

**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**  
**(Approval of Auction Services Agreement, and Ancillary Matters)**  
**Returnable October 28, 2022**

October 27, 2022

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**TO: SERVICE LIST**

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**PART I - OVERVIEW**

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

- (a) approving the Auction Services Agreement dated October 18, 2022 (the “**ASA**”) between Corporate Assets Inc. (the “**Auctioneer**”) and the Receiver, and the transactions contemplated thereby (the “**Transaction**”);
- (b) authorizing the Receiver to sell the Danella Units and the LMS Units (each as defined below), provided that the net proceeds of sale are segregated pending a subsequent distribution order;
- (c) authorizing the Receiver to return the VIN Registered Setay Units (as defined below) to Setay Motors Inc. (“**Setay**”), sell the Unregistered Setay Units (as defined below), and pay Setay rent for the VIN Registered Setay Units;
- (d) authorizing the Receiver to return the Short Term LMS Units (as defined below);
- (e) sealing the confidential appendices to this Report until the Transaction closes;
- (f) approving the Interim Receiver’s activities for the period September 17 to September 23, 2022 and the Receiver’s activities for the period September 23, 2022 to the date of the First Report (as defined below); and
- (g) approving the fees and disbursements of the Interim Receiver and its counsel, Blake, Cassels & Graydon LLP (“**Blakes**”).

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**”). KSV’s tenure as Interim Receiver ended on September 23, 2022 when it was appointed Receiver.

3. The principal purpose of Allied's insolvency proceeding is to wind-down its operations and liquidate its assets for the benefit of its creditors and other stakeholders. KSV, in its capacities as Receiver and Interim Receiver, has been facilitating this wind-down and liquidation.

4. As Interim Receiver and Receiver, KSV identified and located Allied's equipment, which was disbursed across remote job sites in British Columbia, Manitoba, Alberta and Ontario. The Receiver is now in a position to coordinate the sale of this equipment in one or more auctions, to be facilitated pursuant to the ASA. Conducting the auction or auctions in the short term is critical, as Allied's business is seasonal and the opportunity to get the best price for the assets will diminish if the sales do not happen in early November.

5. Allied leased equipment from a number of lessors. The Receiver and its counsel have undertaken a review of the leased equipment and the registrations made (or not made) by lessors in the British Columbia, Alberta, Manitoba and Ontario personal property security registry. This review has disclosed that a number of lessors have not properly perfected the deemed security interests created by the applicable provincial personal property security acts, and the Receiver is accordingly seeking authorization to sell this leased equipment in the auctions.

6. The Receiver is accordingly seeking the Court's approval of the ASA, and authorization to sell leased equipment in respect of which the lessors have not properly perfected their interests.

## **PART II – THE FACTS**

7. The facts relevant to the relief sought by the Receiver are set out in the First Report of the Receiver dated October 20, 2022 (the "**First Report**") and the Supplement to the First Report of the Receiver dated October 26, 2022 (the "**Supplemental Report**"), and are summarized below. All capitalized terms not otherwise defined herein have the meanings given to them in the First Report.

## A. BACKGROUND

8. Allied is a railroad maintenance service provider offering various services, including track maintenance and repair, construction, bridging, civil engineering, signalling and related services. Allied leases its head office in Grimsby, Ontario and operates in Ontario, Alberta, Manitoba and British Columbia.<sup>1</sup>

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

10. Allied purchased all of the assets and undertakings of a company called "Allied Track Services Inc." ("**Old Allied**") out of a proposal proceeding in April 2021. Despite successful implementation of the transaction, Allied continued to generate losses and never reached profitability. Allied is insolvent and does not have the liquidity to carry on its business. Accordingly, on August 25, 2022, Allied filed an NOI.<sup>3</sup>

11. 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. This was done in order to bring stability to Allied's operations and wind-down, and in order to facilitate Allied completing certain contracts it is party to with Canadian Pacific Railway. KSV was appointed as Interim Receiver on September 6, 2022.<sup>4</sup>

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<sup>1</sup> First Report at para 2.0(1).

<sup>2</sup> First Report at paras 1.0(2).

