

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 July 11, 2019)
(Approval of Vaughan Property and Stouffville Property Transactions)

Date: July 4, 2019

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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 real property municipally known as 3420 Queen Street East, Brampton, Ontario (formerly 3420 Highway 7 East, Brampton, Ontario) (the “**Brampton Property**”) and the real property municipally known as 407 Basaltic Road, Concord, Ontario (the “**Basaltic Property**”), and 1087507 Ontario Limited (“**108**”), and together with Forma-Con, the “**Debtors**”), including without limitation, the real property municipally known as 4431 Stouffville Road, Stouffville, Ontario (the “**Stouffville Property**”); (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 (the “**Vaughan Property**”, together with the Stouffville Property, collectively, the “**Unsold Properties**”, and such assets described (i) – (iii), collectively, the “**Property**”).

2. This Factum is filed by the Receiver in connection with its motion returnable July 11, 2019, for an order (the “**Vaughan/Stouffville Order**”) dealing with the Unsold Properties and seeking, among other things:

(a) the approval of the sale of the Vaughan Property pursuant to the agreement of purchase and sale made as of June 11, 2019, between the Receiver and Tedescorp Holdings Inc. (“**Tedescorp**”), pursuant to which Tedescorp has agreed to purchase the Vaughan Property (such agreement, the “**Vaughan APA**”, and such transaction, the “**Vaughan Transaction**”);

(b) the approval of the Receiver’s execution of the Vaughan APA and authorizing and directing the Receiver to execute all other ancillary documents and agreements required to complete the transaction set out in the Vaughan APA and to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Vaughan Transaction and for the conveyance of the Vaughan Property to Tedescorp;

(c) the vesting of 108's right, title and interest in and to the Vaughan Property 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 Tedescorp of a certificate substantially in the form attached to the draft order confirming, among other things, that all terms and conditions under the Vaughan APA have been satisfied or waived;

(d) the approval of the sale of the Stouffville Property pursuant to the agreement of purchase and sale made as of June 24, 2019, between the Receiver and Tree Valley Garden Centre Ltd. ("**Tree Valley**"), pursuant to which Tree Valley has agreed to purchase the Stouffville Property (such agreement, the "**Stouffville APA**", and such transaction, the "**Stouffville Transaction**" and collectively, the "**Transactions**");

(e) the approval of the Receiver's execution of the Stouffville APA and authorizing and directing the Receiver to execute all other ancillary documents and agreements required to complete the transaction set out in the Stouffville APA and to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Stouffville Transaction and for the conveyance of the Stouffville Property to Tree Valley;

(f) the vesting of Ralph Aquino's right, title and interest in and to the Stouffville Property 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 Tree Valley of a certificate substantially in the form attached to the draft order confirming, among other things, that all terms and conditions under the Stouffville APA have been satisfied or waived;

(g) sealing the offer summary and unredacted version of the Vaughan APA and Stouffville APA, which are appended as Confidential Appendices "1", "2", "3" and "4", respectively, to the Sixth Report (as defined below), until further Order of this Court;

(h) authorizing the Receiver to distribute \$100,000 of the Vaughan Purchase Price (as such term is defined in the Vaughan APA) to Bondfield Construction Company Limited ("**BCCL**");

(i) authorizing the Receiver to make an interim distribution in the amount of \$7.8 million to Bridging Financing Inc. (the “**Agent**”), as agent for 2665405 Ontario Inc. (collectively, the “**Secured Creditor**”), from proceeds of the Transactions (the “**Interim Distribution**”);

(j) approving the fees and disbursements of the Receiver for the period from May 1, 2019, to May 31, 2019 and those of its legal counsel, Torys LLP (“**Torys**”), for the period from May 1, 2019, to May 31, 2019; and

(k) the approval of the sixth report of the Receiver dated July 4, 2019 (the “**Sixth Report**”) and the actions and activities of the Receiver described therein.

3. Approval of the Vaughan APA and Stouffville APA and the transaction contemplated thereby is an important piece of these receivership proceedings. For this reason, and the other reasons set forth in greater detail in the Sixth Report, the Receiver recommends that this Court grant the requested orders.

