

**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 OF
2607380 ONTARIO INC. (the "**Applicant**")

FACTUM OF BRIDGING FINANCE INC., AS AGENT
(re Comeback Motion returnable March 6, 2020)

March 5, 2020

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As Agent**

TO: THE SERVICE LIST

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PART I - OVERVIEW

1. This factum is filed by Bridging Finance Inc. as agent ("**Bridging**") in opposition to the relief sought by the Applicant, 2607380 Ontario Inc. ("**260**") under the *Companies' Creditors Arrangement Act* (the "**CCAA**") and in support of Bridging's application for the appointment of a receiver of the property and assets of 260.

PART II – FACTS

Nuvo Property and Nuvo Building

2. 260 is the owner of property municipally known as 1295 North Service Road, Burlington, Ontario (the "**Nuvo Property**").

3. A multi-purpose commercial building approximately 144,000 sq. ft. in size is located on the Nuvo Property (the “**Nuvo Building**”).

Saulnier Affidavit, paras. 4 and 22.

4. 260 acquired the Nuvo Property in 2018 with the intention of renovating the Nuvo Building.

Saulnier Affidavit, para. 23.

5. 260 has nine (9) full time employees and eight (8) independent contractors providing cleaning, labour, administrative, finance, sales, IT and HR services with respect to the Nuvo Building.

Saulnier Affidavit, para. 11.

Nuvo Property Mortgagees

6. The Nuvo Property is encumbered in favour of Meridian Credit Union Limited (“**Meridian**”), Crossroads Christian Communications Inc. (“**CCCI**”), and Bridging.

Meridian

7. Meridian provided financing for the acquisition of the Nuvo Property and renovation of the Nuvo Building and has the first ranking mortgage on the Nuvo Property in the principal amount of \$23.0 million. 260 has been in default under its loans from Meridian since early 2019. As of January 31, 2020, 260 was indebted to Meridian in the amount of approximately \$17.3 million.

Saulnier Affidavit, paras. 27 and 35-41.

CCCI

8. CCCI is the former owner of the Nuvo Property and provided a vendor-take-back mortgage in the principal amount of \$4.5 million, which is the second ranking mortgage on the Nuvo Property. The second mortgage does not bear interest until 2022 and is repayable in January 2023.

Saulnier Affidavit, para. 42.

Bridging

9. Bridging provided a \$2.5 million loan (the “**Loan**”) to 260 for the acquisition of the Nuvo Property pursuant to a commitment letter dated March 20, 2018 (the “**Commitment Letter**”). The Loan has an outside maturity date of March 23, 2020, which was to coincide with the completion of the renovations to the Nuvo Building and the refinancing of the Nuvo Property.

Motion Record of Bridging Finance Inc., Tab 1, Affidavit of Robert Cacovic sworn March 5, 2020 (“**Cacovic Affidavit**”), paras. 8-9.

10. As security for the Loan, Bridging holds the third ranking mortgage on the Nuvo Property (the “**Third Mortgage**”) and a general security agreement (the “**GSA**”).

Cacovic Affidavit, paras. 10-11.

11. Each of the Commitment Letter, the Third Mortgage and the GSA provide that, upon default, Bridging may appoint a receiver over the property and assets of 260.

Cacovic Affidavit, para. 12.

12. Interest on the Loan for the months of May and June 2019 were paid late. Interest on the Loan has not been paid since June 2019 and continues to accrue.

Cacovic Affidavit, para. 13; Saulnier Affidavit, para. 47.

13. Despite having more than six (6) months to do so, 260 was unable to obtain financing to service the Meridian and Bridging loans and to complete the renovations at the Nuvo Building.

Cacovic Affidavit, para. 23.

14. 260 has been in default under the Loan for non-payment of interest since July 2019. As at February 26, 2020, the outstanding balance of the Loan was \$2,990,611.74 for principal and interest excluding costs.

Cacovic Affidavit, para. 19.