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

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

12. The appointment on 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 Solicitation Process and Proposed Transaction***

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

- (a) The Receiver approached eight liquidators with a national and/or international presence and experience with assets similar to Allied's assets (each, an "**Interested Party**").
- (b) The Receiver requested that each Interested Party submit a proposal with certain prescribed elements.
- (c) The Receiver facilitated the Interested Parties' information requests, including providing a detailed inventory of owned and leased assets, and arranged for the Interested Parties to attend at Allied's sites to inspect assets.
- (d) In addition, Generale Construzioni Ferroviarie S.p.A. ("**GCF**"), a railway services company, contacted the Receiver and expressed an interest in acquiring the assets.
- (e) The Receiver requested that Interested Parties and GCF submit offers by September 23, 2022. Five, including GCF and the Auctioneer, did so.

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

<sup>6</sup> First Report at para 3.2

- (f) Upon reviewing the proposals, the Receiver advanced discussions with the three Interested Parties with the strongest proposals, including the Auctioneer.
- (g) The Receiver requested that the three Interested Parties submit revised proposals by September 30, 2022 (the “**Second Proposal Deadline**”).
- (h) Two of the Interested Parties, including the Auctioneer, submitted proposals with similar economic terms by the Second Proposal Deadline. The Receiver requested that these two Interested Parties submit a final proposal by October 2, 2022.
- (i) The Auctioneer submitted the liquidation proposal with the highest net minimum guarantee (the “**NMG**”) and most favorable profit-sharing arrangement to the Receiver.

14. Following the RFP Process, the Receiver negotiated and entered into the ASA. The terms of the Transaction set out in the ASA are described in detail in the First Report, and are summarized as follows:<sup>7</sup>

- (a) Guaranteed Amount: The Auctioneer will pay a NMG and has paid a deposit representing 15% of the NMG.
- (b) Buyer’s Premium: All sales by the Auctioneer are subject to an 18% Buyer’s Premium, 100% of which will be retained by the Auctioneer.
- (c) Assets: The assets to be sold consist of substantially all of the equipment and tools owned by Allied, and certain leased assets (discussed below).
- (d) Expenses: The Auctioneer will be responsible for 100% of its expenses incurred in connection with marketing and selling the assets, and entitled to a cost recovery

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<sup>7</sup> First Report at para 3.3

payment in a fixed amount, provided the auction generates proceeds greater than the NMG (the “**Expense Recovery Payment**”).

- (e) Profit Sharing. All net proceeds in excess of the NMG and the Expense Recovery Payment will be paid to the Receiver.

15. The Receiver believes that the ASA and the Transaction represent the highest and best opportunity to maximize recoveries for Allied’s assets. The RFP Process was commercially reasonable, sufficiently thorough and reasonable in the circumstances, and the market was appropriately canvassed for proposals.<sup>8</sup>

16. The ASA and the Transaction are supported by Bridging, Allied’s largest creditor.<sup>9</sup>

17. The ASA includes certain commercially sensitive pricing information. This commercially sensitive information is included in the two confidential appendices to the First Report, comprised of a summary of proposals received in the RFP Process, and an unredacted copy of the ASA (the “**Confidential Appendices**”).<sup>10</sup>

## **B. LEASED EQUIPMENT**

18. The Receiver is aware of nine equipment lessors to Allied.<sup>11</sup>

19. The Receiver and its counsel reviewed the lease documentation and personal property security act (“**PPSA**”) registrations of the nine lessors. As a result of this review, the Receiver has concluded that:<sup>12</sup>

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<sup>8</sup> First Report at para 3.5

<sup>9</sup> First Report at para 3.5(1) e)

<sup>10</sup> First Report at para 3.4

<sup>11</sup> First Report at para 4.1(1)

<sup>12</sup> First Report at para 4.1(2) and (3)



- (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 have priority to the equipment they leased to Allied: (a) Calmont Leasing Ltd. (b) Caterpillar Financial Services Limited, (c) Falcon Equipment Ltd./Valiant Financial Services Inc., (d) Meridian OneCap Credit Corp., (e) Quip Finance/Vault Credit Corporation, and (f) Wheaton Chevrolet Buick Cadillac GMC Ltd. (collectively, the “**Perfected Lessors**”).<sup>13</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 cure the defective registration in respect of 14 of the vehicles (the “**VIN Registered Setay Vehicles**”), and accordingly Setay has priority to the VIN Registered Setay Vehicles, but not to an additional three vehicles leased to Allied against which Setay is unregistered (the “**Unregistered Setay Vehicles**”).<sup>14</sup>
- (c) two lessors were not properly registered to perfect their deemed security interest in the leased equipment, or not registered in time, and therefore do not have priority to the vehicles they leased to Allied: Danella Rental Systems Ltd. (“**Danella**”)<sup>15</sup> and LMS Rail Services Limited<sup>16</sup> (“**LMS**”, together with Danella, the “**Unperfected Lessors**”).