PART II - THE FACTS

Sixth Report

4. The Sixth Report sets forth a detailed description of the facts and considerations relevant to the relief sought pursuant to the Vaughan Vesting Order and the Stouffville Vesting Order. The Receiver’s actions and activities, as described in the Sixth 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**”).

Facts

5. 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. On April 3, 2019, BCCL and certain of its affiliates were granted protection under the *Companies’ Creditors Arrangement Act*.

Sixth Report, Receiver's Motion Record, Tab 2, Section 2.1, Paras. 1-3.

6. On November 18, 2019, KSV was appointed as the Receiver. On February 25, 2019, this Court issued an order with respect to the Unsold Properties (the "**Real Estate Sale Process Order**"). Such order permitted the Receiver to engage in a sale process for the Unsold Properties (the "**Sale Process**"), which included the Vaughan Property and the Stouffville Property. The Sale Process was a necessary milestone in realizing value from these assets for the benefit of creditors.

Sixth Report, Receiver's Motion Record, Tab 2, Section 1.0, Para. 1-3.

7. The terms of the Sale Process cover the marketing, facilitation of due diligence, solicitation of offers and selection of successful bids, in respect of the Unsold Properties, as described in the Sixth Report. The Sale Process also considers the interests of holders of rights of first refusal and provides a framework for dealing with those rights.

Sixth Report, Receiver's Motion Record, Tab 2, Section 3.0, Paras. 1-3.

8. The Receiver completed a process to select a listing agent for the Unsold Properties, as described in greater detail in the Sixth Report. This process culminated in the selection of CBRE Canada Inc.

Sixth Report, Receiver's Motion Record, Tab 2, Section 3.0, Para. 1.

9. A summary of the Sale Process is as follows:

A. Vaughan Property

- 20 parties executed a confidentiality agreement, were provided a copy of the Confidential Information Memorandum and were given access to the data room; and
- 4 parties submitted offers.

B. Stouffville Property

- 12 parties executed a confidentiality agreement, were provided a copy of the Confidential Information Memorandum and were given access to the data room; and
- 6 parties submitted offers.

Sixth Report, Receiver's Motion Record, Tab 2, Section 3.3, Para. 1.

10. The Receiver invited the three parties with the best offers to participate in a second round of bidding. Second round bids were due on June 3, 2019. All bidders submitted second round offers.

Sixth Report, Receiver's Motion Record, Tab 2, Section 3.3, Paras. 1-3.

11. As set out in the Sixth Report, the Receiver accepted the Vaughan APA and an asset purchase agreement for the Stouffville Property submitted by Mr. Wang, in trust and without personal liability (the "**Pre-ROFR Stouffville Purchaser**"), subject to the rights of ROFR holders for each of those properties. Each of the ROFR holders was provided the opportunity to exercise their respective ROFRs in accordance with their terms. The ROFR Holder on the Vaughan Property did not exercise its ROFR. Tree Valley, the ROFR holder on the Stouffville Property, exercised its ROFR on a timely basis and submitted the Stouffville APA.

Sixth Report, Receiver's Motion Record, Tab 2, Section 3.3, Paras. 4-5.

12. As set out in the Sixth Report, the Purchased Assets include certain solar panels affixed to the Vaughan Property and related contracts (collectively, the "**Solar Panel Assets**") which are owned by BCCL and not subject to the Receivership Order, and the Receiver has negotiated a Bill of Sale with BCCL, with the consent of Ernst & Young Inc., in its capacity as Monitor of BCCL, to acquire the Solar Panel Assets for \$100,000. The Receiver is seeking Court approval to distribute \$100,000 of the sale proceeds to BCCL.

Sixth Report, Receiver's Motion Record, Tab 2, Section 3.5, Para. 1.

