subsection 58 (1) and section 59 of the *Consumer Protection Act, 2002*, if applicable, and the repairer has not done so.

#### **Tow and storage services**

(2.0.1) Except as otherwise provided for in the regulations, if the repair includes one or more tow and storage services in respect of which Part VI.1 of the *Consumer Protection Act, 2002* applies, no lien arises with respect to those services if the repairer fails to comply with the prescribed provisions of that Part, if any.

#### **Amount of lien**

(2.1) In cases where Part VI of *Consumer Protection Act, 2002* applies, the amount of a repairer's lien under subsection (2) shall not exceed,

- (a) the amount that the repairer is authorized to charge for the repair under subsection 58 (2) and section 64 of the *Consumer Protection Act, 2002*, if those provisions apply to the repairer; and
- (b) the maximum amount authorized by the person who requested the repair, if section 56 of the *Consumer Protection Act, 2002* applies to the person.

#### **Amount, tow and storage**

(2.2) In cases where Part VI.1 of the *Consumer Protection Act, 2002* applies, the amount of a repairer's lien under subsection (2) with respect to tow and storage services shall be determined in accordance with the prescribed requirements, if any.

### **Disposition**

(3) A repairer has the right to sell an article that is subject to a lien in accordance with Part III (Redemption, Sale or Other Disposition) upon the expiration of the sixty-day period following the day,

- (a) on which the amount required to pay for the repair comes due; or
- (b) on which the repair is completed, if no date is stated for when the amount required to pay for the repair comes due.

### **Deemed possession**

(4) For the purposes of this Act, a repairer who commences the repair of an article that is not in the repairer's actual possession shall be deemed to have gained possession of the article when the repair is commenced and shall be deemed to have given up possession when the repair is completed or abandoned.

### **Idem**

(5) A repairer who, under subsection (4), is deemed to have possession of an article may remove the article from the premises on which the repair is made.

### **Storer's lien**

4 (1) Subject to subsection (2), a storer has a lien against an article that the storer has stored or stored and repaired for an amount equal to one of the following, and the storer may retain possession of the article until the amount is paid:

1. The amount agreed upon for the storage or storage and repair of the article.
2. Where no such amount has been agreed upon, the fair value of the storage or storage and repair, determined in accordance with any applicable regulations.
3. Where only part of a repair is completed, the fair value of the storage and the part of the repair completed, determined in accordance with any applicable regulations.

### **Limit on storer's lien**

(2) A storer is not entitled to a lien for a repair made to an article unless the repair is made by the storer on the understanding that the storer would be paid for the repair or unless subsection 28 (2) applies.

### **When lien arises**

(3) A storer's lien arises and takes effect when the storer receives possession of the article for storage or storage and repair, except that no storer's lien arises with respect to repair if the storer was required to comply with sections 56 and 57, subsection 58 (1) and section 59 of the *Consumer Protection Act, 2002*, if applicable, and the storer has not done so.

### **Tow and storage services**

(3.0.1) Except as otherwise provided for in the regulations, if the storage or storage and repair includes one or more tow and storage services in respect of which Part VI.1 of the *Consumer Protection Act, 2002* applies, no lien arises with respect to those services if the storer fails to comply with the prescribed provisions of that Part, if any.

### **Amount of lien**

(3.1) In cases where Part VI of *Consumer Protection Act, 2002 applies*, if a storer receives possession of an article for storage and repair, the amount of the storer's lien under subsection (3) shall not exceed,

- (a) the amount of the charge for the storage, together with the amount that the storer is authorized to charge for the repair under subsection 58 (2) and section 64 of the *Consumer Protection Act, 2002*, if those provisions apply to the storer; and
- (b) the amount of the charge for the storage, together with the maximum amount authorized by the person who requested the repair, if section 56 of the *Consumer Protection Act, 2002* applies to the person.

### **Amount, tow and storage**

(3.2) In cases where Part VI.1 of the *Consumer Protection Act, 2002* applies, the amount of a storer's lien under subsection (3) with respect to the tow and storage services shall be determined in accordance with the prescribed requirements, if any.