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

<sup>14</sup> First Report at para 4.1(3)(h)

<sup>15</sup> First Report at para 4.1(3)(c)

<sup>16</sup> First Report at para 4.1(3)(i)

20. The Receiver is in the process of negotiating with the Perfected Lessors to determine if a buyout of their respective leases is achievable at an amount that the Auctioneer is willing to match by an increase to the NMG. If such buyouts are possible, the Receiver will purchase the applicable equipment, and sell it at auction. If a buyout at an acceptable amount is not possible, the Receiver will return the vehicles to the applicable Perfected Lessor.

21. Setay has advised that it will require the return of the VIN Registered Setay Units, and payment of the corresponding rent in arrears. The Receiver has agreed to do this, subject to the Court approving such return and payment. Setay has further advised that it does not object to the Receiver selling the Unregistered Setay Vehicles.

22. The Receiver is seeking the Court's authorization to sell the vehicles and equipment leased by the Unperfected Lessors, with the exception of two vehicles leased by LMS that are not subject to leases of a term of more than one year (the "**Short Term LMS Units**"), which the Receiver is seeking the Court's authorization to return. The Receiver has been advised by LMS that it does not object to the relief requested in respect of the vehicles leased to Allied by LMS.

### **C. FEES AND ACTIVITIES**

23. 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 are set out in the First Report. In addition, the activities of the Interim Receiver for the period beginning on September 17, 2022 and ending on its automatic discharge, September 23, 2022, and the fees of the Interim Receiver and its counsel for the period beginning on the Interim Receiver's appointment, September 6, 2022, and ending on its automatic discharge, September 23, 2022, are also set out in the First Report.<sup>17</sup>

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<sup>17</sup> First Report at para 6.0(1) and (2)

### **PART III – ISSUES AND THE LAW**

24. There are six issues to be determined by the Court in this motion:
- (a) Should the ASA and Transaction be approved?
  - (b) Should the Confidential Appendices be sealed until the assets have been sold?
  - (c) Should the Receiver be authorized to sell the equipment leased by the Unregistered Lessors?
  - (d) Should the VIN Registered Setay Units be returned to Setay, and the rent arrears paid in respect thereof?
  - (e) Should the Short Term LMS Units be returned to LMS?
  - (f) Should the activities of the Receiver, and the fees and activities of the Interim Receiver, be approved?
25. In the Receiver's view, each of the foregoing questions should be answered in the affirmative.

#### **A. APPROVAL OF AUCTION SERVICES AGREEMENT & SEALING**

##### **Approval of ASA and Transaction**

26. It is settled law that when asked to approve a transaction in a receivership context, a court is required to consider the factors set out in *Royal Bank of Canada v Soundair Corp*:
- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
  - (b) the interests of all parties;
  - (c) the efficacy and integrity of the process by which offers are obtained; and
  - (d) whether there has been unfairness in the working out of the process.

[\(1991\), 4 OR \(3d\) 1 \(ONCA\) \[Soundair\].](#)

27. Deference is to be afforded to a receiver respecting its proposed sale process. Absent a violation of the *Soundair* principles or other exceptional circumstances, the court should uphold the business judgment of the receiver, as its court officer.

[\*Crown Trust Co v Rosenberg\* \(1986\), 60 OR \(2d\) 87 \(HC\)](#) at para 83.

28. As set out in *Bank of Montreal v Dedicated National Pharmacies Inc.*:

Where a receiver or manager has acted reasonably, prudently and not arbitrarily, as is the case here, a court ought not to sit in appeal from a receiver or manager's decision or review in every detail every element of the procedure by which the receiver or manager made its decision. To do so would be futile, duplicative and would neutralize the role of the receiver or manager.