13. The Real Estate Sale Process is fair, open and transparent and is intended to canvass the market broadly, with the assistance of an experienced listing agent, in order to obtain the highest and best offers. The listing agent used in connection with the Sale Process is of the view that the Transactions are the best available transactions in the circumstances and the Agent is supportive of them. Absent the Transactions, a protracted marketing period will likely be necessary. The ongoing professional fees and other costs will erode the recoveries with no certainty that superior transactions could be completed.

Sixth Report, Receiver's Motion Record, Tab 2, Section 3.8, Para.
1.

14. The Receiver is seeking Court approval to make a distribution of \$7.8 million to the Agent, as agent for the Secured Creditor. The Secured Creditor's security has been reviewed by Torys. Subject to the standard assumption and qualifications contained in the security opinion, Torys is of the opinion that the Secured Creditor has a valid and perfected security interest in the assets subject to the receivership.

Sixth Report, Receiver's Motion Record, Tab 2, Section 4.2, Para.
1.

15. The fees and disbursements of the Receiver for the period from May 1, 2019 to May 31, 2019, and those of Torys for the period from May 1, 2019, to May 31, 2019, are summarized in the Sixth Report. Detailed invoices are appended to the Sixth Report. The fees of the Receiver and Torys were incurred in connection with the administration of the receivership. The Receiver is of the view that the hourly rates charged by Torys are consistent with the rates charged by downtown Toronto law firms practicing in the area of insolvency and restructuring in the Toronto market, and that the fees charged are reasonable in the circumstances.

Sixth Report, Receiver's Motion Record, Tab 2, Section 5, Paras.
1-3.

PART III - THE ISSUES

16. The issues before this Court, and addressed below, are:

- (a) Should this Court should approve the Transactions and grant the vesting orders?

- (b) Should this Court approve the Interim Distribution?
- (c) Should this Court seal the order summary and the unredacted Vaughan APA and Stouffville APA on the terms requested?
- (d) Should this Court approve the fees and disbursements of the Receiver and Torys that were incurred in connection with the administration of the receivership?
- (e) Should this Court approve the Receiver's Sixth Report and the actions and activities of the Receiver described therein?

PART IV - LAW AND ARGUMENT

This Court should approve the Vaughan APA and Stouffville APA and grant the vesting orders

17. 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.

Receivership Order, Receiver's Brief of Authorities, Tab 1, Subsection 3(1).

Third Eye Capital v. Resources Dianor Inc., 2019 ONCA 508 (Ont.C.A.) ("Third Eye"), Receiver's Brief of Authorities, Tab 2, para. 74.

Application of the Soundair Principles/Approval of the Transactions

18. It is settled law that where a Court is asked to approve a 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 3, Pg. 6.

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.)), Receiver's Brief of Authorities, Tab 4, Para. 3.

19. 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 3, Paras. 14 and 21.

20. The application of the *Soundair* Principles to the present case demonstrates why this Court should approve the Transaction and APA and grant a vesting order:

(a) ***Sufficient effort was made to obtain the best price.*** The goal of the Sale Process was to obtain the best price possible. With the implementation of the Sale Process, the market was canvassed extensively and parties that may have had an interest were given a reasonable opportunity to review the opportunity, conduct due diligence, and make an offer. The Receiver's view is that the price achieved is fair and reasonable. Under the current circumstances, any further marketing efforts are unlikely to result in a superior transaction.

Sixth Report, Receiver's Motion Record, Tab 2, Section 3.8, Para. 1.

(b) ***Interests of all parties have been served.*** The Transaction provides for the best possible outcome for all parties with an economic interest in these proceedings, as it will result in a substantial reduction in the indebtedness owed to the Agent and corresponding interest and fees payable in connection therewith.

Sixth Report, Receiver's Motion Record, Tab 2, Section 3.8, Para. 1.

(c) ***The process was run with integrity.*** The Vaughan Property and the Stouffville Property were extensively marketed. All interested parties were given the opportunity to participate in the Sale Process and were provided with access to data rooms upon executing the appropriate confidentiality arrangements. The Vaughan APA and the Stouffville APA were each negotiated in good faith and is the best and highest price under the circumstances. The appropriateness of this is evidenced in the Sixth Report. No one objected to the Sale Process at the time that it was previously approved by this Court, and the Receiver has implemented and adhered to the Sale Process.

