

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN

BRIDGING FINANCE INC., as agent for
2665405 ONTARIO INC.

Applicant

-and-

1033803 ONTARIO INC. and 1087507 ONTARIO LIMITED

Respondents

IN THE MATTER OF AN APPLICATION UNDER SECTION 243(1) OF THE
***BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED;**
AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*,
R.S.O. 1990, c. C.43, AS AMENDED

FACTUM OF THE RECEIVER
(Returnable December 13, 2018)
(Approval of Brampton Stalking Horse Agreement and Bidding Procedures)
(Sale Approval – Forma-Con Business)

Date: December 11, 2018

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in its capacity as Court-appointed Receiver

PART I - OVERVIEW

1. Pursuant to an order of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) made on November 19, 2018 (the “**Receivership Order**”), KSV Kofman Inc. (“**KSV**”) was appointed receiver and manager (KSV, in such capacity, the “**Receiver**”) of: (i) all of the assets, undertakings and properties of 1033803 Ontario Inc. (operating as Forma-Con Construction and Forma Finishing) (“**Forma-Con**”), including without limitation, the lands municipally known as 3420 Queen Street East, Brampton, Ontario (formerly 3420 Highway 7 East, Brampton, Ontario) (the “**Lands**”) and 1087507 Ontario Limited (together with Forma-Con, the “**Debtors**”); (ii) certain assets of Bondfield Construction Company Limited (“**BCCL**”) and Bondfield Construction Equipment Ltd. (“**BCEL**”); and (iii) the real property known municipally as 131 Saramia Crescent, Vaughan, Ontario ((i) – (iii), collectively, the “**Property**”).

2. This Factum is filed by the Receiver in connection with its motions, each returnable December 13, 2018, for three orders. The first order (the “**Brampton Order**”) deals with the Lands, and seeks approval of, among other things:

(a) the stalking horse agreement of purchase and sale made as of December 6, 2018, between the Receiver and 2657897 Ontario Inc. (“**265**” or the “**Stalking Horse Bidder**”), an affiliate of Bridging Finance Inc. (the “**Agent**”), pursuant to which the Stalking Horse Bidder has agreed to purchase the Lands (the “**Stalking Horse Agreement**”);

(b) related bidding procedures (the “**Bidding Procedures**”) to be followed by the Receiver in connection with the sale of the Lands (the “**Lands Sale**”);

(c) the engagement of Intercity Realty Inc. (“**Intercity**”) as listing agent in connection with the Bidding Procedures and the Lands Sale;

(d) the termination agreement (the “**Termination Agreement**”) dated as of December 6, 2018, between the Receiver and 265 that terminates an agreement of purchase and sale dated October 4, 2018, between Forma-Con and 265 in connection with the Lands (the “**Original APS**”), which Original APS was entered into prior to these receivership proceedings; and

(e) the First Report of the Receiver dated December 7, 2018 (the “**First Report**”).

3. The second and third orders (the “**Forma-Con and Supplemental Orders**”) deal with the sale of the Forma-Con business, and seeks, among other things:

(a) the approval of the sale of the Forma-Con business (the “**Transaction**”) contemplated by a letter agreement dated November 23, 2018 (the “**Letter Agreement**”) and an amendment thereto dated December 10, 2018 (the “**Amendment**”, and together, with the Letter Agreement, the “**APA**”), each between the Receiver and GF Equipment Corp. (the “**Purchaser**”), in connection with the Forma-Con business;

(b) the approval of the Receiver’s execution of the APA and authorizing and directing the Receiver to execute all other ancillary documents and agreements required to complete the transaction set out in the APA and to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Companies’¹ right, title and interest in and to the assets described in the APA (the “**Purchased Assets**”) to the Purchaser;

(c) the vesting of the Companies’ right, title and interest in and to the Purchased Assets free and clear of all encumbrances (other than permitted encumbrances, if any) provided that such vesting shall be effective only upon delivery by the Receiver to the Purchaser of a certificate substantially in the form attached to the draft order confirming, among other things, that all terms and conditions under the APA have been satisfied or waived;

(d) authorization for the Receiver to pay to Gabrielli Crane Erectors Inc. up to the maximum amount of \$222,219.70 from the sale proceeds of the Transaction, as required by the APA (such payment, the “**Gabrielli Payment**”);

(e) the sealing of the un-redacted versions of the Letter Agreement and Amendment, which version are appended as Confidential Appendices “1” and “2”, respectively, to the Second Report (as defined below), until further Order of this Court; and

¹ Forma-Con, BCCL and BECL are collectively referred to as the “Companies” in this Factum.

