

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 February 25, 2019)
(Approval of Brampton Transaction and Supplemental Relief)

Date: February 21, 2019

TORYS LLP
79 Wellington St. W., Suite 3000
Box 270, TD Centre
Toronto, Ontario
M5K 1N2 Canada
Fax: 416.865.7380

Scott A. Bomhof (LSO#: 37006F)
Tel: 416.865.7370
Email: sbomhof@torys.com

Adam M. Slavens (LSO#: 54433J)
Tel: 416.865.7333
Email: aslavens@torys.com

Lawyers for KSV Kofman Inc.,
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 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 “**Concord Property**”), and 1087507 Ontario Limited (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 Concord Property and 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 February 25, 2019, for two orders. The first order (the “**Brampton Order**”) deals with the Brampton Property, and seeks, among other things:

(a) the approval of the sale of the Brampton Property pursuant to the stalking horse agreement of purchase and sale made as of December 6, 2018, between the Receiver and 2657897 Ontario Inc. (“**265**”), an affiliate of Bridging Finance Inc. (the “**Agent**”), pursuant to which 265 has agreed to purchase the Brampton Property (such agreement, the “**Brampton Agreement**”, and such transaction, the “**Brampton Transaction**”);

(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 Brampton Transaction and for the conveyance of the Brampton Property to the Purchaser; and

(c) the vesting of Forma-Con's right, title and interest in and to the Brampton 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 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.

3. The second order (the "**Supplemental Order**") deals with the balance of the relief sought by the Receiver, and seeks, among other things:

(a) the approval of a sale and marketing process to solicit offers for and sell the Unsold Properties, including the retention of CBRE Group Inc. ("**CBRE**") as listing agent, as described in the Third Report of the Receiver dated February 15, 2019 (the "**Third Report**", and such process, the "**Real Estate Sale Process**");

(b) the approval of the allocation of the purchase price (the "**Allocation**") from the sale of certain assets related to the Forma-Con business (the "**GF Transaction**"), which sale was previously approved by this Court on December 13, 2018;

(c) authorization for the Receiver to make an interim distribution in the amount of \$12,300,000 to the Agent, on behalf of 265, the Debtors' principal secured creditor, from proceeds of the sale of the BCCL and BCEL Equipment (as such term is defined below) that was sold as part of the GF Transaction (such distribution, the "**Interim Distribution**");

(d) the approval of the fees and disbursements of the Receiver for the period from November 19, 2018, to January 31, 2019, and its legal counsel, Torys LLP ("**Torys**"), for the period from November 13, 2018, to December 31, 2018; and

(e) the approval of the Third Report and the actions and activities of the Receiver described therein.

4. Approval of the Brampton Agreement and the transaction contemplated thereby and the commencement of the Real Estate Sale Process are important milestones in these receivership proceedings. Now is also an appropriate time for the Receiver to seek the balance of the relief

described above. For these reasons, and the other reasons set forth in greater detail in the Third Report, the Receiver recommends that this Court grant the requested orders.

PART II - THE FACTS

Third Report

5. The Third Report sets forth a detailed description of the facts and considerations relevant to the relief sought pursuant to the Brampton Order and the Supplemental Order. The Receiver's actions and activities, as described in the Third 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.

Third Report, Receiver's Motion Record, 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 \$82 million, including \$1.895 million that has been advanced under Receiver's Certificates, plus costs and expenses which continue to accrue.

Third Report, Receiver's Motion Record, Tab 2, Section 5.1, Para.
1.

8. On December 13, this Court approved the GF Transaction. The GF Transaction closed on December 14, 2018.

Third Report, Receiver's Motion Record, Tab 2, Section 1.0,
Paras. 3-4.

Brampton Order Facts

9. On December 13, 2018, this Court approved a “stalking horse” sale process in connection with the sale of the Brampton Property (such process, the “**Stalking Horse Sale Process**”) and authorized the Receiver to enter into the Brampton Agreement.

Third Report, Receiver’s Motion Record, Tab 2, Section 1.0, Para. 3.

10. The Stalking Horse Sale Process has been completed in accordance with the terms thereof, and as described in the Third Report. No Qualified Bids (as such terms is defined in the Stalking Horse Sale Process) were received. Accordingly, the Receiver now seeks approval of the Brampton Transaction.