Sixth Report, Receiver's Motion Record, Tab 2, Section 3.0, Paras. 1-3.

(d) ***There was no unfairness.*** The Sale Process was approved pursuant to an Order of this Court dated February 25, 2019. The Receiver had direct involvement in negotiating the terms and conditions of the APA, and believes they are fair and reasonable under the current circumstances. The Receiver carried out the Sale Process approved by the Court.

Sixth Report, Receiver's Motion Record, Tab 2, Section 3.0 and Section 3.8.

21. Based on the foregoing, the proposed Transactions satisfy the *Soundair* Principles.

Application of the Third Eye Criteria/Vesting Out of Interests in Real Property

22. Section 243 of the *Bankruptcy and Insolvency Act* (the "**BIA**") empowers this Court to issue a vesting order which transfers title to real property free and clear of claims and encumbrances on the basis that the power to vest out such interests is incidental and ancillary to the power to sell.

Third Eye, Receiver's Brief of Authorities, Tab 2, para. 77, 85 and 87

BIA, Section 243, Schedule "B"

23. In determining whether it is appropriate to vest out a particular interest in land, the Court should consider:

- (a) the nature of the interest in land; and
- (b) whether the interest holder has consented to the vesting out of their interest, either in the insolvency process or in agreements reached prior to the insolvency.

Third Eye, Receiver's Brief of Authorities, Tab 2, Para. 109.

24. Once the nature of the interest is determined, the Court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the circumstances, which includes (the "**Third Eye Criteria**"):

- (a) a consideration of the prejudice, if any, to the third party interest holder;
- (b) whether the third party may be adequately compensated for its interest from the proceeds of the disposition of the property;
- (c) based on evidence of value, whether there is any equity in the property; and
- (d) whether the parties are acting in good faith.

Third Eye, Receiver's Brief of Authorities, Tab 2, paras. 109-110.

25. Each of the Instruments to be vested off title to the Stouffville Property are financial Instruments, being charges and assignments of rent, as well as postponements of financial instruments. Each of the Instruments to be vested off title to the Vaughan Property are financial instruments, being charges, assignments of rents and executions, except for:

- (a) Instrument No. VA41945, being a by-law ("VA41945"); and
- (b) Instrument No. LT590331, being a reservation of right to re-enter and covenant in a transfer ("LT590331").

Draft Approval and Vesting Orders, Receiver's Motion Record, Tabs 3 and 4.

Sixth Report, Receiver's Motion Record, Tab 2, Section 3.4.

26. VA41945 is a by-law of The Corporation of The Township of Vaughan in respect of certain land use matters. It is a temporary by-law and has been superseded by the adoption of By-law 1-88, which was passed by the City of Vaughan on September 18, 1998. As such, VA41945 is no longer required.

Sixth Report, Receiver's Motion Record, Tab 2, Appendix "A".

27. LT590331 is a transfer from York Jane Developments Inc. ("YJD") to Burkstone Management Ltd. and Nerdi Developments Inc. which reserves a right of re-entry in favour of YJD until the earlier of: (i) 10 years from the date of the Instrument; and (ii) the final assumption of the Corporation of the City of Vaughan of the roads and services in Registered Plan 65M-2724. LT590331 was registered on June 12, 1989 and the right of re-entry has expired. LT590331 also granted certain easements to The Bell Telephone Company of Canada which expired on the later of final assumption of Registered Plan 65M-2724 by the City of Vaughan or 5 years after the registration of the Instrument. On May 28, 2019, the City of Vaughan confirmed that the works required relating to Plan 65M-2724 have been completed and assumed by the City of Vaughan. As such, the easements referred to in LT590331 have also expired.

Sixth Report, Receiver's Motion Record, Tab 2, Appendix "A".