### **Notice to owner, etc., articles**

(4) Where the storer knows or has reason to believe that possession of an article that is subject to a lien was received from a person other than its owner or a person having its owner's authority, the storer, within 60 days after the day of receiving the article, shall give written notice of the lien to every person whom the storer knows or has reason to believe is the owner or has an interest in the article, including every person who has a security interest in the article that is perfected by registration under the *Personal Property Security Act* against the name of the person whom the storer knows or has reason to believe is the owner.

### **Notice to owner, etc., articles of prescribed class**

(4.1) Despite subsection (4), where the storer knows or has reason to believe that possession of an article of a prescribed class that is subject to a lien was received from a person other than its owner or a person having its owner's authority, the storer, within a prescribed period after the day of receiving the article of the prescribed class, shall give written notice of the lien,

- (a) to the persons mentioned in subsection (4); and
- (b) to such other classes of persons and entities as may be prescribed.

### **Contents of notice**

(5) A notice under subsection (4) or (4.1) shall contain,

- (a) a description of the article sufficient to enable it to be identified;
- (b) the address of the place of storage, the date that it was received and the name of the person from whom it was received;
- (c) a statement that a lien is claimed under this Act by the storer in respect of the article;
- (d) a statement advising how the article may be redeemed; and
- (e) any other prescribed information.

#### **Effect of failure to give notice, articles**

- (6) Where a storer fails to give the notice required by subsection (4),
  - (a) the storer's lien as against the person who should have been given the notice is limited to the unpaid amount owing in respect of the period of 60 days from the day that the article was received; and
  - (b) the storer shall surrender possession of the article to that person where the person proves a right to possession and pays that unpaid amount.

#### **Effect of failure to give notice, articles of prescribed class**

- (6.1) Where a storer fails to give the notice required by subsection (4.1),
  - (a) the storer's lien as against the person who should have been given the notice is limited to the unpaid amount owing in respect of the period prescribed for the purposes of subsection (4.1) from the day that the article of the prescribed class was received; and
  - (b) the storer shall surrender possession of the article to that person where the person proves a right to possession and pays that unpaid amount.

#### **Disposition**

(7) The storer has the right to sell an article that is subject to a lien in accordance with Part III (Redemption, Sale or Other Disposition) upon the expiration of the sixty-day period following the day on which the amount required to pay for the storage or storage and repair becomes due.

#### **Loss of lien**

**5** A lien under this Part is discharged and cannot be revived as an interest in the article if possession of the article that is subject to the lien is surrendered to, or lawfully comes into the possession of, the owner or any other person who is entitled to receive a notice under subsection 15 (2).

#### **Non-possessory lien**

**7** (1) A lien claimant who is entitled to a lien under Part I (Possessory Liens) against an article, and who gives up possession of the article without having been paid the full amount of the lien to which the lien claimant is entitled under Part I, has, in place of the possessory lien, a non-possessory lien against the article for the amount of the lien claimed under Part I that remains unpaid.

### **When lien arises**

(2) A non-possessory lien arises and takes effect when the lien claimant gives up possession of the article.

### **Priority**

(3) A non-possessory lien has priority over the interest in the article of any other person other than a lien claimant who is claiming a lien under Part I, and, where more than one non-possessory lien is claimed in the same article, priority shall be determined according to the same rules of priority as govern the distribution of proceeds under section 16.

### **Period of credit not to affect lien**

(4) A non-possessory lien is not extinguished by reason only that the lien claimant has allowed a period of credit for the payment of the debt to which the lien relates.

### **Acknowledgment of indebtedness required**

(5) A non-possessory lien is enforceable only if the lien claimant obtains a signed acknowledgment of the indebtedness which acknowledgment may be on an invoice or other statement of account.

### **Idem**

(6) An acknowledgment of indebtedness under subsection (5) is without prejudice to the right of the owner or any other person to dispute in a proceeding the amount that the lien claimant is owed.

### **Registration of documents**

9 (1) A claim for lien or change statement to be registered under this Part shall contain the required information presented in a required format.

### **Electronic transmission**

(1.1) A claim for lien or change statement in a required format may be tendered for registration by direct electronic transmission to the database of the registration system established under the *Personal Property Security Act*.

### **Authorized person**

(1.2) A claim for lien or change statement in a required format may be tendered for registration by direct electronic transmission only by a person who is, or is a member of a class of persons that is, authorized by the registrar to do so.

### **Errors in documents**

(2) A claim for lien or change statement is not invalidated nor is its effect impaired by reason only of error or omission therein or in its execution or registration unless a reasonable person is likely to be misled materially by the error or omission.