Third Report, Receiver’s Motion Record, Tab 2, Section 3.2, Paras. 1-2.

11. The Stalking Horse Sale Process was conducted in accordance with its terms. The Brampton Property had been marketed by the listing agent for over two years prior to the commencement of this process. The listing agent used in connection with the Stalking Horse Sale Process is of the view that the Brampton Transaction is the best available transaction in the circumstances and the Agent is supportive of it. Absent the Brampton Transaction, a protracted marketing period will likely be necessary. The ongoing professional fees and other costs will erode the recoveries with no certainty that a superior transaction could be completed.

Third Report, Receiver’s Motion Record, Tab 2, Section 3.5, Para. 1.

Supplemental Order Facts

Real Estate Sale Process

12. The Unsold Properties are assets subject to these receivership proceedings. The commencement of the Real Estate Sale Process is a necessary milestone in realizing value from these assets for the benefit of creditors.

Third Report, Receiver’s Motion Record, Tab 2, Section 1.0, Para. 1 and Section 1.1, Para 1.

13. The Receiver has completed a process to select a listing agent for the Unsold Properties, as described in greater detail in the Third Report. This process has culminated in the selection of CBRE, which selection has the Agent's consent.

Third Report, Receiver's Motion Record, Tab 2, Section 4.2,
Paras. 1-5.

14. The terms of the Real Estate 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 Third Report. The Real Estate Sale Process also considers the interests of holders of rights of first refusal and provides a framework for dealing with those rights.

Third Report, Receiver's Motion Record, Tab 2, Section 4.3,
Paras. 1-5 and Section 4.4, Para 1-3.

15. 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. Any transaction will be subject to Court approval.

Third Report, Receiver's Motion Record, Tab 2, Section 4.5, Para.
1.

Allocation

16. The purchase price under the GF Transaction was \$13 million. The assets sold in that transaction consisted primarily of aluminum scaffolding owned by BCCL and thirty-two cranes owned by BCEL (the "**BCCL and BCEL Equipment**"). The Receiver and GF Equipment Corp, the purchaser under the GF Transaction (the "**Purchaser**"), have agreed to allocate \$12.5 million of the purchase price to the BCCL and BCEL Equipment, which is reasonable based on an appraisal that had been commissioned by BCCL in August 2018, the available asset book values and net realizable values of those assets. The parties have allocated \$500,000 to Forma-Con, which amount the Receiver is not proposing to distribute at this time. The allocation mechanism followed by the Receiver and the Purchaser was set out in the agreement of purchase and sale entered into in connection with the GF Transaction (the "**GF APA**"), which was previously approved by this Court.

Third Report, Receiver's Motion Record, Tab 2, Section 5.3,
Paras. 1-6.

Interim Distribution

17. The Receiver is seeking Court approval to make a distribution of \$12.3 million from the proceeds generated from the sale of the BCCL and BCEL Equipment to the Agent in respect of 265's pre-filing debt (the "**Interim Distribution**"). The Agent's security has been reviewed by Torsys. Subject to the standard assumptions and qualifications contained in the security opinion, Torsys is of the opinion that the security granted by the Debtors, BCCL and BCEL and Ralph Aquino, a guarantor, in favour of the Agent creates a valid and perfected security interest in the assets subject to the receivership.

Third Report, Receiver's Motion Record, Tab 2, Section 5.3,
Paras. 7, 10.

18. Other than the Receiver's Charge, the amounts borrowed under Receiver Certificates and the potential claim of PERI Formwork Systems Inc. ("**PERI**") under the *Repair and Storage Lien Act*, which is described in greater detail in the Third Report, the Receiver is not aware of any claims in BCCL and BCEL that rank in priority to the proposed distribution. The Receiver is nevertheless maintaining a holdback of \$1.7 million to fund ongoing receivership costs, including professional fees, PERI's potential claim and the claims of various unions for pension amounts that they allege rank in priority to the Agent's security interest in the Brampton Property, as described in greater detail in the Third Report. There will also be further asset sales and additional realizations, the proceeds of which are further security for PERI's potential claim and may be available for other uses.