Construction Liens and State of Renovations

15. 260 retained Maple Reinders Constructors Ltd. (“**Maple Reinders**”) to be the general contractor for the renovation of the Nuvo Building. Maple Reinders engaged several subcontractors to assist in carrying out the renovations.

Saulnier Affidavit, paras. 62 and 64.

16. In July 2019, Maple Reinders left the site due to lack of payment. On November 25, 2019, Maple Reinders registered a construction lien on title to the Nuvo Property in the amount of approximately \$1.86 million for arrears of payment. Barrie Glass & Mirror Ltd. (“**Barrie Glass**”), a subcontractor hired by Maple Reinders, also registered a construction lien on the Nuvo Property for unpaid work in the amount of \$89,543.93.

Saulnier Affidavit, para. 77.

17. By late August 2019, most subcontractors had left the site. By early September 2019, all work at the site had stopped.

Saulnier Affidavit, para. 76.

18. Maple Reinders has estimated that the cost to complete the renovations of the Nuvo Building is approximately \$4.1 million, but that includes approximately \$2.1 million in arrears owed to Maple Reinders and subcontractors.

Saulnier Affidavit, para. 83; Report of Richter Advisory Group Inc. in its capacity as Proposed Monitor dated February 24, 2020 (“**Richter Report**”), para. 33.

CCAA Proceedings

19. On February 25, 2020, without any effective notice to Bridging and other secured creditors, 260 sought protection from its creditors under the CCAA so that it could complete the renovation of the Nuvo Building and pursue refinancing options and/or conduct a court-supervised sale and investment solicitation process (“**SISP**”).

Saulnier Affidavit, paras. 6, 8 and 98; Richter Report, paras. 15 and 19.

20. Justice Conway granted an initial order with limited relief, pending the hearing of the comeback motion. 260 now seeks an extension of the stay of proceedings for approximately 8 months to October 24, 2020 and requests that the Court authorize it to obtain a priming debtor-in-possession loan of approximately \$7.18 Million from Meridian (the “**DIP Loan**”) to complete the renovations and then refinance or sell the Nuvo Property.

21. A 13-week cash flow for the period February 24, 2020 to May 24, 2020 (the “**Cash Flow Forecast**”) was prepared in connection with 260’s CCAA application. The Cash Flow Forecast provides that 260 will incur professional fees of approximately \$639,000 during this three-month period. Extrapolated over 8 months, the professional fees to be incurred for the CCAA proceeding will be approximately \$1.6 million.

Richter Report, para. 71.

22. 260 also is requesting that Maple Reinders and Barrie Glass be designated as “critical suppliers” under the CCAA, and that it be authorized to use \$2.375 million of the DIP Loan to pay Maple Reinders and Barrie Glass in connection with their construction liens. 260 alleges that such payments are necessary to ensure Maple Reinders and Barrie Glass return to the Nuvo Property and the renovations can continue.

Saulnier Affidavit, para. 135; Motion Record of 260 dated March 4, 2020, Tab 2, Affidavit of Shawn Saulnier Sworn March 4, 2020 (“**Second Saulnier Affidavit**”).

23. 260 alleges that Maple Ridges is best suited to ensure construction is completed on a timely basis, relying solely on its prior involvement with the site.

Second Saulnier Affidavit, paras. 26-29.

24. Bridging objects to the proposed payment of the lien claims at this time, as they rank subordinate in priority to Bridging’s Third Mortgage on the Nuvo Property and such payment puts repayment of the Bridging Loan, which is already in jeopardy, at further risk.

Cacovic Affidavit, para. 25.

25. It is unlikely that 260 will be able to refinance the property for an amount sufficient to fully repay all mortgages and other encumbrances on the Nuvo Property, including the DIP Loan, due to inadequate lease revenue to service the debt. Instead, 260 will have to sell the Nuvo Property.

Cacovic Affidavit, para. 27.

26. The continued involvement of 260’s management in the completion of the renovations is unnecessary and the CCAA proceeding adds a significant layer of additional costs in priority to Bridging’s Third Mortgage which is highly prejudicial to Bridging’s security position.

Cacovic Affidavit, para. 28.