**Deemed not likely to be misled by errors or omissions**

(3) For the purposes of subsection (2), in the case of a claim for lien or change statement in respect of a motor vehicle or in respect of two or more articles that include a motor vehicle, a reasonable person shall be deemed not likely to be misled materially, insofar as the lien against the motor vehicle is concerned, by the fact that the claim for lien or change statement has one or more errors or omissions described in subsection (4), if,

- (a) the motor vehicle's vehicle identification number is set out correctly in the designated place on the claim for lien or change statement;
- (b) the claim for lien or change statement sets out at least the name of one debtor and, if the debtor is a natural person, his or her date of birth; and
- (c) the claim for lien or change statement otherwise substantially complies with the requirements that apply for the purposes of subsection (1).

**Errors or omissions to which subs. (3) applies**

(4) The errors or omissions to which subsection (3) applies are:

- 1. Regarding any debtor named in the claim for lien or change statement, the debtor's name is set out incorrectly or in a way that does not comply with the requirements that apply for the purposes of subsection (1).
- 2. Regarding any debtor named in the claim for lien or change statement who is a natural person, the date of birth of the debtor is set out incorrectly or in a way that does not comply with the requirements that apply for the purposes of subsection (1).

**Deemed likely to be misled by error or omission**

(5) For the purposes of subsection (2), in the case of a claim for lien or change statement in respect of a motor vehicle or in respect of two or more articles that include a motor vehicle, a reasonable person shall be deemed likely to be misled materially, insofar as the lien against the motor vehicle is concerned, by any one or more of the following errors or omissions in the claim for lien or change statement:

- 1. A vehicle identification number for the motor vehicle is not set out on the claim for lien or change statement.
- 2. A vehicle identification number for the motor vehicle is set out on the claim for lien or change statement but not in the designated place.
- 3. A vehicle identification number for the motor vehicle is set out on the claim for lien or change statement but is incorrect.

**No limitation**

(6) Nothing in subsections (3), (4) and (5) affects the application of subsection (2) in circumstances not described in subsections (3), (4) and (5).

## Bankruptcy and Insolvency Act

### R.S.C., 1985, c. B-3

#### Property of bankrupt

**67 (1)** The property of a bankrupt divisible among his creditors shall not comprise

- (a) property held by the bankrupt in trust for any other person;
- (b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;
- (b.1) goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b);
- (b.2) prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b); or
- (b.3) without restricting the generality of paragraph (b), property in a *registered retirement savings plan*, a *registered retirement income fund* or a *registered disability savings plan*, as those expressions are defined in the *Income Tax Act*, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

but it shall comprise

- (c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that
  - (i) is not subject to the operation of this Act, or
  - (ii) in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the *Family Orders and Agreements Enforcement Assistance Act*, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and
- (d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

#### Deemed trusts

**(2)** Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

## Exceptions

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a “federal provision”) nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a *provincial pension plan* as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

## Security for unpaid wages, etc. — receivership

**81.4 (1)** The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a person who is subject to a receivership for services rendered during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of \$2,000 — less any amount paid for those services by a receiver or trustee — by security on the person’s current assets that are in the possession or under the control of the receiver.

## Commissions

(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for during the six-month period referred to in that subsection, are deemed to have been earned in those six months.

## Security for disbursements

(3) The claim of a travelling salesperson who is owed money by a person who is subject to a receivership for disbursements properly incurred in and about the person’s business during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of \$1,000 — less any amount paid for those disbursements by a receiver or trustee — by security on the person’s current assets that are in the possession or under the control of the receiver.

## Rank of security

(4) A security under this section ranks above every other claim, right, charge or security against the person’s current assets — regardless of when that other claim, right, charge or security arose — except rights under sections 81.1 and 81.2.



### **Liability of receiver**

(5) If the receiver takes possession or in any way disposes of current assets covered by the security, the receiver is liable for the claim of the clerk, servant, travelling salesperson, labourer or worker to the extent of the amount realized on the disposition of the current assets and is subrogated in and to all rights of the clerk, servant, travelling salesperson, labourer or worker in respect of the amounts paid to that person by the receiver.

### **Claims of officers and directors**

(6) No officer or director of the person who is subject to a receivership is entitled to have a claim secured under this section.