28. The Instruments being vested out by the Vaughan Approval and Vesting Order and the Stouffville Approval and Vesting Order (collectively, the "**Vesting Orders**") meet the Third Eye Criteria:

- (a) *Consideration of Prejudice to the Instrument Holder.* Each of the Instrument Holders have been served with the Receiver's Motion Record. The Agent has consented to the Vesting Orders and Instrument No. R670518 (in favour of Ralph Aquino and registered against the Stouffville Property) has been postponed in favour of the Agent. Each of the Vesting Orders transfers the interest of such Instrument Holder to the respective proceeds from the Transaction. As such, there is minimal prejudice to the holders of the affected Instruments.

Sixth Report, Receiver's Motion Record, Tab 2, Section 3.8 and Draft Vesting Orders, Tabs 3 and 4.

- (b) ***Whether the third party may be adequately compensated for its interest from the proceeds of disposition of the property.*** As noted above, each of the Vesting Orders preserves each Instrument Holders' interest in the respective properties by transferring such interest to the proceeds of sale, with the same priority they had with respect to the subject Property. In the case of Instruments VA41945 and LT590331, the underlying interests have expired.

Sixth Report, Receiver's Motion Record, Tab 2, Appendix "A" and Draft Vesting Orders, Tabs 3 and 4.

- (c) ***Based on evidence of value, whether there is any equity in the property.*** The Agent has security over both the Vaughan Property and the Stouffville Property. The Agent's debt is approximately \$43 million. The best indication of value of the Vaughan Property and the Stouffville Property has been determined by the Sales Process and is reflected in the Vaughan APA and the Stouffville APA. It does not appear that there is any equity in either of the Properties.

Sixth Report, Receiver's Motion Record, Tab 2, Section 4.1, Para. 1.

- (d) ***Whether the parties acted in good faith.*** The parties have acted in good faith. The Receiver was authorized by the Receivership Order to sell the Properties and complied with the Real Estate Sale Process Order. Parties were given an opportunity to exercise Rights of First Refusal, and the Vaughan APA is the result of the exercise of a Right of First Refusal by Tree Valley. The Receiver has conducted a fair and transparent process in accordance with the Orders of this Court.

Sixth Report, Receiver's Motion Record, Tab 2, Section 3.8.

29. The application of these factors to the present case demonstrates that the Court has the authority to issue the requested Vesting Orders.

This Court should approve the Interim Distribution

30. Orders granting interim distributions are routinely granted by courts in insolvency proceedings and receiverships.

Re Windsor Machine & Stamping Ltd., 2009 CanLII 39772 (ON SC), Receiver's Brief of Authorities, Tab 5, paras. 8, 13.

Re Abitibowater Inc., 2009 QCCS 6461 (CanLII) (QC SC), Receiver's Brief of Authorities, Tab 6, at paras. 70-75.

31. In *Re Abitibowater Inc.*, Justice Gascon considered a number of factors in deciding whether to approve an interim distribution under the CCAA that are equally applicable to a receivership proceeding, including whether the payee's security is valid and enforceable, whether the distribution would result in significant interest savings to the estate and whether the distribution will leave the estate with sufficient liquidity.

Re Abitibowater Inc., 2009 QCCS 6461 (CanLII) (QC SC), Receiver's Brief of Authorities, Tab 6, at para. 75.

32. The application of these factors to the present case demonstrates why this Court should approve the Interim Distribution.

(a) ***The Agent's security is valid.*** The Agent's security has been reviewed by Torys. Subject to the standard assumptions and qualifications contained in the security opinion, Torys is of the opinion that the security granted by the Debtors, BCCL and BCEL and Ralph Aquino, a guarantor, in favour of the Secured Creditor creates a valid and perfected security interest in the assets subject to the receivership.

Sixth Report, Receiver's Motion Record, Tab 2, Section 4.2, Para. 1.

(b) ***The Interim Distribution will result in significant interest savings.*** A distribution to the Agent at this time will pay down a portion of the indebtedness owed to the Secured Creditor and limit the accrual of additional fees and interest in respect thereof, for the benefit of creditors generally. This will result in significant interest savings.

Sixth Report, Receiver's Motion Record, Tab 2, Section 4.