(f) the approval of the Second Report of the Receiver dated December 10, 2018 (the “**Second Report**”) and the actions and activities of the Receiver described therein.

4. Entry into the Stalking Horse Agreement, the commencement of the process to be followed by the Receiver in connection with the Lands Sale, and the approval of the sale of the Forma-Con business are important milestones in these receivership proceedings. For this reason, and the other reasons set forth in greater detail in the First Report and the Second Report, the Receiver recommends that this Court grant the requested order.

PART II - THE FACTS

First Report and Second Report

5. A detailed description of the general background facts to these receivership proceedings, is set forth in the First Report. The First Report also sets forth a detailed description of the facts and considerations relevant to the relief sought pursuant to the Brampton Order. The Second Report sets forth a detailed description of the facts and considerations relevant to the relief sought pursuant to the Forma-Con and Supplemental Orders. The Receiver’s actions and activities, as described in the Second Report, are lawful and proper, consistent with its powers and duties under the Receivership Order and in accordance with the provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”).

General Background Facts

6. Forma-Con was founded in 1993. It operates a concrete forming business that provides forming services for construction projects. The shares of Forma-Con are owned by members of the Aquino family. Forma-Con is an affiliate of BCCL. BCCL is a major full-service construction company operating in Ontario. Except for those assets of BCCL subject to the Receivership Order, BCCL’s business continues to operate and is not subject to these receivership proceedings. Forma-Con owns real property municipally described as 407 Basaltic Road, Vaughan (the “**Head Office**”) and the Brampton Property. The Receiver is presently leasing the Head Office premises to BCCL.

First Report, Receiver's Motion Record (Approval of Brampton Stalking Horse Agreement and Bidding Procedures), Tab 2, Section 2.1, Paras. 1 - 3.

7. The Agent is the agent for the Debtors' principal secured creditor, 265. The Debtors and certain of their affiliates are indebted to 265 for approximately \$85 million, plus costs and expenses which continue to accrue.

First Report, Receiver's Motion Record (Approval of Brampton Stalking Horse Agreement and Bidding Procedures), Tab 2, Section 2.2, Para. 1.

Brampton Order Facts

8. In connection with the Lands Sale, the Receiver has negotiated and entered into the Stalking Horse Agreement. The Stalking Horse Agreement contemplates that the Receiver will follow the Bidding Procedures in connection with the Lands Sale.

First Report, Receiver's Motion Record (Approval of Brampton Stalking Horse Agreement and Bidding Procedures), Tab 2, Section 3.1, Paras. 1 - 2.

9. Pursuant to the Bidding Procedures, parties interested in purchasing the Lands will be provided with the opportunity to submit bids for the Lands and, if such bids are Qualified Bids, such Qualified Bidders will be invited to participate in an auction with the Stalking Horse Bidder to identify the Successful Bidder (each, as defined in the Bidding Procedures). There are no bid protections or expense reimbursements payable under the Stalking Horse Agreement or the Bidding Procedures

First Report, Receiver's Motion Record (Approval of Brampton Stalking Horse Agreement and Bidding Procedures), Tab 2, Section 4.1, Para. 3, Section 4.3, Para. 1, Section 4.4, Paras. 1-2.

10. Intercity is familiar with the Lands, having already marketed them for over two years, and its retention by the Receiver as listing agent will assist with the implementation of the Bidding Procedures and the Lands Sale pursuant thereto.

First Report, Receiver's Motion Record (Approval of Brampton Stalking Horse Agreement and Bidding Procedures), Tab 2, Section 4.1, Para. 2.

11. In connection with the Receiver's entry into the Stalking Horse Agreement, the Receiver and 265 entered into the Termination Agreement in order to terminate the Original APS that was entered into prior to these receivership proceedings.