Third Report, Receiver's Motion Record, Tab 2, Section 3.4, Para.
1, Section 5.2, Para 1, Section 5.3, Para. 11.

19. The Agent has been the only source of funding for these proceedings. The Agent has requested that the Receiver distribute available proceeds to it that are not otherwise subject to a holdback for the reasons described above. In light of the benefits provided by the Agent's funding of these proceedings, this is a reasonable request, in the view of the Receiver. Given the other relief that is being sought and that is described herein, as well as the availability of funds to

distribute, this motion is an appropriate time to accommodate this request. In addition, a distribution to the Agent at this time will pay down a portion of the indebtedness owed to the Agent and limit the accrual of additional fees and interest in respect thereof, for the benefit of creditors generally.

Third Report, Receiver's Motion Record, Tab 2, Section 5.3, Para. 12.

Fees and Disbursements

20. The fees and disbursements of the Receiver for the period from November 19, 2018, to January 31, 2019, and its legal counsel, Torys LLP, for the period from November 13, 2018, to December 31, 2018, are summarized in the Third Report. Detailed invoices are appended to the 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. The Agent does not oppose the approval of the fees of the Receiver and Torys.

Third Report, Receiver's Motion Record, Tab 2, Section 6.0, Paras. 1-3.

PART III - THE ISSUES

21. With respect to the Brampton Order, the issue before this Court, and addressed below, is whether this Court should approve the Brampton Transaction and grant a vesting order?

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

- (a) Should this Court approve the Real Estate Sales Process, including the retention of CBRE?
- (b) Should this Court approve the Allocation?
- (c) Should this Court approve the Interim Distribution?

(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 Third Report and the actions and activities of the Receiver described therein?

PART IV - LAW AND ARGUMENT

Section 1: Brampton Order

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

23. 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).

24. 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".

25. 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 2, 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 3, Para. 3.

26. 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 2, Paras. 14 and 21.

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 3, Paras. 3 and 4.

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 4, Paras. 1-3.

Battery Plus Inc. (Re.), [2002] O.J. No. 731, Receiver's Brief of Authorities, Tab 5, Paras. 2-3 and 22-23.

27. Moreover, if a sale process leading up to a proposed asset sale is determined to be fair and reasonable, "a court will not lightly interfere with the exercise of...commercial and business judgment in the context of an asset sale."

Re AbitibiBowater Inc., 2010 QCCS 1742, Receiver's Brief of Authorities, Tab 6, para. 71.

28. In the case of *Re Grant Forest Products Inc.*, Justice Campbell held that, "once a process has been put in place by Court Order for the sale of assets of a failing business, that process should be honoured, excepting extraordinary circumstances."

Re Grant Forest Products Inc., 2010 ONSC 1846 [Comm. List], Receiver's Brief of Authorities, Tab 7, Para. 29

29. 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 Stalking Horse Sale Process was to obtain the best price possible, which was helped by the establishment of a floor price by the Brampton Agreement. Despite the implementation of that sale process, pursuant to which 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 process did not generate an unconditional offer that exceeded the floor price. The Receiver's view was that the floor price under the Brampton Agreement was fair and reasonable and that has been confirmed by the outcome of the Stalking Horse Sale Process. Under the current circumstances, any further marketing efforts are unlikely to result in a superior transaction.

(b) ***Interests of all parties have been served.*** The Brampton 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.

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

(d) ***There was no unfairness.*** The Stalking Horse Sale Process was approved pursuant to an Order of this Court dated December 27, 2013. The Receiver had direct involvement in negotiating the terms and conditions of the Brampton Agreement, and believes they are fair and reasonable under the current circumstances.

30. Based on the foregoing, the proposed Brampton Transaction satisfies the *Soundair* Principles.

Section 2: Supplemental Order

(A) This Court should approve the Real Estate Sale Process

31. 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 Brief of Authorities, Tab 1, Subsection 3(k).

32. 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 a sales process approved by Court order. 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 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.”

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 8.

33. The application of these principles to the present case demonstrates why this Court should approve the sale process:

(a) ***The process is fair and transparent.*** The Real Estate Sale Process includes an extensive marketing phase that will be coordinated by a recognized and experienced listing agent. Rights of first refusal have also been addressed. Interested parties will have ample opportunity to participate in the process, which has been described in detail in the Third Report.