[\*Bank of Montreal v. Dedicated National Pharmacies Inc. et al.\*, 2011 ONSC 4634 \(CanLII\)](#), at para 43

29. The Receiver submits that the *Soundair* test is satisfied in respect of the RFP Process conducted in these proceedings and that the Transaction should be approved, for the following reasons:

- (a) Efforts to Get the Best Price: Liquidators with the ability to conduct an auction of the size and specialization necessary for the Allied assets were widely canvassed by the Receiver, resulting in material participation from, and competition among, potential liquidators. The economic terms proposed by the Auctioneer were superior to all other proposals. The NMG is therefore the best guaranteed price the Receiver could reasonably obtain, and by the nature of an auction, the sale prices for Allied's assets will be set in a competitive market process.
- (b) Interests of the Parties: The RFP Process was designed to ensure that the process would be robust and run with integrity, transparency and fairness. No alternatives to the proposed Transaction have been presented that would provide for superior recoveries to stakeholders, and Allied's key stakeholders either support or do not object to the ASA and the Transaction.

- (c) Efficacy and Integrity of the Process. The Receiver has extensive experience with liquidations and with selecting liquidators and auctioneers, and is of the view that the RFP Process was run in a commercially reasonable, fair and transparent manner, consisted with market and industry standards for comparable liquidations. The timing of the auction is sensitive; it must be conducted in the short term to avoid missing the season for purchasers of specialized rail equipment, and accordingly in the Receiver's view it would not have been cost effective, efficient or necessary to have the RFP Process pre-approved by the Court, prior to commencing it. The Receiver has ensured that all procedural and process issues have been conducted with integrity. All interested parties have had ample opportunity to participate. No objections or concerns with the RFP Process have been brought to the Receiver's attention. Finally, in the Receiver's view, an auction is the only reasonable and efficient means for liquidating equipment and assets like the ones to be sold at the proposed auction.
- (d) No Unfairness. In the Receiver's view, there has been no unfairness in the conduct of the RFP Process, no party has been prejudiced or excluded, and the range of competitive offers received informs the Receiver's conclusion that the ASA and the proposed Transaction are the optimal means of achieving the highest and best prices for Allied's assets.

30. The approval order sought by the Receiver is in the standard, model form of approval and vesting order in Ontario, and its issuance is a requirement of the ASA. The parties with registered interests being vested out by the vesting provisions in the requested order have been given notice of the Receiver's motion, and the proposed order provides that any interests that are vested out

attach to the proceeds of sale in accordance with their respective priorities. Accordingly, the Receiver believes that the approval order is fair, reasonable, and ought to be granted.

### **Sealing of Confidential Appendices**

31. In *Sierra Club of Canada v Canada (Minister of Finance)*, the Supreme Court of Canada (“SCC”) held that courts should exercise their discretion to grant sealing orders where (a) the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk, and (b) the salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

[\*Sierra Club of Canada v. Canada \(Minister of Finance\)\*, 2002 SCC 41 \(CanLII\), \[2002\] 2 SCR 522](#) at para 53

32. In *Sherman Estate v Donovan*, the SCC recast the test from *Sierra Club* differently, without altering its essence. According to *Sherman Estate*, a person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

- (a) court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[\*Sherman Estate v. Donovan\*, 2021 SCC 25 \(CanLII\)](#) at para 38

33. Although the SCC was considering issues of personal privacy in *Sherman Estate*, it noted in citing *Sierra Club* that the term “important interest” can capture a broad array of public objectives including commercial interests.

[\*Sherman Estate, supra\*](#) at para 41

34. In the insolvency context, courts have commonly applied the *Sierra Club* test and granted sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders.

[Elleway Acquisitions Ltd., v 4358376 Canada Inc., 2013 ONSC 7009](#) at paras 47-48; [GE Canada Real Estate Financing Business Property Company v 1262354 Ontario Inc., 2014 ONSC 1173](#) at para 32; [Stelco Inc. \(Re\), 2006 CarswellOnt 394](#) at paras 2-5, [2006] OJ No. 275 (Ont SCJ); [Re Canwest Publishing Inc., 2010 ONSC 222](#) at paras 63-65.

35. The test for a sealing order as recast in *Sherman Estate* has similarly been recently employed in the insolvency context to authorize sealing orders over confidential or commercially sensitive documents.