### **Non-arm's length**

(7) A person who, in respect of a transaction, was not dealing at arm's length with a person who is subject to a receivership is not entitled to have a claim arising from that transaction secured by this section unless, in the opinion of the receiver, having regard to the circumstances — including the remuneration for, the terms and conditions of and the duration, nature and importance of the services rendered — it is reasonable to conclude that they would have entered into a substantially similar transaction if they had been dealing with each other at arm's length.

### **Proof by delivery**

(8) A claim referred to in this section is proved by delivering to the receiver a proof of claim in the prescribed form.

### **Definitions**

(9) The following definitions apply in this section.

*compensation* includes vacation pay but does not include termination or severance pay. (*rémunération*)

*person who is subject to a receivership* means a person any of whose property is in the possession or under the control of a receiver. (*personne faisant l'objet d'une mise sous séquestre*)

*receiver* means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1). (*séquestre*)

### **Security for unpaid amounts re prescribed pensions plan — receivership**

**81.6 (1)** If a person who is subject to a receivership is an employer who participated or participates in a prescribed pension plan for the benefit of the person's employees, the following amounts that are unpaid immediately before the first day on which there was a receiver in relation to the person are secured by security on all the person's assets:

- (a) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund;
- (b) if the prescribed pension plan is regulated by an Act of Parliament,

(i) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(ii) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*,

(iii) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the *Pooled Registered Pension Plans Act*; and

(c) in the case of any other prescribed pension plan,

(i) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament,

(ii) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament, and

(iii) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the *Pooled Registered Pension Plans Act*.

#### **Rank of security**

(2) A security under this section ranks above every other claim, right, charge or security against the person's assets, regardless of when that other claim, right, charge or security arose, except rights under sections 81.1 and 81.2 and securities under sections 81.3 and 81.4.

#### **Liability of receiver**

(3) If the receiver disposes of assets covered by the security, the receiver is liable for the amounts referred to in subsection (1) to the extent of the amount realized on the disposition of the assets, and is subrogated in and to all rights of the fund established for the purpose of the pension plan in respect of those amounts.

#### **Definitions**

(4) The following definitions apply in this section.

**person who is subject to a receivership** means a person any of whose property is in the possession or under the control of a receiver. (*personne faisant l'objet d'une mise sous séquestre*)

**receiver** means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1). (*séquestre*)

## Income Tax Act

### R.S.C., 1985, c. 1 (5th Supp.)

#### Withholding taxes

**227 (1)** No action lies against any person for deducting or withholding any sum of money in compliance or intended compliance with this Act.

#### Return filed with person withholding

**(2)** Where a person (in this subsection referred to as the “payer”) is required by regulations made under subsection 153(1) to deduct or withhold from a payment to another person an amount on account of that other person’s tax for the year, that other person shall, from time to time as prescribed, file a return with the payer in prescribed form.

#### Failure to file return

**(3)** Every person who fails to file a return as required by subsection (2) is liable to have the deduction or withholding under section 153 on account of the person’s tax made as though the person were a person who is neither married nor in a common-law partnership and is without dependants.

#### Trust for moneys deducted

**(4)** Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

#### Extension of trust

**(4.1)** Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

**(a)** to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and

**(b)** to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

### **Meaning of security interest**

**(4.2)** For the purposes of subsections 227(4) and 227(4.1), a security interest does not include a prescribed security interest.

### **Application to Crown**

**(4.3)** For greater certainty, subsections (4) to (4.2) apply to Her Majesty in right of Canada or a province where Her Majesty in right of Canada or a province is a secured creditor (within the meaning assigned by subsection 224(1.3)) or holds a security interest (within the meaning assigned by that subsection).