(b) ***The process is commercially effective.*** The Real Estate Sale Process is designed to market, and solicit offers for, the Unsold Properties. The involvement of the listing agent is a key component of the strategy.

(c) ***The process will optimize the chances of achieving the best prices.*** The Real Estate Sale Process will provide interested parties with a fair and transparent process by which they may make offers to purchase the Unsold Properties. The duration of the process is sufficient to allow interested parties to perform due diligence and submit an offer, thereby optimizing the prospects of achieving the best possible price such properties. The Receiver also has the option to extend the process if required.

34. Any agreement or sale of the Unsold Properties and distributions from sale proceeds, if any, will remain subject to the further approval of this Court.

(B) This Court should approve the Allocation

35. This Court approved the GF Transaction and the GF APA on December 13, 2018. The GF APA contained a mechanism for the Receiver and the Purchaser, acting at arm's length, to determine the allocation of the purchase price among the assets sold pursuant to the GF Transaction. It is the Receiver's position that the Allocation was effectively approved at that time.

36. This position is consistent with Justice Brown's holding in the *Royal Bank of Canada v. Atlas Block Co. Limited* case:

Once a court approves a sale agreement, however, as occurred here, it becomes more difficult for a creditor to advance an objection about the fairness of the term of the sales agreement allocating the purchase price because such an objection, in essence, constitutes an objection to a material term of the now-approved sale agreement. Put another way, not having opposed the approval of a sales transaction, thereby securing the benefit of that sale of the debtor's assets, a

creditor faces difficulty in objecting subsequently to a material term of the agreement which it did not oppose.

Royal Bank of Canada v. Atlas Block Co. Limited, 2014 ONSC 1531, Receiver's Brief of Authorities, Tab 9, para. 33.

37. This allocation mechanism set out in the GF APA was not opposed at the motion to approve the GF Transaction. The Allocation has now been agreed to by the Receiver and Purchaser pursuant to the GF APA. The Allocation is reasonable based on an appraisal that had been commissioned by BCCL in August 2018, the available asset book values and net realizable values of those assets. These benchmarks do not support any argument that the Receiver was unreasonable in agreeing to the Allocation. Thus, whether because the allocation was already effectively approved or because the allocation is reasonable or because of both, the Allocation warrants the approval of this Court.

38. Given the different priorities over the different assets sold in the GF Transaction, the Receiver is seeking express approval of the Allocation at this time, notwithstanding what it submits is an allocation that has already been effectively approved by this Court.

(C) This Court should approve the Interim Distribution

39. Orders granting interim distributions with a reserve or holdback 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 10, paras. 8, 13.

Re Abitibiwater Inc., 2009 QCCS 6461 (CanLII) (QC SC), Receiver's Brief of Authorities, Tab 11, at paras. 70-75

40. In *Re Abitibiwater 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 Abitibiwater Inc., 2009 QCCS 6461 (CanLII) (QC SC), Receiver's Brief of Authorities, Tab 11, at para. 75.

41. 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 Agent creates a valid and perfected security interest in the assets subject to the receivership.

(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 Agent 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.

(c) *There will be sufficient liquidity after the Interim Distribution is made.* The Receiver is maintaining a holdback of \$1.7 million to fund ongoing receivership costs, including professional fees, PERI's potential claim and the claims of various unions for pension amounts that they allege rank in priority to the Agent's security interest in the Brampton Property, as described in greater detail in the Third Report. There will also be further asset sales and additional realizations, the proceeds of which are further security for PERI's potential claim and may be available for other uses.

42. The Agent has requested that the Receiver distribute available proceeds to it that are not otherwise subject to a holdback for the reasons described above. In light of the benefits provided by the Agent's funding of these proceedings, this is a reasonable request, in the view of the Receiver. Given the other relief that is being sought and that is described herein, as well as the availability of funds to distribute, this motion is an appropriate time to accommodate this request.

(D) This Court should approve the fees and disbursements

43. 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.

Receivership Order, Receiver's Brief of Authorities, Tab 1,
Sections 18-20.