[Ontario Securities Commission v Bridging Finance Inc., 2021 ONSC 4347](#) at paras 23-27; [Laurentian University of Sudbury, 2021 ONSC 4769](#) at paras 12-14.

36. The Confidential Appendices contain confidential and commercially sensitive information, including with respect to key economic terms of the Auctioneer's engagement, and the values attributed to the assets in the Transaction.

37. The Confidential Appendices are comprised of (a) a summary of the proposals received from liquidators in the RFP Process, and (b) a copy of the unredacted ASA, including the NMG and prices allocated to the assets to be sold.

38. If such documents were not sealed, the information contained therein would negatively impact bids at the Auction (because bidders would know the prices allocated to assets by the Auctioneer and the Receiver) and, in the event that the ASA is not approved or the auction does not proceed with the Auctioneer for any reason, would prejudice the Receiver in negotiating with a new liquidator. The Receiver is not aware of any party that will be prejudiced if the information is sealed.

39. In the circumstances, the sealing order sought is the least restrictive means to maintain the confidentiality of this commercially sensitive information, as the balance of the terms of the ASA

have been made available to all stakeholders on an unredacted basis. By the terms of the requested sealing order, the sealing will fall away upon the sale of the last of Allied's assets, when the information is no longer commercially sensitive. Accordingly, the Receiver submits that the salutary effects of the sealing order outweigh the deleterious effects of restricting access to the Confidential Appendices, and that the requested sealing order is therefore appropriate.

## **B. LEASED EQUIPMENT**

40. The Receiver has proposed that it will return leased equipment in respect of which the lessors have priority, and that it will sell leased equipment in respects of which proper or timely registrations have not been made. This section of the factum will outline the legal analysis that informs that decision, and examine the facts of particular leases in light of that legal analysis.

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

41. The Receiver's analysis with respect to leased equipment that ought to be sold 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.

42. 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.



43. 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.”

44. Section 1(1) of the OPPSA defines “lease for a term of more than one year” as follows:

“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.

45. 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”.

46. 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.

47. 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.

[\*Giffen \(Re\)\*, 1998 CanLII 844 \(SCC\), \[1998\] 1 SCR 91](#) at para 50

48. 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 of more than one year was subordinate to the interests of the lessee's lender, which held a perfected general security interest.

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

49. 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...”

[\*Big Eagle, supra\*](#) at 62 and 63

### **Sale of Equipment Leased by Unregistered Lessors and the Unregistered Setay Units**

50. Based on the analysis in the foregoing section, the Receiver has determined that the interests of Danella in the Danella Units, the interests of Setay in the Unregistered Setay Units, and the interests of LMS in the LMS Units (other than the Short Term LMS Units) are subordinate to the interest of Allied's other secured creditors in the same collateral, and therefore ought to be sold by the Receiver so that the proceeds can be distributed in accordance with creditors' priority claims, subject to Court approval at a distribution motion to be brought after the auction has been completed.

#### ***Danella***

51. As detailed in the First Report, 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.

52. Danella has not registered a financing statement, and it is not in possession of the Danella Units. It is therefore unperfected.

53. 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.

54. As a result of Danella's unperfection and resulting subordinate position, it is just and appropriate for the Receiver to sell the Danella Units, and distribute the proceeds of sale to Allied's creditors in accordance with their priority thereto, pursuant to a future distribution motion. The

Receiver has agreed to segregate the net proceeds of sale of the Danella Units (ie: the gross proceeds less taxes and the buyer's premium, "**Net Proceeds**"), subject to being distributed in accordance with a further order of the Court sought on notice to Danella.

### *Setay*

55. As detailed in the First Report, the Setay Leases have terms varying from 21 months to 60 months, including the leases for the Unregistered Setay Units. The Setay Leases do not include purchase options, and are therefore probably "true" leases, however it is not necessary to make this determination because they are all of a term of more than one year. Accordingly, the Setay Leases of the Unregistered Setay Units create a security interest for the purposes of the OPPSA.

56. Setay has not registered a financing statement, and it is not in possession of the Unregistered Setay Units. It is therefore unperfected.

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

58. As a result of Setay's unperfection and resulting subordinate position with respect to the Unregistered Setay Units, it is just and appropriate for the Receiver to sell the Unregistered Setay Units, and distribute the proceeds of sale to Allied's creditors in accordance with their priority thereto, pursuant to a future distribution motion.

