

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

**IN THE MATTER OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT INVOLVING MJARDIN GROUP, INC.,
GROWFORCE HOLDINGS INC., 8586985 CANADA
CORPORATION AND HIGHGRADE MMJ CORPORATION**

B E T W E E N:

**PRICEWATERHOUSECOOPERS INC., IN ITS CAPACITY
AS COURT-APPOINTED RECEIVER AND MANAGER OF
BRIDGING FINANCE INC. AND CERTAIN RELATED
ENTITIES AND INVESTMENT FUNDS**

Applicant

- and -

**MJARDIN GROUP, INC., GROWFORCE HOLDINGS INC.,
8586985 CANADA CORPORATION AND HIGHGRADE
MMJ CORPORATION**

Respondents

**FACTUM OF THE APPLICANT
(Motion Returnable June 9, 2022)**

June 8, 2022

Thornton Grout Finnigan LLP
3200 – 100 Wellington Street West
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7

Rebecca Kennedy (LSO# 61146S)
Email: rkennedy@tgf.ca

Adam Driedger (LSO# 77296F)
Email: adriedger@tgf.ca

Lawyers for PricewaterhouseCoopers Inc.

PART I - OVERVIEW

1. PricewaterhouseCoopers Inc., solely in its capacity as court-appointed receiver and manager of Bridging Finance Inc. and certain related entities and investment funds (in such capacity, the “**Bridging Receiver**”), seeks an order (the “**Amended and Restated Initial Order**”) that, among other things¹:
 - (a) seals the Confidential Appendices to the KSV Report;
 - (b) extends the stay of proceedings to September 9, 2022;
 - (c) appoints Howards Capital Corp. (“**HCC**”) as chief restructuring officer of the Respondents (in such capacity, the “**CRO**”) in accordance with the terms of the CRO Engagement Letter and grants certain related relief;
 - (d) approves the Respondents’ ability to borrow up to the principal amount of \$2 million under a debtor-in-possession credit facility (the “**DIP Facility**”) to finance their operations and restructuring costs during the CCAA proceedings in accordance with the terms of the DIP Term Sheet;
 - (e) increases the amount of the Administration Charge to \$300,000 and provides that the CRO shall have the benefit of the Administration Charge up to a maximum of \$160,000 and not in respect of the obligation of the Respondents to pay any Additional Consideration;
 - (f) increases the amount of the DIP Lender’s Charge to the principal amount of \$2 million plus accrued interest, fees, and other costs in accordance with the DIP Term Sheet;
 - (g) increases the amount of the Directors’ Charge to \$785,000; and
 - (h) grants the CRO Additional Consideration Charge.

¹ All capitalized terms not expressly defined herein are defined in the Affidavit of Graham Page sworn June 1, 2022 located at Tab 2 of the Bridging Receiver’s Application Record dated June 1, 2022.

2. This factum solely addresses the issue of whether the Court should grant a sealing order in respect of the Confidential Appendices to the KSV Report. With regard to the other relief sought, the Bridging Receiver relies upon the Affidavit of Graham Page sworn June 1, 2022 (the “**Page Affidavit**”), the factum of the Bridging Receiver dated June 1, 2022 (the “**Previous Factum**”), the KSV Report, and the First Report of the Monitor dated June 7, 2022 (the “**First Report**”).

PART II - THE FACTS

3. The facts relevant to the Bridging Receiver’s request for a sealing order are summarized below and are set out in greater detail in section 5.1 of the First Report.²
4. The Confidential Appendices are comprised of the unredacted CRO Engagement Letter and the Business Assessment Report.³
5. The redacted version of the CRO Engagement Letter attached to the Page Affidavit redacted: (i) the monthly fee of HCC (the “**HCC Monthly Fee**”); (ii) the individual per month compensation of each expected Consultant (the “**Individual Consultant Compensation**”); and (iii) the Hurdle Rate (as defined in the First Report).⁴
6. The Bridging Receiver no longer seeks to seal the HCC Monthly Fee, which, as described in the First Report, is \$30,000 per month.⁵

² First Report of the Monitor dated June 7, 2022 (the “**First Report**”) at section 5.1.

³ First Report; KSV Report.

⁴ Affidavit of Graham Page sworn June 1, 2022 (the “**Page Affidavit**”) at Exhibit “O”.

⁵ First Report at section 5.1(3).