27. A Court-appointed receiver can take all necessary steps to complete the renovation work on the Nuvo Building and sell the Nuvo Property on a more cost-efficient basis than is being proposed by 260. The costs savings are material to Bridging as the third ranking mortgagee, whose loan is at serious risk of non-payment.

Cacovic Affidavit, para. 29.

28. Bridging is prepared to provide the receiver with the necessary funding to complete the renovations and sell the Nuvo Property if the receiver considers it advisable to do so, secured by a receiver's charge on the property of 260 ranking immediately behind Meridian's security. Accordingly, the funding provided by Bridging to the receiver will not prejudice Meridian's security position.

Cacovic Affidavit, para. 31.

PART III - ISSUES

- (a) Is it more appropriate for the Court to grant Bridging's application for the appointment of a receiver over 260's property or continue 260's protection from its creditors under the CCAA?

PART IV – LAW AND ARGUMENT

29. The initial order was obtained by 260 without any effective notice to Bridging and other secured creditors. At the comeback hearing, the onus remains on 260 to demonstrate that the relief

it seeks under the CCAA is “appropriate in the circumstances” pursuant to section 11 of the CCAA. There is no onus on Bridging to demonstrate that the initial order should be set aside or varied.

Target Canada Co., Re, 2015 ONSC 303, para. 82; *Warehouse Drug Store Ltd., Re*, 2005 CarswellOnt 1724 (S.C.J.), para. 4.

30. Both an order appointing a receiver and an initial order under the CCAA are highly discretionary in nature. As a result, the specific factors taken into account by a court are very circumstance oriented. The court must consider and balance competing interests of various economic stakeholders in coming to a conclusion about which remedial process is more appropriate.

Romspen Investment Corp. v. 6711162 Canada Inc., 2014 ONSC 2781, para. 61; *Hush Homes Inc. (Re)*, 2015 ONSC 370 (“**Hush Homes**”), paras. 20 and 23.

31. In situations where a company whose sole business is a single land development seeks protection from its creditors under the CCAA, courts have identified several factors which might influence a decision about whether to grant an initial order under the CCAA.

Hush Homes, para. 21.

32. In *Hush Homes Inc. (Re)*, Justice Penny referred to the decision of the British Columbia Court of Appeal in *Cliffs Over Maple Bay Investments v. Fisgard Capital Corp.*, where the British Columbia Court of Appeal held that a CCAA proceeding may not be appropriate for a land development company where:

- (a) the priorities of the security are straightforward and there may be little incentive for creditors having senior priority to agree to an arrangement or compromise that

involves money being paid to more junior creditors before the senior creditors are paid in full; and

- (b) secured creditors may be in a better position in exercising their remedies rather than letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing etc.

Hush Homes, para. 21.

33. In *Octagon Properties Group Ltd., Re*, the debtor companies were real estate companies which sought protection under the CCAA as they were unable to make their mortgage payments. The debtor companies proposed to market the properties for sale during a CCAA proceeding. The majority of the first mortgagees of the properties opposed the application on the basis that they should be permitted to exercise their enforcement remedies against the properties. Justice Kent of the Alberta Court of Queen's Bench dismissed the CCAA application as:

“if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt.”

Octagon Properties Group Ltd., Re, 2009 ABQB 500, Para. 17.

34. In *Romspen Investment Corporation v. Atlas Healthcare (Richmond Hill) Ltd. et al* (“*Atlas*”), the debtor companies were owners of a number of real properties, one of which had a building that was under construction. The debtor companies had a limited number of employees and consultants that were employed solely for the purpose of constructing the building. In considering a CCAA application and a receivership application brought by the mortgagees, Justice Wilton-Siegel noted that:

I do not think that they any of the Debtors can be properly characterized as a business in the sense contemplated in the cases relied upon by the CCAA Applicants. **There is no demonstrated ongoing business of any of the Debtors.** There are only a limited number of employees and consultants of Richmond Hill and these individuals are employed solely for the purpose of building the Project. The fact that approximately 20 entities have executed leases for space in the Project when it is completed also does not establish the existence of a business at the present time.