### **Payments by trustees, etc.**

**(5)** Where a specified person in relation to a particular person (in this subsection referred to as the “payer”) has any direct or indirect influence over the disbursements, property, business or estate of the payer and the specified person, alone or together with another person, authorizes or otherwise causes a payment referred to in subsection 135(3), 135.1(7) or 153(1), or on or in respect of which tax is payable under Part XII.5 or XIII, to be made by or on behalf of the payer, the specified person

**(a)** is, for the purposes of subsections 135(3) and 153(1), section 215 and this section, deemed to be a person who made the payment;

**(a.1)** is, for the purposes of subsections 135.1(7) and 211.8(2), deemed to be a person who redeemed, acquired or cancelled a share and made the payment as a consequence of the redemption, acquisition or cancellation;

**(b)** is jointly and severally, or solidarily, liable with the payer to pay to the Receiver General

**(i)** all amounts payable by the payer because of any of subsections 135(3), 135.1(7), 153(1) and 211.8(2) and section 215 in respect of the payment, and

**(ii)** all amounts payable under this Act by the payer because of any failure to comply with any of those provisions in respect of the payment; and

**(c)** is entitled to deduct or withhold from any amount paid or credited by the specified person to the payer or otherwise recover from the payer any amount paid under this subsection by the specified person in respect of the payment.

### **Definition of *specified person***

**(5.1)** In subsection 227(5), a *specified person* in relation to a particular person means a person who is, in relation to the particular person or the disbursements, property, business or estate of the particular person,

**(a)** a trustee;

**(b)** a liquidator;

**(c)** a receiver;

**(d)** an interim receiver;

**(e)** a receiver-manager;

(f) a trustee in bankruptcy or other person appointed under the *Bankruptcy and Insolvency Act*;

(g) an assignee;

(h) a secured creditor (as defined in subsection 224(1.3));

(i) an executor, a liquidator of a succession or an administrator;

(j) any person acting in a capacity similar to that of a person referred to in any of paragraphs 227(5.1)(a) to 227(5.1)(i);

(k) a person appointed (otherwise than as an employee of the creditor) at the request of, or on the advice of, a secured creditor in relation to the particular person to monitor, or provide advice in respect of, the disbursements, property, business or estate of the particular person under circumstances such that it is reasonable to conclude that the person is appointed to protect or advance the interests of the creditor; or

(l) an agent of a specified person referred to in any of paragraphs 227(5.1)(a) to 227(5.1)(k).

### ***Person includes partnership***

(5.2) For the purposes of this section, references in subsections 227(5) and 227(5.1) to persons include partnerships.

### **Excess withheld, returned or applied**

(6) Where a person on whose behalf an amount has been paid under Part XII.5 or XIII to the Receiver General was not liable to pay tax under that Part or where the amount so paid is in excess of the amount that the person was liable to pay, the Minister shall, on written application made no later than 2 years after the end of the calendar year in which the amount was paid, pay to the person the amount so paid or such part of it as the person was not liable to pay, unless the person is or is about to become liable to make a payment to Her Majesty in right of Canada, in which case the Minister may apply the amount otherwise payable under this subsection to that liability and notify the person of that action.

### **Repayment of non-resident shareholder loan**

(6.1) Where, in respect of a loan from or indebtedness to a corporation or partnership, a person on whose behalf an amount was paid to the Receiver General under Part XIII because of subsection 15(2) and paragraph 214(3)(a) repays the loan or indebtedness or a portion of it and it is established by subsequent events or otherwise that the repayment was not made as part of a series of loans or other transactions and repayments, the Minister shall, on written application made no later than 2 years after the end of the calendar year in which the repayment is made, pay to the person an amount equal to the lesser of

(a) the amount so paid to the Receiver General in respect of the loan or indebtedness or portion of it, as the case may be, and

(b) the amount that would be payable to the Receiver General under Part XIII if a dividend described in paragraph 212(2)(a) equal in amount to the amount of the loan or indebtedness repaid were paid by the corporation or partnership to the person at the time of the repayment,

unless the person is or is about to become liable to make a payment to Her Majesty in right of Canada, in which case the Minister may apply the amount otherwise payable under this subsection to that liability and notify the person of that action.

### **Foreign affiliate dumping — late-filed form**

**(6.2)** If, in respect of an investment described in subsection 212.3(10), a corporation is deemed by subparagraph 212.3(7)(d)(ii) to pay a dividend and the corporation subsequently complies with the requirements of subparagraph 212.3(7)(d)(i) in respect of the investment,

**(a)** subject to paragraph (b), the Minister shall, on written application made on a particular day that is, or is no more than two years after, the day on which the form described in subparagraph 212.3(7)(d)(i) is filed, pay to the corporation an amount equal to the lesser of

**(i)** the total of all amounts, if any, paid to the Receiver General, on or prior to the particular day, on behalf of a person and in respect of the liability of the person to pay an amount under Part XIII in respect of the dividend, and