(c) *There will be sufficient liquidity after the Interim Distribution is made.* As detailed in the Sixth Report, the Receiver intends to retain \$1.9 million to fund ongoing receivership costs, including professional fees, and any potential liabilities.

Sixth Report, Receiver's Motion Record, Tab 2, Section 4.2, Para. 3.

This Court should seal the offer summary and the unredacted APA on the terms requested

33. 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 proceeding be treated as confidential, sealed and not form part of the public record.

34. 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 7, Para. 53.

35. Sealing the offer summary and the unredacted versions of the APAs until further Order of this Court is necessary to preserve the integrity of any subsequent attempts to market and sell the Purchased Assets (in the event that one or both of the Transactions do 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 prevent 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 Vaughan APA or the Stouffville APA that are being publicly disclosed. The salutary effects of maintaining the confidential nature of the Confidential Appendices greatly outweighs the deleterious effects.

Sixth Report, Receiver's Motion Record, Tab 2, Section 3.7, Para. 1.

This Court should approve the fees and disbursements

36. Pursuant to the Receivership Order, the fees and disbursements of the Receiver and its legal counsel are authorized to be paid on a periodic basis subject to any final approval as ordered by the Court.

37. The Receiver is seeking approval of the Court for the fees and disbursements of: (a) the Receiver for the period from May 1, 2019, to May 31, 2019; and (b) its legal counsel, Torys, for the period from May 1, 2019, to May 31, 2019.

38. The accounts meet the technical requirements established by prior case law:

- (a) the accounts disclose the name of each person who rendered services, the rate charged and the total charges for each of the categories of services rendered;
- (b) the accounts are in a form that can be easily understood by those affected by the receivership or by the judicial officer required to assess the accounts; and
- (c) both the Receiver's and Torys' accounts are verified by an affidavit.

Confectionately Yours Inc., Re, 2002 CarswellOnt 3002 (C.A.), Receiver's Brief of Authorities, Tab 8, at paras. 37-38.

39. A Receiver is entitled to be paid its fees and disbursements, along with those of its counsel, where the amount charged is fair and reasonable in the circumstances. Courts will consider the following factors in making this determination:

- (a) the nature, extent and value of the assets handled;
- (b) the complications and difficulties encountered;

- (c) the degree of assistance provided by the company, its officers or its employees and the time spent;
- (d) the receiver's knowledge, expertise and skill;
- (e) the diligence and thoroughness displayed;
- (f) the responsibilities assumed;
- (g) the results of the receiver's efforts; and
- (h) the cost of comparable services when performed in a prudent and economical manner.

Confectionately Yours Inc., Re, 2002 CarswellOnt 3002 (C.A.), Receiver's Brief of Authorities, Tab 8, at para. 42.

Belyea v. Federal Business Development Bank, 1983 CarswellNB 27 (C.A.), Tab 9, at para. 9.

40. Any assessment of whether the Receiver's account is fair and reasonable must focus on the circumstances as they existed at the time the fees and disbursements were incurred, and not with the benefit of hindsight.

BT-PR Realty Holdings Inc. v. Coopers & Lybrand, 1997 CarswellOnt 1246 (Sup. Ct. (Commercial List)), Tab 10, at para. 22.

41. These have not been simple receivership proceedings. As highlighted in the Sixth Report and the prior court reports, among other things, the Receiver has been:

- (a) engaging in various sale processes, including the negotiation and closing of various complicated asset sales;
- (b) protecting the interests of the estate by taking steps to recover outstanding accounts receivable on construction projects and registering liens where appropriate;

- (c) communicating with contractors, owners, unions, suppliers, customers and other stakeholders in connection with the various construction projects and the receivership proceedings;
- (d) communicating with the Agent, union representatives and other creditors in respect of their various claims against the assets that are subject to the receivership;
- (e) preparing motion materials and court reports; and
- (f) generally administering the estate.

42. This list of activities is not exhaustive, but is meant to be indicative of the complexity of the Receiver's mandate. The Receiver has acted in good faith and in the interest of the creditors. Over the course of these receivership proceedings, the Receiver has exercised the reasonable care, supervision and control that an ordinary person would have given to the Debtors if they were his or her own companies.