7. As such, the Bridging Receiver only seeks to seal: (i) the Individual Consultant Compensation; (ii) the Hurdle Rate; and (iii) the Business Assessment Report.
8. The Bridging Receiver and the Monitor have disclosed the aggregate of the Individual Consultant Compensation for all expected Consultants (the “**Aggregate Consultant Compensation**”) and the HCC Monthly Fee, which is approximately \$150,000 per month.⁶
9. With respect to the Consultants, the Bridging Receiver notes as follows:⁷
 - (a) it is anticipated that the Consultants will perform certain management functions of the Respondents;
 - (b) the Individual Consultant Compensation is based on an anticipated “full time” contribution from each Consultant and is akin to a monthly salary;
 - (c) the expected Consultants are not aware of each other’s proposed Individual Consultant Compensation, nor is such information otherwise publicly available;
 - (d) although HCC expects to engage most of the expected Consultants specified in the CRO Engagement Letter, HCC has not made formal offers to such individuals prior to its appointment as CRO;
 - (e) the Bridging Receiver and HCC are concerned that if the Individual Consultant Compensation is publicly disclosed, it could impact the ability of HCC to engage the Consultants (or potential alternatives) and/or put upward pressure on the Consultant’s compensation and potentially other expenses of the Respondents, in each case negatively impacting the Respondents’ restructuring efforts.

⁶ First Report at section 5.1(1).

⁷ First Report at sections 5.1(3)(a)-(e).

PART III - LAW & ANALYSIS

10. As described in the Previous Factum at paragraphs 48 to 52, the applicable legal test for granting a sealing order, as set out by the Supreme Court in *Sherman Estate v. Donovan*, is that the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
- (a) court openness poses a serious risk to an important public interest;
 - (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
 - (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.⁸
11. The Bridging Receiver respectfully submits that the request for a sealing order in respect of the Individual Consultant Compensation, the Hurdle Rate, and the Business Assessment Report satisfies the *Sherman Estate* test for the reasons set out below.

The Individual Consultant Compensation

12. The Bridging Receiver submits that the request to seal the Individual Consultant Compensation is analogous to a request for a sealing order in respect of individual KERP payments to employees in a restructuring.
13. Courts have recognized that it would be detrimental to the operations of a company to disclose the identities of the beneficiaries of a KERP and the quantum of any individual payments⁹ and that the beneficiaries of a KERP have a reasonable expectation that their

⁸ *Sherman Estate v. Donovan*, 2021 SCC 25 [at para 38](#).

⁹ *Danier Leather Inc. (Re)*, 2016 ONSC 1044 [at para 83](#).

personal and financial information will be kept confidential.¹⁰ As held by Pepall J. (as she then was) in *Canwest Global Communications Corp., Re*:

[i]n this case, the unredacted KERPs reveal individually identifiable information including compensation information. **Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected.** The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, **the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing.** It seems to me that this second branch of the test has been met. The relief requested is granted (emphases added).¹¹

14. In *Ontario Securities Commission v. Bridging Finance Inc. et al*, which was decided after the Supreme Court's decision in *Sherman Estate*, the Bridging Receiver sought an order sealing the KERP compensation attributable to each eligible employee of Bridging Finance Inc. while disclosing the aggregate amount of all KERP payments (and thus the aggregate impact of the KERP on the Bridging estate). Chief Justice Morawetz granted the sealing order, holding that the three perquisites from *Sherman Estate* were satisfied.¹²
15. This reasoning was adopted by Justice Koehnen in *Just Energy Group Inc. et al*, where a sealing order was granted in respect of a KERP on the basis that the order was proportional and the benefits in protecting the privacy interests of the non-party employees outweighed the very limited impact on the open court principle.¹³

¹⁰ *Canwest Global Communications Corp. (Re)*, 2009 CanLII 55114 (ONSC) [at para 52](#).

¹¹ *Ibid*.

¹² *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 4347 [at paras 24-26](#).

¹³ *Just Energy Group Inc. et al.*, 2021 ONSC 7630 [at paras 28-29](#).

16. The Bridging Receiver submits that the foregoing principles should apply equally in the context of the Individual Consultant Compensation. As described above, the Consultants will perform certain management functions of the Respondents based on an anticipated “full time” contribution to the Respondents’ restructuring. The Individual Consultant Compensation is akin to a monthly salary, and compensation details are routinely recognized by Courts as personal and sensitive information that implicates an individual’s privacy. The Consultants are non-parties to this proceeding and the Bridging Receiver submits that they have a reasonable expectation that their monthly compensation will remain private. Further, disclosing the Individual Consultant Compensation may negatively impact the Respondents’ ability to restructure by putting upward pressure on compensation and could therefore negatively impact recoveries for the Respondents’ stakeholders, including Bridging.
17. The sealing order with respect to the Individual Consultant Compensation seeks to protect the important public interests of: (i) maintaining privacy and confidentiality with respect to personal financial information; and (ii) maximizing recoveries in a restructuring proceeding, each of which has been recognized by this Court in cases decided after *Sherman Estate*.
18. In terms of proportionality, the limitation on the open court principle is minimal in these circumstances. The Bridging Receiver and the Monitor have disclosed the HCC Monthly Fee and the Aggregate Consultant Compensation and therefore stakeholders have full disclosure regarding the economic impact of HCC and the expected Consultants on the estate. Consistent with the reasoning of Pepall J. in *Canwest Global*, given that the

Aggregate Consultant Compensation is disclosed, the Bridging Receiver respectfully submits that the Individual Consultant Compensation adds nothing.