59. Setay has advised the Receiver that it does not object to the Receiver selling the Unregistered Setay Units.

### *LMS*

60. As detailed in the First Report and the Supplementary 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 the Short Term LMS Units) are for a term of more than one year, and accordingly create a security interest for the purposes of the OPPSA.

61. LMS appears to have 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.

62. 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 (other than the Short Term LMS Units) are subordinate to the interests of Allied’s secured creditors with a perfected interest in the same collateral, which includes Bridging. If LMS’s registration is valid, then it has perfected, but because it registered just days ago, it is subordinate to the interests of Allied’s secured creditors with a prior-perfected interest in the same collateral, which includes Bridging, pursuant to PPSA s. 30(1)1.

63. As a result of LMS’s subordinate position with respect to the LMS Units (other than the Short Term LMS Units), it is just and appropriate for the Receiver to sell the LMS Units (other than the Short Term LMS Units), and distribute the proceeds of sale to Allied’s creditors in accordance with their priority, pursuant to a future distribution motion.

64. The LMS Units present a complication that is not a factor in respect of Allied’s other lessors: between 14 and 19 of the LMS Units are subject to PPSA registrations by VIN in favour of LMS’s creditors, being HSBC Bank Canada, Meridian OneCap Credit Corp and Caisse Populaire (collectively, the “**LMS Secured Creditors**”).

65. The LMS Secured Creditors are not creditors of Allied, but by virtue of their VIN registrations against the LMS Units, they may have an enforceable interest in the LMS Units against which they are registered. In the Receiver's view, this is a distribution issue. The Receiver is seeking authorization to sell the LMS Units, including the LMS Units in respect of which the LMS Secured Creditors have registered a financing statement, and separately track the proceeds of sale. Whether or not the LMS Secured Creditors have a priority interest in the proceeds will be determined at a subsequent distribution motion, in respect of which the Receiver will provide the Court with its analysis and recommendation.

66. LMS has advised the Receiver that it does not object to the Receiver selling the LMS Units (other than the Short Term LMS Units).

#### **Treatment of VIN Registered Setay Units**

67. Setay has not registered a financing statement against Allied. However, Setay has registered a financing statement in respect of each of the VIN Registered Setay Units, which names "Allied Track Services Inc." as debtor. These registrations were made against Old Allied, prior to the sale of the Old Allied assets to Allied, and never amended following the closing of the sale.

68. The PPSA includes a provision to cure defective registrations if the defect is not likely to materially mislead a reasonable person. Section 46(4) of the PPSA provides:

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.

69. Section 46.1 of the PPSA provides additional guidance on errors or omissions that could mislead a reasonable person, and deems that a reasonable person will not be misled if a registration against a motor vehicle correctly includes the vehicle identification number, and sets out at least one debtor name:

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).

46.1(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)...

70. Setay's registrations against the VIN Registered Setay Units do not include an "error" in the debtor name; rather, they are registered against the wrong debtor (Old Allied). However, the registrations name "Allied Track Services Inc." as the debtor, which is the name under which Allied conducts business, and the registrations correctly set out the vehicle identification numbers in the designated spaces in each financing statement.

71. A third party conducting a search against any of the VIN Registered Setay Units would turn up Setay's registration, naming "Allied Track Services Inc." as the debtor. While this is the wrong corporate entity, it is almost exactly Allied's business name.

72. The Receiver is satisfied that no reasonable person, searching against any of the VIN Registered Setay Units, would be misled materially by Setay's error in its registration, and therefore Setay's incorrect registration is, in the Receiver's view, cured by sections 46(4) and 46.1 of the PPSA.

73. On the basis of the foregoing, the Receiver is prepared to accept that Setay is sufficiently registered to be treated as having a perfected security interest, and therefore entitled to the return of the VIN Registered Setay Units, and payment of the rent in arrears on these VIN Registered Setay Units.

74. Bridging, the senior security creditor who would otherwise have priority to the VIN Registered Setay Units under the PPSA, does not object to the foregoing analysis of the Receiver.