First Report, Receiver's Motion Record (Approval of Brampton Stalking Horse Agreement and Bidding Procedures), Tab 2, Section 3.0, Para. 3.

Forma-Con and Supplemental Orders Facts

12. Prior to the commencement of these receivership proceedings, Forma-Con's management conducted a sale process in respect of the Forma-Con business that did not result in a sale transaction, though it did identify the Purchaser. Also prior to these proceedings, Forma Con's management, the Purchaser and representatives of the Agent, participated in discussions concerning a potential sale transaction.

Second Report, Receiver's Motion Record (Sale Approval – Forma-Con Business)), Tab 2, Section 2.4, Para. 2.

13. As described in greater detail in the Second Report, negotiations between the Receiver and the Purchaser (in consultation with the Agent) culminated in the carefully constructed APA, which represents the highest and best offer in terms of price and conditions that was achievable in the circumstances, in the view of the Receiver.

Second Report, Receiver's Motion Record (Sale Approval – Forma-Con Business)), Tab 2, Section 2.4, Para. 4, Section 3.4, Para. 1.

14. Completing the Transaction is urgent, as funding for the Forma-Con business has been provided by the Agent, and the Agent has only agreed to fund for a short period of time. A discontinuation or interruption of Forma-Con's operations would likely cause irreparable damage to the value of its business and assets, and give rise to the possibility of unionized labour walking

off job sites, damage claims being asserted by project owners due to project delays, and difficulties collecting accounts receivable. In light of the foregoing, it is the Receiver's view that there is no opportunity to conduct a further marketing or sale process for the Purchased Assets, and there is no funding available for such a process.

Second Report, Receiver's Motion Record (Sale Approval – Forma-Con Business)), Tab 2, Section 2.4, Para. 5.

15. Sealing the un-redacted versions of the Letter Agreement and the Amendment until further Order of this Court is necessary to preserve the integrity of any subsequent attempts to market and sell the Forma-Con business (in the event that the Transaction does not close) and to avoid any prejudice that might be caused by publicly disclosing the confidential and commercially-sensitive information contained therein. The Gabrielli Payment is a requirement, and part of the careful construction, of the APA, and is supported by the Agent.

Second Report, Receiver's Motion Record (Sale Approval – Forma-Con Business)), Tab 2, Section 3.3, Para. 1, Section 3.2, Para. 1.

16. The Transaction will provide the Forma-Con business with a path forward, thereby preserving jobs and providing creditors with the prospect, though not a guarantee, of recoveries. The granting of an approval and vesting order substantially in the form of the draft order is a condition of the APA.

Second Report, Receiver's Motion Record (Sale Approval – Forma-Con Business)), Tab 2, Section 3.1, Para. 4.

PART III - THE ISSUES

17. With respect to the Brampton Order, the issues before this Court, and addressed below, are:

(a) Should this Court approve the Stalking Horse Agreement, the Bidding Procedures and other agreements related to the Lands Sale?

(b) Should this Court approve the Receiver's First Report?

18. With respect to the Forma-Con and Supplemental Orders, the issues before this Court, and addressed below, are:

- (a) Should this Court approve the Transaction and APA and grant a vesting order that, among other things, authorizes the Gabrielli Payment?
- (b) Should this Court seal the APA, on the terms requested?
- (c) Should this Court approve the Receiver's Second Report and the actions and activities of the Receiver described therein?

PART IV - LAW AND ARGUMENT

Section 1: Brampton Order

(A) This Court should approve the Stalking Horse Agreement, the Bidding Procedures and the related agreements

19. Court-appointed receivers have the powers set out in the orders appointing them. It is usual for receivers to be granted the power to market the property of a debtor, which is the case under the Receivership Order granted in this case that authorizes the Receiver to “market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate.”

Receivership Order, Receiver's Motion Record (Approval of Brampton Stalking Horse Agreement and Bidding Procedures), First Report, Appendix “A”, Subsections 3(k).