19. In light of the foregoing, the Bridging Receiver is of the view that no party will be prejudiced in sealing the Individual Consultant Compensation and the benefits of granting the sealing order outweigh any limited impact on the open court principle. There are no reasonable alternatives in the circumstances.

The Hurdle Rate & Business Assessment Report

20. The Hurdle Rate represents the Bridging Receiver's estimated liquidation value of the Respondents' assets. Disclosing the Hurdle Rate at this stage would negatively impact future realizations and potentially set a "ceiling" in any future sales process, to the detriment of stakeholders.
21. The Business Assessment Report contains various confidential and commercially sensitive information, including potential operational restructuring initiatives and HCC's assessment of the value (including the liquidation value) of the Respondents' business and assets. Similar to the Hurdle Rate, disclosing the Business Assessment Report would negatively impact future realization efforts.
22. Courts have recognized that there is a public interest in maximizing recoveries in a restructuring proceeding, which transcends each individual case.¹⁴

¹⁴ *Danier Leather Inc., Re*, 2016 ONSC 1044 at para [84](#).

23. In *Ontario Securities Commission v. Bridging Finance Inc. et al*, Chief Justice Morawetz granted an order sealing: (i) certain bids in Bridging's sale and investment solicitation process; and (ii) the Bridging Receiver's liquidation model (representing the Bridging Receiver's estimated liquidation value of Bridging's portfolio of assets). Chief Justice Morawetz held that:

[i]n my view, I am satisfied that the Receiver has satisfied the foregoing test in that the disclosure of the information in the Confidential Appendices would have a negative impact on future realizations on the assets and thus the Receiver's efforts to maximize value for stakeholders.¹⁵

24. The Bridging Receiver submits that the same principles should apply to the request to seal the Hurdle Rate and the Business Assessment Report.

PART IV - RELIEF REQUESTED

25. For all of the foregoing reasons, the Bridging Receiver requests that this Honourable Court grant the Amended and Restated Initial Order substantially in the form located at Tab 2 of its Motion Record, including the sealing request in respect of the Confidential Appendices.

¹⁵ *Ontario Securities Commission v. Bridging Finance Inc.*, 2022 ONSC 1857 [at paras 53-54](#).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of June, 2022

June 8, 2022



Thornton Grout Finnigan LLP

3200 – 100 Wellington Street West

TD West Tower, Toronto-Dominion Centre

Toronto, ON M5K 1K7

Rebecca Kennedy (LSO# 61146S)

Email: rkennedy@tgf.ca

Adam Driedger (LSO# 77296F)

Email: adriedger@tgf.ca

Lawyers for PricewaterhouseCoopers Inc.

**SCHEDULE “A”
LIST OF AUTHORITIES**

No.	Case Law
1	<i>Sherman Estate v. Donovan</i> , 2021 SCC 25
2	<i>Danier Leather Inc. (Re)</i> , 2016 ONSC 1044
3	<i>Canwest Global Communications Corp. (Re)</i> , 2009 CanLII 55114
4	<i>Ontario Securities Commission v. Bridging Finance Inc.</i> , 2021 ONSC 4347
5	<i>Just Energy Group Inc. et al.</i> , 2021 ONSC 7630
6	<i>Ontario Securities Commission v. Bridging Finance Inc.</i> , 2022 ONSC 1857

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C.
1985, c. C-36, AS AMENDED

Court File No. CV-22-00682101-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
INVOLVING MJARDIN GROUP, INC., GROWFORCE HOLDINGS INC., 8586985
CANADA CORPORATION AND HIGHGRADE MMJ CORPORATION

Respondents

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

FACTUM OF THE APPLICANT

Thornton Grout Finnigan LLP
TD West Tower, Toronto-Dominion Centre
100 Wellington Street West, Suite 3200
Toronto, ON M5K 1K7
Fax: (416) 304-1313

Rebecca L. Kennedy (LSO# 61146S)
Email: rkennedy@tgf.ca
Tel: (416) 304-0603

Adam Driedger (LSO #77296F)
Email: adriedger@tgf.ca
Tel.: (416) 304-1152

Lawyers for the PricewaterhouseCoopers Inc.