**(ii)** the amount that the person was liable to pay in respect of the dividend under Part XIII;

**(b)** where the corporation or the person is or is about to become liable to make a payment to Her Majesty in right of Canada, the Minister may apply the amount otherwise payable under paragraph (a) to that liability and notify the corporation, and, if applicable, the person, of that action; and

**(c)** for the purposes of this Part (other than subparagraph (a)(i)), if the amount described in subparagraph (a)(ii) exceeds the amount described in subparagraph (a)(i), the corporation is deemed to pay that excess to the Receiver General on the day on which the form described in subparagraph 212.3(7)(d)(i) is filed.

### **Application for assessment**

**(7)** Where, on application under subsection 227(6) by or on behalf of a person to the Minister in respect of an amount paid under Part XII.5 or XIII to the Receiver General, the Minister is not satisfied

**(a)** that the person was not liable to pay any tax under that Part, or

**(b)** that the amount paid was in excess of the tax that the person was liable to pay,

the Minister shall assess any amount payable under that Part by the person and send a notice of assessment to the person, and sections 150 to 163, subsections 164(1) and 164(1.4) to 164(7), sections 164.1 to 167 and Division J of Part I apply with any modifications that the circumstances require.

### **Application for determination**

**(7.1)** Where, on application under subsection 227(6.1) by or on behalf of a person to the Minister in respect of an amount paid under Part XIII to the Receiver General, the Minister is not satisfied that the person is entitled to the amount claimed, the Minister shall, at the person's request, determine, with all due dispatch, the amount, if any, payable under subsection 227(6.1) to the person and shall send a notice of determination to the person, and sections 150 to 163, subsections 164(1) and 164(1.4) to 164(7), sections 164.1 to 167 and Division J of Part I apply with such modifications as the circumstances require.

### **Penalty**

**(8)** Subject to subsection (9.5), every person who in a calendar year has failed to deduct or withhold any amount as required by subsection 153(1) or section 215 is liable to a penalty of

**(a)** 10% of the amount that should have been deducted or withheld; or

(b) where at the time of the failure a penalty under this subsection was payable by the person in respect of an amount that should have been deducted or withheld during the year and the failure was made knowingly or under circumstances amounting to gross negligence, 20% of that amount.

#### **Joint and several, or solidary, liability**

(8.1) If a particular person has failed to deduct or withhold an amount as required under subsection 153(1) or section 215 in respect of an amount that has been paid to a non-resident person, the non-resident person is jointly and severally, or solidarily, liable with the particular person to pay any interest payable by the particular person pursuant to subsection (8.3) in respect thereof.

#### **Retirement compensation arrangement deductions**

(8.2) Where a person has failed to deduct or withhold any amount as required under subsection 153(1) in respect of a contribution under a retirement compensation arrangement, that person is liable to pay to Her Majesty an amount equal to the amount of the contribution, and each payment on account of that amount is deemed to be, in the year in which the payment is made,

(a) for the purposes of paragraph 20(1)(r), a contribution by the person to the arrangement; and

(b) an amount on account of tax payable by the custodian under Part XI.3.

#### **Interest on amounts not deducted or withheld**

(8.3) A person who fails to deduct or withhold any amount as required by subsection 135(3), 135.1(7), 153(1) or 211.8(2) or section 215 shall pay to the Receiver General interest on the amount at the prescribed rate, computed

(a) in the case of an amount required by subsection 153(1) to be deducted or withheld from a payment to another person, from the fifteenth day of the month immediately following the month in which the amount was required to be deducted or withheld, or from such earlier day as may be prescribed for the purposes of subsection 153(1), to,

(i) where that other person is not resident in Canada, the day of payment of the amount to the Receiver General, and

(ii) where that other person is resident in Canada, the earlier of the day of payment of the amount to the Receiver General and April 30 of the year immediately following the year in which the amount was required to be deducted or withheld;

(b) in the case of an amount required by subsection 135(3) or 135.1(7) or section 215 to be deducted or withheld, from the day on which the amount was required to be deducted or withheld to the day of payment of the amount to the Receiver General; and

(c) in the case of an amount required by subsection 211.8(2) to be withheld, from the day on or before which the amount was required to be remitted to the Receiver General to the day of the payment of the amount to the Receiver General.