20. The sale of the assets for the benefit of creditors is a principal objective of receivership proceedings, and this is often accomplished by way of stalking horse sale transactions and integrated bidding procedures. Houlden and Morawetz, in their analysis of sales and auction processes in receiverships, explain as follows:

The Ontario Superior Court of Justice approved a sales/auction process ... Justice Brown held that the reasonableness and adequacy of a sales process proposed by a receiver must be assessed in light of factors that the Ontario Court of Appeal identified in *Royal Bank v. Soundair Corp.* (1991), 1991 CarswellOnt 205, 4 O.R.

(3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.), specifically, when reviewing a sales and marketing process proposed by a receiver, a court should assess: the fairness, transparency and integrity of the proposed process; the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale. The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable element of a sales process. The court must balance the need to move quickly to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process. In light of the financial circumstances of the debtor and the lack of funding available to support operations during a sales process, Brown J. accepted the receiver's recommendation that a quick sales process was required in order to optimize the prospects of securing the best price for the assets. The court approved the stalking horse agreement for the purposes requested by the receiver."

Houlden, Lloyd W. et al, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2018), L20, citing *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.* (2012), 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]), Receiver's Brief of Authorities, Tab 1.

21. Justice Morawetz has approved stalking horse agreements and related bidding procedures in various cases commenced under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), including in *Re Nortel Networks Corp.* and *Re Timminco and Bécancour Silicon Inc.*, for many of the reasons set out above, which reasons are common to asset sales conducted in the insolvency context, whether under the CCAA or in a receivership. Of particular note, those cases involved the approval of break-fees or bid protections, which are not being sought in this case.

Re Nortel Networks Corp., (2009), 56 C.B.R. (5th) 224, 2009 CarswellOnt 4838 (Ont. S.C.J. [Commercial List]), Receiver's Brief of Authorities, Tab 2.

Re Timminco and Bécancour Silicon Inc., Endorsement dated March 9, 2012, Court File No. CV-12-9539-00CL, Receiver's Brief of Authorities, Tab 3.

22. As noted in the passage above from *The 2013-2014 Annotated Bankruptcy and Insolvency Act*, the use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable element of a sales process, and so it is the case here. It is the Receiver's view that the Stalking Horse Agreement provides a floor price for the Lands that is supported by the valuation obtained by the Receiver. Despite the Lands having been listed for sale since July 2016, and no offers other than the one set out in the Original APS having been received since that time, the Bidding Procedures provide interested parties with a fair and transparent process by which they may make a superior offer to purchase the Lands, optimizing the prospects of achieving the best possible price for the Lands. Given the existing listing of the Lands, the duration of the process contemplated by the Bidding Procedures is appropriate, and it would be best to commence this process now.

23. The Termination Agreement is a necessary prerequisite to doing so, and its approval is part and parcel with the approval of the Stalking Horse Agreement and the Bidding Procedures. The Listing Agreement with Intercity, an agent already familiar with the Lands will further enhance the prospects of achieving superior offers. These agreement, combined with the Stalking Horse Agreement and the Bidding Procedures, position the Receiver to maximize value for the Lands, which is in the best interests of creditors.

24. Any agreement or sale of the Lands and distributions from sale proceeds, if any, will remain subject to further court approval.

(B) This Court should approve the First Report

25. Justice Morawetz, in *Target Canada Co. (Re)*, found that a request to approve a monitor's report "is not unusual. A practice has developed in proceedings under the [CCAA] whereby the Monitor will routinely bring a motion for such approval. In most cases, there is no opposition to such requests, and the relief is routinely granted."

Re Target Canada Co. (Re), 2015 ONSC 7574 (Ont. S.C.J. [Comm. List]), Receiver's Brief of Authorities, Tab 4, Para. 2.

26. In the context of a motion to approve a sales process or a sale of assets, Justice Morawetz held that

certain findings of fact must be made before making a determination that the sale process or the sale of assets should be approved. Evidence is generally provided by way of affidavit from a representative of the applicant and supported by commentary from the monitor in its report. The approval issue is put squarely before the court and the court must, among other things conclude that the sales process or the sale of assets is, among other things, fair and reasonable in the circumstances.

Re Target Canada Co. (Re), 2015 ONSC 7574 (Ont. S.C.J. [Comm. List]), Receiver's Brief of Authorities, Tab 4, Para. 18.