BT-PR Realty Holdings Inc. v. Coopers & Lybrand, 1997 CarswellOnt 1246 (Sup. Ct. (Commercial List)), Tab 10, at para. 22.

43. The fees and disbursements of both the Receiver and Torys reflect the firms' standard billing rates and were validly incurred in accordance with the provisions of the Receivership Order. In light of the circumstances of these receivership proceedings, as set out further in the Third Report and the prior court reports, this Court should approve the payment of the fees and disbursements incurred by the Receiver and Torys.

Sixth Report, Receiver's Motion Record, Tab 2, Section 5.

This Court should approve the Sixth Report and the actions and activities of the Receiver described therein

44. 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 11, Para. 2.

45. 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 Sixth Report inform the relief sought in this motion.

46. In *Target*, 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.”

Re Target Canada Co. (Re), 2015 ONSC 7574 (Ont. S.C.J. [Comm. List]), Receiver’s Brief of Authorities, Tab 11, Para. 22.

47. 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 11, Para. 23.

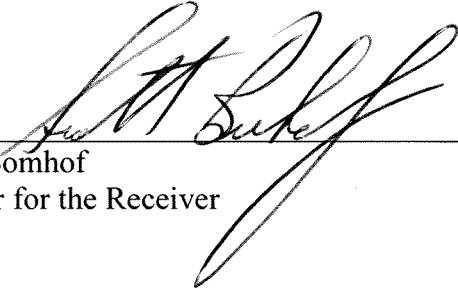
These purposes apply equally to receiverships. In this case, the Sixth Report, which was prepared in a manner consistent with the Receiver’s powers and duties under the Receivership

Order and in accordance with the provisions of the BIA, should be approved. The Receiver's actions and activities, as described in the Sixth 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

48. For the reasons set forth herein and in the Sixth Report, the Receiver respectfully requests the granting of the Orders in the form contained in the Receiver's Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of July, 2019.



Scott Bomhof
Lawyer for the Receiver



TABA

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. Receivership Order issued November 18, 2019.
2. *Third Eye Capital v. Resources Dianor Inc.*, 2019 ONCA 508 (Ont.C.A.)
3. *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (C.A.)
4. *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.))
5. *Re Windsor Machine & Stamping Ltd.*, 2009 CanLII 39772 (ON SC)
6. *Re Abitibiwater Inc.*, 2009 QCCS 6461 (CanLII) (QC SC)
7. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522
8. *Confectionately Yours Inc., Re*, 2002 CarswellOnt 3002 (C.A.)
9. *Belyea v. Federal Business Development Bank*, 1983 CarswellNB 27 (C.A.)
10. *BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, 1997 CarswellOnt 1246 (Sup. Ct. (Commercial List))
11. *Re Target Canada Co. (Re)*, 2015 ONSC 7574 (Ont. S.C.J. [Comm. List])



TABB

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.

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

Court may appoint receiver

- **243 (1)** Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
 - **(a)** take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
 - **(b)** exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or

- (c) take any other action that the court considers advisable.
- **Restriction on appointment of receiver**

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

 - (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
 - (b) the court considers it appropriate to appoint a receiver before then.
- **Definition of receiver**

(2) Subject to subsections (3) and (4), in this Part, *receiver* means a person who

 - (a) is appointed under subsection (1); or
 - (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
 - (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
 - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.
- **Definition of receiver — subsection 248(2)**

(3) For the purposes of subsection 248(2), the definition *receiver* in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).
- **Trustee to be appointed**

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).
- **Place of filing**

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.
- **Orders respecting fees and disbursements**

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver’s claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

- **Meaning of *disbursements***

(7) In subsection (6), *disbursements* does not include payments made in the operation of a business of the insolvent person or bankrupt.

**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 July 11, 2019)
(Approval of Vaughan Transaction and
Stouffville Transaction)**

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in its capacity as Court-appointed
Receiver