#### **Liability to pay amount not deducted or withheld**

(8.4) A person who fails to deduct or withhold any amount as required under subsection 135(3) or 135.1(7) in respect of a payment made to another person or under subsection 153(1) in respect of an amount paid to another person who is non-resident or who is resident in Canada solely because of

paragraph 250(1)(a) is liable to pay as tax under this Act on behalf of the other person the whole of the amount that should have been so deducted or withheld and is entitled to deduct or withhold from any amount paid or credited by the person to the other person or otherwise to recover from the other person any amount paid by the person as tax under this Part on behalf of the other person.

**No penalty — certain deemed payments**

**(8.5)** Subsection (8) does not apply to a corporation in respect of

(a) an amount of interest deemed by subsection 214(16) to have been paid as a dividend by the corporation unless, if the Act were read without reference to subsection 214(16), a penalty under subsection (8) would have applied in respect of the amount; and

(b) an amount deemed by subparagraph 212.3(7)(d)(ii) or subsection 247(12) to have been paid as a dividend by the corporation.

**No penalty — qualifying non-resident employers**

**(8.6)** Subsection (8) does not apply to a *qualifying non-resident employer* (as defined in subsection 153(6)) in respect of a payment made to an employee if, after reasonable inquiry, the employer had no reason to believe at the time of the payment that the employee was not a *qualifying non-resident employee* (as defined in subsection 153(6)).

**Penalty**

**(9)** Subject to subsection 227(9.5), every person who in a calendar year has failed to remit or pay as and when required by this Act or a regulation an amount deducted or withheld as required by this Act or a regulation or an amount of tax that the person is, by section 116 or by a regulation made under subsection 215(4), required to pay is liable to a penalty of

(a) subject to paragraph (b), if

(i) the Receiver General receives that amount on or before the day it was due, but that amount is not paid in the manner required, 3% of that amount,

(ii) the Receiver General receives that amount

(A) no more than three days after it was due, 3% of that amount,

(B) more than three days and no more than five days after it was due, 5% of that amount, or

(C) more than five days and no more than seven days after it was due, 7% of that amount, or

(iii) that amount is not paid or remitted on or before the seventh day after it was due, 10% of that amount; or

(b) where at the time of the failure a penalty under this subsection was payable by the person in respect of an amount that should have been remitted or paid during the year and the failure was made knowingly or under circumstances amounting to gross negligence, 20% of that amount.



## **Penalty**

**(9.1)** Notwithstanding any other provision of this Act, any other enactment of Canada, any enactment of a province or any other law, the penalty for failure to remit an amount required to be remitted by a person on or before a prescribed date under subsection 153(1), subsection 21(1) of the *Canada Pension Plan*, subsection 53(1) of the *Unemployment Insurance Act* and subsection 82(1) of the *Employment Insurance Act* shall, unless the person who is required to remit the amount has, knowingly or under circumstances amounting to gross negligence, delayed in remitting the amount or has, knowingly or under circumstances amounting to gross negligence, remitted an amount less than the amount required, apply only to the amount by which the total of all so required to be remitted on or before that date exceeds \$500.

## **Interest on amounts deducted or withheld but not remitted**

**(9.2)** Where a person has failed to remit as and when required by this Act or a regulation an amount deducted or withheld as required by this Act or a regulation, the person shall pay to the Receiver General interest on the amount at the prescribed rate computed from the day on which the person was so required to remit the amount to the day of remittance of the amount to the Receiver General.

## **Interest on certain tax not paid**

**(9.3)** Where a person fails to pay an amount of tax that, because of section 116, subsection 212(19) or a regulation made under subsection 215(4), the person is required to pay, as and when the person is required to pay it, the person shall pay to the Receiver General interest on the amount at the prescribed rate computed from the day on or before which the amount was required to be paid to the day of payment of the amount to the Receiver General.

## **Liability to pay amount not remitted**

**(9.4)** A person who has failed to remit as and when required by this Act or a regulation an amount deducted or withheld from a payment to another person as required by this Act or a regulation is liable to pay as tax under this Act on behalf of the other person the amount so deducted or withheld.

## **Payment from same establishment**

**(9.5)** In applying paragraphs 227(8)(b) and 227(9)(b) in respect of an amount required by paragraph 153(1)(a) to be deducted or withheld, each establishment of a person shall be deemed to be a separate person.