27. The practice of approving court reports extends to all officers of the Court, including receivers. The approval of a receiver's report takes on an added importance because there is rarely an affidavit from a representative of the debtor company to provide additional evidence or the Court. In this case, the contents of the First Report inform the relief sought in this motion.

28. In this case, the First Report, which was prepared in a manner consistent with the Receiver's powers and duties under the Receivership Order and in accordance with the provisions of the BIA, should be approved.

Section 2: Forma-Con and Supplemental Orders

(A) This Court should approve the Transaction and APA and grant a vesting order

29. Receivers have the powers set out in the orders appointing them. Receivers are consistently granted the power to sell property of a debtor, which is, indeed, the case under the Receivership Order, as described at Section 1(A) of the Law and Argument Section of this Factum.

Receivership Order, Receiver's Motion Record (Approval of Brampton Stalking Horse Agreement and Bidding Procedures), First Report, Appendix "A", Subsections 3(l).

30. Under Section 100 of the *Courts of Justice Act* (Ontario), this Court has the power to vest in any person an interest in real or personal property that the Court has authority to order be conveyed.

Courts of Justice Act, R.S.O. 1990, c. C-43, s. 100, Schedule "B".

31. It is settled law that where a Court is asked to approve a sales process and transaction in a receivership context, the Court is to consider the following principles (collectively, the “*Soundair Principles*”):

- (a) whether the party made a sufficient effort to obtain the best price and to not act improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which the party obtained offers; and
- (d) whether the working out of the process was unfair.

Royal Bank of Canada v. Soundair Corp., (1991), 4 O.R. (3d) 1 (C.A.), Receiver’s Brief of Authorities, Tab 5, Pg. 6.

Skyepharm PLC v. Hyal Pharmaceutical Corp., (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J., appeal quashed, (2000), 47 O.R. (3d) 234 (C.A.)), Receiver’s Brief of Authorities, Tab 6, Para. 3.

32. Absent clear evidence that a proposed sale is improvident or that there was an abuse of process, a Court is to grant deference to the recommendation of a receiver to sell a debtor’s assets. Only in such exceptional circumstances will a Court intervene and proceed contrary to the recommendation of its officer, the Receiver.

Royal Bank of Canada v. Soundair Corp., (1991), 4 O.R. (3d) 1 (C.A.), Receiver’s Brief of Authorities, Tab 5, Pg. 7.

Skyepharm PLC v. Hyal Pharmaceutical Corp., (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J., appeal quashed, (2000), 47 O.R. (3d) 234 (C.A.)), Receiver’s Brief of Authorities, Tab 6, Para. 3.

Integrated Building Corp. v. Bank of Nova Scotia (1989), 75 C.B.R. (N.S.) 158 (Alta. C.A.), Receiver’s Brief of Authorities, Tab 7, Paras. 1-3.

Battery Plus Inc. (Re.), [2002] O.J. No. 731, Receiver’s Brief of Authorities, Tab 8, Paras. 2-3 and 22-23.

33. A formal sales process need not be a pre-requisite to a sale of assets by a receiver, and Courts will even approve “quick-flip” sales with limited notice if the circumstances of a particular case warrant it. The hallmarks of a “quick flip” sale include a motion for the sale of assets without a formal court officer-driven sale process that occurs without notice to parties in interest and that takes place on the same date as the receivership is commenced.

Tool-Plas Systems Inc. (Re), 2008 CanLII 54791 (Ont. S.C.J. [Comm. List]), Receiver’s Brief of Authorities, Tab 9.

34. Though the sale in this case was not a “quick-flip” sale, some of the considerations of the Court in such a sale are also applicable to this Transaction, but it is the view of the Receiver that the burden of justifying this Transaction is lower than a “quick-flip” sale.

35. Justice Morawetz approved a “quick-flip” sale in *Tool-Plas Systems Inc. (Re)*, and in addition to citing the Soundair Principles, he cited the following test:

In considering whether to approve a 'quick flip' transaction, the Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the 'quick flip' transaction would realistically be any different if an extended sales process were followed.

Tool-Plas Systems Inc. (Re), 2008 CanLII 54791 (Ont. S.C.J. [Comm. List]), Receiver’s Brief of Authorities, Tab 9, Para. 15.