Romspen Investment Corporation v. Atlas Healthcare (Richmond Hill) Ltd. et al, 2018 ONSC 7382 (“*Atlas*”), para. 82.

35. Justice Wilton-Siegel went on to remark that:

[T]here are no features of the business of the Debtors, or the Properties, that render a CCAA proceeding necessary, or more appropriate than a receivership proceeding, to address the current liquidity difficulties of the Debtors and the need to complete the Project with an additional injection of funds from third parties. The proposed receivership and the proposed CCAA proceeding should each accomplish the objective of completion of construction of the Project. However, the case law suggests that, in similar circumstances, particularly where the security coverage of secured creditors is in question, courts have given effect to the rights of secured creditors by granting a receivership order.

Atlas, para. 84.

36. In *Atlas*, the debtor companies sought approval of a DIP loan and provided an appraisal that allegedly demonstrated that the secured creditor, Romspen, was very well secured. Romspen’s evidence was that it could suffer a deficiency under a CCAA proceeding using its estimate of the costs of such a proceeding.

Atlas, paras. 88-89.

37. Justice Wilton-Siegel held that the appraisals provided by the debtor companies were not sufficiently reliable so that the Court could rely on them, since, among other things, the appraisals

were conducted on a “fully built” basis and assumed 100 per cent occupancy at certain projected rental rates.

Atlas, paras. 90-91.

38. Justice Wilton-Siegel took into account that the proposed DIP lender required a priming charge on the properties and additional security on other properties outside of the *CCAA* proceeding and drew an inference that the proposed DIP lender did not share the debtor companies’ confidence in the value of the properties. The Court proceeded on the basis that there was at least a reasonable possibility that the DIP loan would adversely affect Romspen’s security position and that, under a *CCAA* proceeding, the debtor companies would be “playing with Romspen’s money” and Romspen would be paying the cost to permit the debtor companies to buy some time.

Atlas, paras. 94 and 98.

39. Justice Wilton-Siegel dismissed the *CCAA* application and granted the receivership application on the basis that, among other things, the *CCAA* application did not further the purpose of the *CCAA* as:

- (a) there was no maintenance of the *status quo* or stabilization, as the construction project was almost completely shut down;
- (b) the purpose of the *CCAA* application was not to restructure the business of the debtor companies with a view to continuing their business but rather to maintain control of the project in the hope of realizing value for subordinated lenders and equity holders; and

- (c) the plan of the debtor companies was simply to repay the secured lenders out of the proceeds of a future sale or refinancing, if possible, after completion of the project.

Atlas, paras. 112-120.

40. 260 is seeking approval of the DIP Loan. Section 11.2 of the *CCAA* provides the Court with the authority to approve DIP financing secured by a priority charge over the debtor company's property. In deciding whether to approve such a charge, the court is to consider a number of factors, including:

- (a) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (b) the nature and value of the company's property; and
- (c) whether any creditor would be materially prejudiced as a result of the security or charge.

41. The DIP Loan sought by 260 would materially prejudice Bridging's rights, as it would result in payment of \$2.375 million to the construction lien claimants, that rank subordinate to them. Section 78(3) of the *Construction Act* provides that a non-building mortgage registered prior to the time when the first lien arose has priority over the liens.

42. 260 is a single purpose land development company that has less than 10 employees. There is no business enterprise that requires the benefit of the protection of the *CCAA*. The DIP Loan sought by 260 would materially prejudice Bridging's interest in the Nuvo Property, as it would result in payment of \$2.375 million to subordinate creditors who do not have priority over

Bridging, and payment of additional layers of professional fees would not need to be incurred in a receivership proceeding.

43. 260 has provided no evidence that a CCAA proceeding is more appropriate than a receivership proceeding. A Court-appointed receiver would be able to complete the Nuvo Building and market the property for sale in a more cost-efficient manner. There is no need for the continued involvement of 260's management in the Nuvo Building project.