## **Assessment**

**(10)** The Minister may at any time assess any amount payable under

**(a)** subsection 227(8), 227(8.1), 227(8.2), 227(8.3) or 227(8.4) or 224(4) or 224(4.1) or section 227.1 or 235 by a person,

**(b)** subsection 237.1(7.4) or (7.5) or 237.3(8) by a person or partnership,

**(c)** subsection 227(10.2) by a person as a consequence of a failure of a non-resident person to deduct or withhold any amount, or

**(d)** Part XIII by a person resident in Canada,

and, where the Minister sends a notice of assessment to that person or partnership, Divisions I and J of Part I apply with any modifications that the circumstances require.

#### **Part XII.5**

**(10.01)** The Minister may at any time assess any amount payable under Part XII.5 by a person resident in Canada and, where the Minister sends a notice of assessment to that person, Divisions I and J of Part I apply with any modifications that the circumstances require.

#### **Idem**

**(10.1)** The Minister may at any time assess

**(a)** any amount payable under section 116 or subsection 227(9), 227(9.2), 227(9.3) or 227(9.4) by any person,

**(b)** any amount payable under subsection 227(10.2) by any person as a consequence of a failure by a non-resident person to remit any amount, and

**(c)** any amount payable under Part XII.5 or XIII by any non-resident person,

and, where the Minister sends a notice of assessment to the person, sections 150 to 163, subsections 164(1) and 164(1.4) to 164(7), sections 164.1 to 167 and Division J of Part I apply with such modifications as the circumstances require.

#### **Joint and several, or solidary, liability re contributions to RCA**

**(10.2)** If a non-resident person fails to deduct, withhold or remit an amount as required by subsection 153(1) in respect of a contribution under a retirement compensation arrangement that is paid on behalf of the employees or former employees of an employer with whom the non-resident person does not deal at arm's length, the employer is jointly and severally, or solidarily, liable with the non-resident person to pay any amount payable under subsection (8), (8.2), (8.3), (9), (9.2) or (9.4) by the non-resident person in respect of the contribution.

#### **Withholding tax**

**(11)** Provisions of this Act requiring a person to deduct or withhold an amount in respect of taxes from amounts payable to a taxpayer are applicable to Her Majesty in right of Canada or a province.

#### **Agreement not to deduct void**

**(12)** Where this Act requires an amount to be deducted or withheld, an agreement by the person on whom that obligation is imposed not to deduct or withhold is void.

#### **Minister's receipt discharges debtor**

**(13)** The receipt of the Minister for an amount deducted or withheld by any person as required by or under this Act is a good and sufficient discharge of the liability of any debtor to the debtor's creditor with respect thereto to the extent of the amount referred to in the receipt.

**Application of other Parts**

**(14)** Parts IV, IV.1, VI and VI.1 do not apply to any corporation for any period throughout which it is exempt from tax because of section 149.

**Partnership included in “person”**

**(15)** In this section, a reference to a “person” with respect to any amount deducted or withheld or required to be deducted or withheld is deemed to include a partnership.

**Municipal or provincial corporation excepted**

**(16)** A corporation that at any time in a taxation year would be a corporation described in any of paragraphs 149(1)(d) to (d.6) but for a provision of an appropriation Act is deemed not to be a private corporation for the purposes of Part IV with respect to that year.

PRICEWATERHOUSECOOPERS INC.  
(solely in its capacity as Court-appointed receiver and manager of  
Bridging Finance Inc. and certain related entities and investment funds)  
Applicant

- and - 2806401 ONTARIO INC. o/a  
ALLIED TRACK SERVICES INC.  
Respondent

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(IN BANKRUPTCY AND INSOLVENCY)  
COMMERCIAL LIST**

Proceeding Commenced at Toronto

**FACTUM OF THE RECEIVER  
(Interim Distribution and Ancillary Matters)  
Returnable April 3, 2023**

**BLAKE, CASSELS & GRAYDON LLP**  
Barristers and Solicitors  
199 Bay Street  
Suite 4000, Commerce Court West  
Toronto, Ontario M5L 1A9

**Chris Burr**, LSO #55172H  
Tel: 416-863-3261  
Email: chris.burr@blakes.com

Lawyers for the Receiver