36. The impact of the Transaction on most, if not all, parties is beneficial in that it: (i) will preserve approximately 500 jobs; (ii) will avoid interruptions to various construction projects across Southern Ontario that will be completed by the Purchaser; and (iii) may permit the completion of various construction projects across Southern Ontario by the Receiver. The benefits to stakeholders in the construction projects are substantial.

37. In addition, the value of the Transaction exceeds the net realizable value of the Purchased Assets, if liquidated. The Transaction also avoids the risks and costs associated with a liquidation of Forma-Con, which are significant as a liquidation would involve removing cranes and other assets from numerous construction projects across Southern Ontario. Finally, while there is no certainty that project receivables will ultimately be collected for the benefit of

stakeholders, it is a virtual certainty that they would not be collected if Forma Con's business is discontinued. Accordingly, creditors are better off if the Transaction is approved and closes.

38. Importantly, there is no realistic prospect of an extended sale process in this case, as the Agent has advised the Receiver that it is not prepared to take the economic risk that funding such a sale process would entail. This largely makes moot the question of an alternative sales process.

39. From the perspective of the applicable Soundair Principles, Forma-Con's management conducted a sale process for the Forma-Con business prior to these receivership proceedings that identified the Purchaser. Immediately following its appointment, the Receiver continued the discussions with the Purchaser, in consultation with the Agent. In its discussions with the Purchaser, the Receiver and the Purchaser agreed that the Purchaser would back stop Forma Con's funding requirement on the basis that it would be entitled to any revenue generated by Forma Con from the date of the receivership. Thereafter, negotiations between the Receiver and the Purchaser continued, in consultation with the Agent, with a view to completing a transaction that would maximize value in the circumstances, continue Forma Con's projects without disruption (to the extent possible) and preserve employment. It is the Receiver's view that this was the best way to obtain the best price for the Purchased Assets.

40. Underlining the urgency of completing a transaction, a discontinuation or interruption of Forma-Con's operations would likely cause irreparable damage to the value of its business and assets, and give rise to the possibility of unionized labour walking off job sites, damage claims being asserted by project owners due to project delays, and difficulties collecting accounts receivable.

41. In these circumstances, the Receiver worked fairly and in the best interests of all parties to enter into the APA and the process by which this occurred had the necessary integrity to warrant this Court's approval.

42. The Gabrielli Payment is a requirement, and part of the careful construction, of the APA. It, along with the rest of the Transaction, is supported by the Agent and should be authorized by this Court.

43. The granting of an approval and vesting order substantially in the form of the draft order is a condition of the APA. The Transaction contemplated thereby will provide the Forma-Con business with a path forward, thereby preserving jobs and providing creditors with the prospect, though not a guarantee, of recoveries.

(B) This Court should seal the APA on the requested terms

44. The Receiver requests that the Confidential Appendices be sealed until further order of this Court. Pursuant to the *Courts of Justice Act*, R.S.O. 1990, c C.43, this Court has the discretion to order that any document filed in a civil proceedings be treated as confidential, sealed and not form part of the public record.

Court of Justice Act, R.S.O. 1990, c C.43, Section 137(2),
Schedule "B"

45. The Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, held that a sealing order may be granted when:

- (a) an order is needed to prevent serious risk to an important 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] 2 S.C.R.
522, Receiver's Brief of Authorities, Tab 10, Para. 53.

46. Sealing the un-redacted versions of the Letter Agreement and the Amendment until further Order of this Court is necessary to preserve the integrity of any subsequent attempts to market and sell the Forma-Con business (in the event that the Transaction does not close) and to avoid any prejudice that might be caused by publicly disclosing the confidential and commercially-sensitive information contained therein. There is no other reasonable alternative to preventing this information from becoming publicly available. The sealing request has been tailored to this transaction and the Receiver is not aware of any party that will be prejudiced if the information is sealed, in light of the terms of the APA that are being publicly disclosed. The

salutary effects of maintaining the confidential nature of the Confidential Appendices greatly outweighs the deleterious effects.