44. The CCAA proceeding is unlikely to add value but would likely result in unnecessary costs being incurred to the detriment of Bridging as third mortgage of the Nuvo Property.

Construction Lien Claimants are Not Critical Suppliers

45. 260 seeks an order declaring Maple Reinders and Barrie Glass to be critical suppliers and authorizing it to pay approximately \$2.375 million to them in priority to the rights of mortgagees on account of pre-filing indebtedness.

46. Section 11.4(1) of the CCAA provides the Court with the authority to declare a person to be a critical supplier to a debtor company if "the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation".

47. As noted by Justice Myers in *Re Toys "R" Us (Canada) Ltd.*, providing payment of pre-filing arrears to parties is:

"a form of preference that is contrary to the goal of universal sharing among creditors of equal priority that is the underpinning of our bankruptcy system. Accordingly, circumstances where payment of pre-filing claims will be allowed to suppliers of goods and services will be few."

Re Toys “R” Us (Canada) Ltd., 2017 ONSC 5571, para. 9.

48. In *Cinram International Inc., Re*, Justice Morawetz (as he then was) noted that the Court had the authority to permit payment of pre-filing obligations. In considering whether to authorize such payments, the Court is to consider a number of factors, including:

- a. whether the goods and services were integral to the business of the applicants;
- b. the applicants' dependency on the uninterrupted supply of the goods or services;
- c. the fact that no payments would be made without the consent of the Monitor;
- d. the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;
- e. whether the applicants had sufficient inventory of the goods on hand to meet their needs; and
- f. the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.”

Cinram International Inc., Re, 2012 ONSC 3767, para. 68.

49. The amounts that 260 seeks to pay to Maple Reinders and Barrie Glass do not represent amounts owed to suppliers of goods and services that are integral to the business of 260. Indeed, the lien claimants have not supplied any goods or services since approximately July 2019 when they left the Nuvo Building site.

50. 260 does not actively carry on a business enterprise in the same manner as companies who have been authorized by this Court to make pre-filing payments to suppliers. As an example, a

chart attached as Appendix "A" summarizes situations where this Court has granted such authority and makes clear that Maple Reinders and Barrie Glass are not critical suppliers to 260's business.

51. 260 has put forth no evidence that another contractor cannot complete the renovation work without having to make a "ransom payment" of approximately \$2.375 million, which may be at Bridging's expense.

PART V - ORDER REQUESTED

52. Bridging respectfully requests that 260's motion be dismissed and its application for the appointment of a receiver of 260's property and assets be granted with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of March, 2020.



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APPENDIX “A”

Case	Business of the Debtor Company	Suppliers that Received Payment of Pre-filing obligations
<i>Cinram International Inc., Re,</i> 2012 ONSC 3767	Canadian component of an international group of companies that were replicators and distributors of CDs and DVDs across North America and Europe, with facilities across the globe	Parties with contracts for supply of goods and services
<i>Canwest Global Communications Corp., Re,</i> 2009 CarswellOnt 6184	Leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations	Television programming suppliers and newsprint suppliers
<i>Smurfit-Stone Container Canada Inc., Re,</i> 2009 CarswellOnt 391	Operator of mills and plants producing liner board, corrugating medium and food board	Suppliers of key materials such as wood, chemicals, fuel and energy from third party suppliers; rail and trucking services, custom brokers and third party warehouses
<i>Index Energy Mills Road Corporation</i>	Owner and operator of an electrical co-generation facility located in Ajax, Ontario that generates electricity by burning wood waste from the construction industry to produce steam to drive turbine generators	Suppliers that are vital to its ongoing operations and where there would be material prejudice if the required suppliers ceased to supply
<i>Performance Sports Group Ltd., Re</i>	Leading designers, developers and manufacturers of high performance sports equipment and related apparel	Suppliers of goods and services necessary for manufacturing, shipping, warehousing and distributing goods
<i>Priszm Income Fund, Re</i> 2011 ONSC 2061	Owner and operator of 428 KFC, Taco Bell and Pizza Hut restaurants in seven provinces across Canada	(a) chicken suppliers; (b) other food and restaurant consumables; (c) utility service providers; (d) suppliers of waste disposal services; (e) providers of appliance repair and information technology services