#### **Treatment of Short Term LMS Units**

75. As set out in the Supplementary Report, the Receiver is satisfied that the two Short Term LMS Units are not subject to a lease of a term of more than one year. Accordingly, LMS's interest in the Short Term LMS Units is not deemed to be a security interest by the PPSA, and LMS's interest is not subordinate to the interests of Allied's secured creditors.

76. On the basis of the foregoing, the Receiver believes that it is appropriate to return the Short Term LMS Units to LMS, and it seeks an order authorizing it to do so.

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

77. 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.

[\*Re Target Canada Co.\*, 2015 ONSC 7574](#) [*Target Canada*] at paras 2, 22-23.



78. Recently, the principles set out in *Target Canada* were reaffirmed by Chief Justice Morawetz in *Laurentian University*.

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

79. 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.

[Re Hanfeng Evergreen Inc., 2017 ONSC 7161](#) at para 15.

80. 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.

[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.

81. The activities of the Receiver and the Interim Receiver were carried out in accordance with the orders appointing them, were consistent with their respective mandates, 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 Interim Receiver 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 the Interim Receiver, should be granted.

#### **PART IV – ORDER REQUESTED**

82. 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 orders included in the Receiver's motion record dated October 20, 2022 and the Interim Receiver's motion record dated October 25, 2022.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 27th day of October, 2022.

A handwritten signature in black ink, appearing to read "Chris Burr", is positioned above a horizontal line.

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Chris Burr  
Lawyers for the Receiver

## SCHEDULE “A”

### LIST OF AUTHORITIES

| <u>Cases</u> |   |
|--------------|---|
| 1.           | <u><i>Royal Bank of Canada v Soundair Corp</i> (1991), 4 OR (3d) 1 (ONCA)</u>   |
| 2.           | <u><i>Crown Trust Co v Rosenberg</i> (1986), 60 OR (2d) 87 (HC)</u>   |
| 3.           | <u><i>Bank of Montreal v. Dedicated National Pharmacies Inc. et al</i>, 2011 ONSC 4634 (CanLII)</u>                                 |
| 4.           | <u><i>Sierra Club of Canada v. Canada (Minister of Finance)</i>, 2002 SCC 41 (CanLII), [2002] 2 SCR 522</u>                         |
| 5.           | <u><i>Sherman Estate v. Donovan</i>, 2021 SCC 25 (CanLII)</u>   |
| 6.           | <u><i>Elleway Acquisitions Ltd., v 4358376 Canada Inc.</i>, 2013 ONSC 7009</u>  |
| 7.           | <u><i>GE Canada Real Estate Financing Business Property Company v 1262354 Ontario Inc.</i>, 2014 ONSC 1173</u>                      |
| 8.           | <u><i>Stelco Inc. (Re)</i>, 2006 CarswellOnt 394, [2006] OJ No. 275 (Ont SCJ)</u>   |
| 9.           | <u><i>Re Canwest Publishing Inc.</i>, 2010 ONSC 222</u>   |
| 10.          | <u><i>Ontario Securities Commission v Bridging Finance Inc.</i>, 2021 ONSC 4347</u>   |
| 11.          | <u><i>Laurentian University of Sudbury</i>, 2021 ONSC 4769</u>  |
| 12.          | <u><i>Giffen (Re)</i>, 1998 CanLII 844 (SCC), [1998] 1 SCR 91</u>   |
| 13.          | <u><i>Wells Fargo Foothill Canada ULC v Big Eagle Hydro-Vac Inc</i>, 2015 ABQB 546 (CanLII)</u>                                     |
| 14.          | <u><i>Re Target Canada Co.</i>, 2015 ONSC 7574</u>  |
| 15.          | <u><i>Re Laurentian University of Sudbury</i>, 2022 ONSC 2927</u>   |
| 16.          | <u><i>Re Hanfeng Evergreen Inc.</i>, 2017 ONSC 7161</u>   |
| 17.          | <u><i>Bank of America Canada v Willann Investments Ltd.</i>, [1993] OJ No. 1647 (Gen Div), <i>aff'd</i> [1996] OJ No. 2806 (CA)</u> |
| 18.          | <u><i>Lang Michener v American Bullion Minerals Ltd.</i>, 2005 BCSC 684</u>   |

## **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.



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  
(Approval of Auction Services Agreement,  
and Ancillary Matters)  
Returnable October 28, 2022**

**BLAKE, CASSELS & GRAYDON LLP**  
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