(C) This Court should approve the Second Report and the actions and activities of the Receiver described therein

47. The law that applies to this issue is set out above at section 1(B) of the Law and Arguments Section of this Factum. The law and considerations discussed by Justice Morawetz in *Target* are applicable to both the approval of the reports of court officers as well as their actions and activities that are described therein. In that case, Justice Morawetz recognized that there are “good policy and practical reasons for the court to approve of Monitor’s activities and providing a level of protection for Monitors during the CCAA process.”²

Re Target Canada Co. (Re), 2015 ONSC 7574 (Ont. S.C.J. [Comm. List]), Receiver’s Brief of Authorities, Tab 4, Para. 22.

48. In the context of the CCAA, Justice Morawetz cited specific purposes served by Court approval of reports and activities, finding that Court approval:

- (a) allows the Monitor to move forward with the next steps in the CCAA proceedings;
- (b) brings the Monitor’s activities before the Court;
- (c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,
- (d) enables the Court to satisfy itself that the Monitor’s activities have been conducted in prudent and diligent manners;
- (e) provides protection for the Monitor not otherwise provided by the CCAA; and
- (f) protects the creditors from the delay and distribution that would be caused by:
 - (i) re-litigation of steps taken to date, and
 - (ii) potential indemnity claims by the Monitor.

Re Target Canada Co. (Re), 2015 ONSC 7574 (Ont. S.C.J. [Comm. List]), Receiver’s Brief of Authorities, Tab 4, Para. 23.

² The reasons why the approvals were limited on the facts of the *Target* case do not apply to this case.


49. These purposes apply equally to receiverships.

50. In this case, the Second Report, which was prepared in a manner consistent with the Receiver's powers and duties under the Receivership Order and in accordance with the provisions of the BIA, should be approved. The Receiver's actions and activities, as described in the Second Report, are lawful and proper, consistent with its powers and duties under the Receivership Order and in accordance with the provisions of the BIA. They should also be approved.

PART V - ORDER REQUESTED

51. For the reasons set forth herein and in the First Report and the Second Report, the Receiver respectfully requests the granting of the Orders in the forms contained in the Receiver's Motion Records.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of December, 2018.



Scott Bomhof



Adam M. Slavens

Lawyers for the Receiver

**SCHEDULE “A”
LIST OF AUTHORITIES**

Battery Plus Inc. (Re.), [2002] O.J. No. 731.

Houlden, Lloyd W. et al, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2018), L20.

Integrated Building Corp. v. Bank of Nova Scotia (1989), 75 C.B.R. (N.S.) 158 (Alta. C.A.).

Re Nortel Networks Corp., (2009), 56 C.B.R. (5th) 224, 2009 CarswellOnt 4838 (Ont. S.C.J. [Comm. List]).

Re Target Canada Co. (Re), 2015 ONSC 7574 (Ont. S.C.J. [Comm. List]).

Re Timminco and Bécancour Silicon In.c., Endorsement dated March 12, 2013, Court File No. CV-12-9539-00CL.

Royal Bank of Canada v. Soundair Corp., (1991), 4 O.R. (3d) 1 (C.A.).

Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 S.C.R. 522.

Skyepharma PLC v. Hyal Pharmaceutical Corp., (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J., appeal quashed, (2000), 47 O.R. (3d) 234 (C.A.)).

Tool-Plas Systems Inc. (Re), 2008 CanLII 54791 (Ont. S.C.J. [Comm. List]).

SCHEDULE "B"
RELEVANT STATUTES

Courts of Justice Act, R.S.O. 1990, c. C-43.

Section 100

Vesting orders

100 A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

Section 137

Documents public

137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

Court lists public

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

Copies

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see. R.S.O. 1990, c. C.43, s. 137.

**BRIDGING FINANCE INC.,
as agent for 2665405 ONTARIO INC.**

Applicant

**1033803 ONTARIO INC. and
1087507 ONTARIO LIMITED**

Respondents

Court File No. CV-18-608978-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceedings commenced in Toronto

**FACTUM OF THE RECEIVER
(Returnable December 13, 2018)
(Approval of Brampton Stalking Horse
Agreement and Bidding Procedures)
(Sale Approval – Forma-Con Business)**

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in its capacity as Court-appointed
Receiver