Case	Business of the Debtor Company	Suppliers that Received Payment of Pre-filing obligations
<i>Re Toys "R" Us (Canada) Ltd.</i> 2017 ONSC 5571	Leading retailer of toys and baby products	Suppliers of goods and services that there would be inordinate risk of interruption of its operations if it does not agree to pay to a supplier of goods or services the amounts of its claims that would otherwise be frozen at the filing date

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Target Canada Co., Re*, 2015 ONSC 303
2. *Warehouse Drug Store Ltd., Re*, 2005 CarswellOnt 1724 (S.C.J.)
3. *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 ONSC 2781
4. *Hush Homes Inc. (Re)*, 2015 ONSC 370
5. *Octagon Properties Group Ltd., Re*, 2009 ABQB 500
6. *Romspen Investment Corporation v. Atlas Healthcare (Richmond Hill) Ltd. et al*, 2018 ONSC 7382
7. *Re Toys “R” Us (Canada) Ltd.*, 2017 ONSC 5571
8. *Cinram International Inc., Re*, 2012 ONSC 3767

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Companies’ Creditors Arrangement Act, R.S.C., 1985, c. C-36

General power of court

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances

...

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company’s property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company’s business and financial affairs are to be managed during the proceedings;

(c) whether the company’s management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge;
and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

...

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Construction Act, R.S.O. 1990, c. C.30

Priority over mortgages, etc.

78 (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.

Building mortgage

(2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.

Prior mortgages, prior advances

(3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

- (a) the actual value of the premises at the time when the first lien arose; and
- (b) the total of all amounts that prior to that time were,
 - (i) advanced in the case of a mortgage, and
 - (ii) advanced or secured in the case of a conveyance or other agreement.

Prior mortgages, subsequent advances

(4) Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled under subsection (3), over the liens arising from the improvement, to the extent of any advance made in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien

Special priority against subsequent mortgages

(5) Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV.

General priority against subsequent mortgages

(6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

(a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or

(b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

Advances to trustee under Part IX

(7) Despite anything in this Act, where an amount is advanced to a trustee appointed under Part IX as a result of the exercise of any powers conferred upon the trustee under that Part,

(a) the interest in the premises acquired by the person making the advance takes priority, to the extent of the advance, over every lien existing at the date of the trustee's appointment; and

(b) the amount received is not subject to any lien existing at the date of the trustee's appointment.

Where postponement

(8) Despite subsections (4) and (6), where a preserved or perfected lien is postponed in favour of the interest of some other person in the premises, that person shall enjoy priority in accordance with the postponement over,

(a) the postponed lien; and

(b) where an advance is made, any unpreserved lien in respect of which no written notice has been received by the person in whose favour the postponement is made at the time of the advance,

but nothing in this subsection affects the priority of the liens under subsections (2) and (5).

Saving

(9) Subsections (2) and (5) do not apply in respect of a mortgage that was registered prior to the 2nd day of April, 1983.

Financial guarantee bond

(10) A purchaser who takes title from a mortgagee takes title to the premises free of the priority of the liens created by subsections (2) and (5) where,

(a) a bond of an insurer licensed under the Insurance Act to write surety and fidelity insurance; or

(b) a letter of credit or a guarantee from a bank listed in Schedule I or II to the Bank Act (Canada),

in the prescribed form is registered on the title to the premises, and, upon registration, the security of the bond, letter of credit or the guarantee takes the place of the priority created by those subsections, and persons who have proved liens have a right of action against the surety on the bond or guarantee or the issuer of the letter of credit.

Home buyer's mortgage

(11) Subsections (2) and (5) do not apply to a mortgage given or assumed by a home buyer.

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 OF 2607380 ONTARIO INC. (the "**Applicant**")

Court File No. CV-20-00636875-00CL

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

PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF BRIDGING FINANCE INC.,
AS AGENT**

(re Comeback Motion returnable March 6, 2020)

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