44. The Receiver is seeking the approval of the Court for the fees and disbursements of: (a) the Receiver for the period from November 19, 2018, to January 31, 2019; and (b) its legal counsel, Torys, for the period from November 13, 2018, to December 31, 2018.

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

(a) the accounts disclose in detail the name of each person who rendered services, the rate charged, the total charges for each of the categories of services rendered and, in some cases, the date on which the services were rendered and the time expended each day;

(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 12, at paras. 37-38.

46. 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 12, at para. 42.

Belyea v. Federal Business Development Bank, 1983 CarswellNB 27 (C.A.), Tab 13, at para. 9.

47. 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 14, at para. 22.

48. These have not been simple receivership proceedings. As highlighted in the Third 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) negotiating various close-out agreements in respect of construction projects that were in different stages of completion at the time of the commencement of these receivership proceedings;
- (c) protecting the interests of the estate by taking steps to recover outstanding accounts receivable and registering liens where appropriate;
- (d) communicating with contractors, owners, unions, suppliers, customers and other stakeholders in connection with the various construction projects and the receivership proceedings;
- (e) communicating with CRA, the Agent and other creditors in respect of their various claims against the assets that are subject to the receivership;
- (f) preparing motion materials and court reports; and
- (g) generally administering the estate.

49. 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 14, at para. 22.

50. 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.

(E) This Court should approve the Third Report and the actions and activities of the Receiver described therein

51. 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 15, Para. 2.

52. 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 Third Report inform the relief sought in this motion.

53. 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 15, Para. 22.

54. 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.

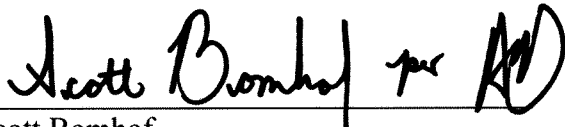
Re Target Canada Co. (Re), 2015 ONSC 7574 (Ont. S.C.J. [Comm. List]), Receiver's Brief of Authorities, Tab 15, Para. 23.

55. These purposes apply equally to receiverships. In this case, the Third 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 Third 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.

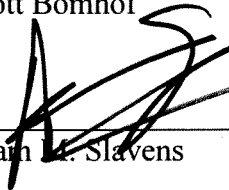
PART V - ORDER REQUESTED

56. For the reasons set forth herein and in the Third Report, the Receiver respectfully requests the granting of the Orders in the forms contained in the Receiver's Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of February, 2019.



Scott Bomhof



Adam W. Slavens

Lawyers for the Receiver



TABA

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (C.A.)
2. *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.))
3. *Integrated Building Corp. v. Bank of Nova Scotia* (1989), 75 C.B.R. (N.S.) 158 (Alta. C.A.)
4. *Battery Plus Inc. (Re.)*, [2002] O.J. No. 731
5. *Re AbitibiBowater Inc.*, 2010 QCCS 1742
6. *Re Grant Forest Products Inc.*, 2010 ONSC 1846 [Comm. List]
7. 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])
8. *Royal Bank of Canada v. Atlas Block Co. Limited*, 2014 ONSC 1531
9. *Re Windsor Machine & Stamping Ltd.*, 2009 CanLII 39772 (ON SC)
10. *Re Abitibowater Inc.*, 2009 QCCS 6461 (CanLII) (QC SC)
11. *Confectionately Yours Inc., Re*, 2002 CarswellOnt 3002 (C.A.)
12. *Belyea v. Federal Business Development Bank*, 1983 CarswellNB 27 (C.A.)
13. *BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, 1997 CarswellOnt 1246 (Sup. Ct. (Commercial List))
14. *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.

**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 February 25, 2019)
(Approval of Brampton Transaction and
Supplemental Relief)**

TORYS LLP

79 Wellington St. W., Suite 3000
Box 270, TD Centre
Toronto, Ontario
M5K 1N2 Canada
Fax: 416.865.7380

Scott A. Bomhof (LSO#: 37006F)
Tel: 416.865.7370
Email: sbomhof@torys.com

Adam M. Slavens (LSO#: 54433J)
Tel: 416.865.7333
Email: aslavens@torys.com

Lawyers for KSV Kofman Inc.,
in its capacity as Court-appointed
Receiver